

61774-5

61774-5

NO. 61774-5

King County Superior Court No. 06-2-19791-7 SEA

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

JANET LANE,
Plaintiff/Appellant,

v.

HARBORVIEW MEDICAL CENTER,
Defendant/Respondent.

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2009 JUL 22 4:11:34 PM

APPELLANT'S REPLY BRIEF

Charles K. Wiggins, WSBA #6948
Wiggins & Masters
241 Madison Avenue N.
Bainbridge Island, WA 98110
(206) 780-5033
Attorneys for Plaintiff/Appellant

Stephen K. Strong, WSBA #6299
Stephen K. Festor, WSBA #23147
Bendich, Stobaugh & Strong, P.C.
701 Fifth Avenue, #6550
Seattle, WA 98104
(206) 622-3536
Attorneys for Plaintiff/Appellant

TABLE OF CONTENTS

	<i>Page</i>
INTRODUCTION	1
ARGUMENT	2
I. IT IS BASELESS FOR HARBORVIEW TO ARGUE THAT JANET LANE WAS A “TEMPORARY” EMPLOYEE WHEN SHE WORKED NEARLY FULL-TIME FOR NINE YEARS.....	2
A. Janet Lane Was Not a “Temporary” Employee Because For Nine Years Harborview Continuously Scheduled Her to Work Virtually Full-Time in an Ongoing Registered Nurse Job.	2
B. Harborview Regularly Scheduled Lane to Work More Than 20 Hours Per Week (Over Half-Time), Making Her a “Part-Time” Nurse	7
C. Even if Facts Concerning “Flexibility” and “Commitment” Were Objective Bases for a Proper Classification Under the Statute and the CBA, Harborview’s Contentions Concerning Janet Lane’s Purported “Flexibility” and “Control” are Fictions, Contrary to the Undisputed Facts in the Record Which Show that Harborview Had Flexibility, Not Lane.....	12
II. HARBORVIEW’S ARGUMENT THAT LANE HAS NO METHOD TO REMEDY HER MISCLASSIFICATION UNDER THE CBA AND TO OBTAIN BENEFITS OTHER THAN TO APPLY FOR A CLASSIFIED POSITION IS CONTRARY TO THE PUBLIC EMPLOYEE MISCLASSIFICATION STATUTE.....	18
III. ALTHOUGH NOT MATERIAL TO THE ARGUMENTS ON WHY THE TRIAL COURT’S DECISIONS SHOULD BE REVERSED, THE COURT SHOULD ALSO REVERSE THE TRIAL COURT’S EVIDENTIARY RULINGS SO THAT THE ERRORS ARE NOT REPEATED ON REMAND	22
CONCLUSION.....	24
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	<i>Page</i>
 Cases	
<i>Allard v. City of Tacoma</i> , 176 Wash. 441, 29 P.2d 698 (1934).....	11, 19, 20
<i>Bellevue School Dist. v. Bentley</i> , 38 Wn.App. 152, 684 P.2d 793 (1984).....	4
<i>Grabicki v. Dept. Ret. Sys.</i> , 81 Wn.App. 745, 916 P.2d 452 (1996).....	8
<i>Hiatt v. Dept. Labor & Ind.</i> , 48 Wn.2d 843, 297 P.2d 244 (1956).....	4
<i>Mader v. Health Care Auth.</i> , 149 Wn.2d 458, 70 P.3d 931 (2003).....	6, 7, 12, 13, 24
<i>Richards v. Met. Life Ins.</i> , 184 Wash. 595, 55 P.2d 1067 (1935).....	4
<i>State v. Vaughn</i> , 36 Wn.App. 171, 672 P.2d 771 (1983) <i>affirmed</i> , 101 Wn.2d 604, 682 P.2d (878) (1984).....	23
<i>State ex rel. Cole v. Coates</i> , 74 Wash. 35, 132 Pac. 727 (1913).....	7, 19
<i>State ex rel. Thompson v. City of Seattle</i> , 185 Wash. 105, 53 P.2d 320 (1936).....	6, 7
<i>Watkins v. City of Seattle</i> , 2 Wn.2d 695, 99 P.2d 427 (1940)	10, 19
 Rules	
RAP 1.2 (a)	22
RAP 2.4 (b)	22

Statutes and Regulations

RCW 49.44.160 and .170..... *passim*
RCW 49.44.170(1)(a)18, 19
RCW 49.44.170(2)(b)2, 5, 11, 18
RCW 49.44.170(2)(d)7, 11
RCW 49.44.170(3).....18
WAC 182-12-115(4).....9
Laws of 2009, Ch. 537 §7(a)(i) and (ii)21

Other Authority

Webster’s Third New International Dictionary, p. 2553 (1976).....4
Black’s Law Dictionary, p. 1476 (7th ed. 1999).....4
American Heritage Dictionary, p. 1848 (3d ed. 1992).....4

INTRODUCTION

The issue here is whether Janet Lane was a “part-time” nurse or a “per diem” nurse (“per diem” is defined as “temporary”). If she were a “temporary” nurse, she was not eligible for employee benefits such as pay steps based on experience, sick leave, and vacation. As a “part-time” nurse, she was entitled to these benefits. Because it is undisputed that Lane was *not in fact temporary*, and indeed *Harborview scheduled Lane to work nearly full-time for nine years*, Harborview argues that a “temporary” nurse can be “temporary” *indefinitely, i.e.*, it contends the term “temporary” does not relate to “the length of time” in the job. Resp., p. 34. Harborview’s argument that the term “temporary” is not related to “the length of time” is contrary to the ordinary meaning of the word “temporary,” contrary to the Public Employee Misclassification Act, and contrary to Supreme Court caselaw, which all require that a “temporary” classification be based on the length of an employee’s service.

Harborview tries to minimize the focus on its own farfetched argument that a nine-year employee is “temporary” by arguing immaterial and erroneous “facts” that are contrary to the record and in any event are not defenses to misclassification. For example, Harborview’s contention that Janet Lane had a “flexible” work schedule and “no commitment” to work at Harborview (*e.g.*, Resp., pp. 24-25, 34-36) is contradicted by the record evidence showing that for years Lane worked nearly full-time in the least desirable night, weekend, and holiday shifts. CP 393, 267, 284-85.

Harborview's arguments are thus contrary to both the law and the undisputed facts, and the trial court should be reversed.

ARGUMENT

I. IT IS BASELESS FOR HARBORVIEW TO ARGUE THAT JANET LANE WAS A "TEMPORARY" EMPLOYEE WHEN SHE WORKED NEARLY FULL-TIME FOR NINE YEARS.

A. Janet Lane Was Not a "Temporary" Employee Because For Nine Years Harborview Continuously Scheduled Her to Work Virtually Full-Time in an Ongoing Registered Nurse Job.

Under the Public Employee Misclassification Act, Janet Lane is entitled to the "benefits to which employees are entitled under . . . collective bargaining agreements [CBAs] *applicable to the employee's correct classification.*" RCW 49.44.170(2)(b) (emphasis added). Lane's opening brief explained that Harborview's CBA has only three categories of registered nurses: "full-time," "part-time," and "per diem." Opening Br., pp. 20-22, 6-7, *citing* CP 114, 474-84. These three categories of nurses are defined in the CBA as follows (CP 114):¹

- 6.2 *Full-Time Nurse.* A registered nurse who is classified staff and is *regularly scheduled on a forty (40) hour week* in a seven (7) day period, or an eighty (80) hour week schedule in a fourteen (14) day period.
- 6.3 *Part-Time Nurse.* A registered nurse who is classified staff and who is *regularly scheduled to work a minimum of twenty (20) hours in a seven (7) day period or forty (40) hours in a fourteen (14) day period.* Such nurses receive

¹ Harborview's CBA has contained these same definitions for at least 10 years. CP 474-84.

prorated salaries and benefits in accordance with the Civil Service Rules.

- 6.4 Per Diem Nurses. *Per Diem Nurses are temporary* University employees not covered under the provisions of the Civil Service Rules or the terms of this labor agreement. [Emphasis added.]

“Full-time” and “part-time” nurses are eligible for the CBA’s benefits such as pay steps and sick leave, while “per diem” nurses are excluded.

The parties agree that Janet Lane was not a “full-time” nurse, although she worked nearly full-time. The parties also agree that Lane worked as a Registered Nurse (RN2) “a minimum of 20 hours a week.” Resp. pp. 33-34. And 20 hours per week is defined as “part-time.” CBA 6.3, *supra*. Lane’s opening brief explained that she was a “part-time” nurse because Harborview scheduled her to work nearly full-time for nine years. Opening Br., pp. 1, 21-22.

As stated in Opening Br., pp. 17-18, Lane undisputedly did not actually work “per diem,” *i.e.*, by the day, as a day laborer. Harborview does not disagree; rather, it contends she was a “temporary” (as the CBA defines a “per diem”). Harborview concedes that Lane was *not in fact* “temporary” in the normal meaning of the word, admitting that Lane did not “work in that capacity for a short period of time.” Resp. p. 34. Instead, Harborview maintains that Lane was still “temporary” despite her nine years as an operating room nurse because, it says, *the word “temporary” in the CBA does not “address[] the length of time a person chooses to remain in the capacity.”* *Id.*, p. 34 (emphasis added).

But the word “temporary” does not, as Harborview says (*id.*), have an opposite meaning – ongoing, indefinite – because the CBA does not define “temporary.” In any CBA it is “presumed that the ordinary dictionary meaning [of a word] applies.” *Bellevue School Dist. v. Bentley*, 38 Wn.App. 152, 158, 684 P.2d 793 (1984) (applying ordinary meaning to words “salary” and “benefits” in CBA). And “temporary” has an ordinary meaning, which is “lasting for a time only: existing or continuing for a limited time.” Webster’s Third New Int’l Dictionary, p. 2553 (1976).² The Supreme Court adopted this definition of “temporary.” *Hiatt v. DLI*, 48 Wn.2d 843, 846, 297 P.2d 244 (1956) (“‘Temporary’ means ‘Lasting for a time only; continuing for a limited time; not permanent.’” [quoting Webster’s]). *See also Richards v. Met. Life Ins.*, 184 Wash. 595, 602, 55 P.2d 1067 (1935)(“the words ‘permanent’ and ‘temporary’ are antonyms ... to give the word ‘permanent’ the meaning of ‘temporary’ would be to delete the word ‘permanent’ from the contract entirely.”).

Consistent with this ordinary meaning of “temporary,” in the Public Employee Misclassification Act the Legislature specifically rejected the idea that “temporary” is not based on “the length of time” in a job (as Harborview contends, p. 34). RCW 49.44.160 expressly says that

² “Temporary” has the same definition in other standard dictionaries: “Lasting for a time only; existing or continuing for a limited (usu. short) time; transitory,” *Black’s Law Dictionary*, p. 1476 (7th ed. 1999); “lasting, used, serving or enjoyed for a limited time ... One that serves for a limited time: *staffed by temporaries.*” *American Heritage Dictionary*, p. 1848 (3d ed. 1992).

for public employee benefits a “temporary” classification must be objective and based on the “length of the employment relationship.” Quoting this section, the Supreme Court said that “[r]ather than the arbitrary labels, ‘[o]bjective standards, such as ... the length of the employment relationship, should determine whether a person is an employee entitled to employee benefits.’” *Mader v. Health Care Auth.*, 149 Wn.2d 458, 475, 70 P.3d 931 (2003), quoting RCW 49.44.160 (emphasis by Supreme Court). And “[m]isclassify” means “to incorrectly classify or label a long-term public employee as ‘temporary’” *Mader*, 149 Wn.2d at 475, quoting RCW 49.44.170(2)(d). The Supreme Court thus said that it violates the act to call a long-term job “a ‘temporary’ position” when determining a public employee’s eligibility for benefits. *Id.* at 474-76 (emphasis added). (*Mader* and the Public Employee Misclassification Act are discussed in Lane’s opening brief, pp. 13-20, 24-27.)

The act was intended to make employee definitions both “objective” and “consistent.” RCW 49.44.160. The Supreme Court noted that one purpose of the act is to make sure that employees who do the same work for the same periods of time receive the same employee benefits. *Mader*, 149 Wn.2d at 475 n. 8. In Harborview’s case, “part-time” nurses receive prorated benefits when they have no set work schedule and their schedules are set four weeks in advance with accommodations to their personal needs, as long as they work a minimum of 20 hours a week. CBA 6.3; CP 58-60; Resp., p. 12. Janet Lane did not receive the same

benefits even though she “rendered identical levels of service, for identical periods of time, for the employer.” *Mader* at 475 n. 8.

Harborview cites *State ex rel. Thompson v. City of Seattle*, 185 Wash. 105, 53 P.2d 320 (1936), saying it “provides useful guidance,” and it implies that *Thompson* held a “temporary” employee could never become permanent by working “considerably longer” than expected. Resp. p. 31. But in *Thompson* the plaintiff was *in fact a temporary* plumber. The City parks department had no plumber position, and the City had contracted the work out for over 22 years. 185 Wash. at 107. Thompson was hired by the City as a “temporary” plumber, a job which the City estimated would take only one month. The installation work ended up taking not one month, but nine months (the extension from one month to nine months being the “considerably longer” period to which Harborview refers). *Id.* When the nine-month job was completed, the City laid off Thompson. *Id.* at 108.

Thompson claimed he should have a permanent plumber position. The Supreme Court rejected Thompson’s claim because the “Park Board evidently does not need a permanent plumber and does not employ one,” 185 Wash. at 109, and “[n]o court can compel the park board to employ a plumber permanently if it does not need one.” *Id.* at 110. The *Thompson* Court distinguished *State ex rel. Cole v. Coates*, 74 Wash. 35, 132 Pac. 727 (1913),³ because in that case a cross-walk foreman, although classi-

³ Lane discussed *Cole* in her opening brief, pp. 17-18.

fied as a “day laborer,” actually had “the attribute of permanency.”

Thompson, 185 Wash. at 110, citing *State ex rel. Cole v. Coates*, *supra*, 74 Wash. at 38-39. *Cole* explained why the cross-walk foreman was misclassified in words that apply equally here (74 Wash. 38-39):

A day laborer is one whose engagement to labor is but a day long (13 Cyc. 264), while this position had the attribute of permanency. As shown by the record, it has now existed for a longer period than two years, and still continues to exist.

Lane’s nine years of nearly full-time work is, of course, well beyond the two years *Cole* said had “the attribute of permanency” and very far beyond the nine months found to be “temporary” in *Thompson*. Lane was simply not “temporary” when she worked for *nine* years in an ongoing job. Dictionaries, the CBA itself, RCW 49.44.160 and .170, and the Supreme Court decisions in *Mader*, *Thompson*, and *Cole* all show that a “temporary” employee is one working a limited time, rather than one working with an indefinite duration and working for several years in an ongoing job. Lane was thus not correctly classified as a “temporary” nurse because she performed ongoing RN2 work at Harborview virtually full-time for nine years. RCW 49.44.160 and .170(2)(d).

B. Harborview Regularly Scheduled Lane to Work More Than 20 Hours Per Week (Over Half-Time), Making Her a “Part-Time” Nurse.

Lane’s opening brief explained that she was a “part-time” nurse under the CBA because for years Harborview consistently scheduled her to work more than 20 hours a week. Opening Br., p. 1, 20-22; see *supra*, pp. 2-7. Harborview now concedes that Lane and “classified” nurses

“perform[ed] essentially the same tasks” (Resp., p. 25) and she met the hours “criteria of a ‘part-time’ position – she probably averaged more than 20 hours a week” (*id.*, pp. 33-34).

Although acknowledging Lane met these objective factual standards for the part-time nurse classification (same tasks, several years of work, working 20 hours a week), Harborview argues that Lane was still properly classified as “temporary” because she supposedly had “flexibility” and “control” over her schedule, Resp., p. 34, and “*per diems are in essence temporary in that they are not committed to any set shift, days, or schedule.*” *Id.*, p. 35 (emphasis added).

It is undisputed, however, that Janet Lane was on a “regular” schedule of working 20 hours a week, because “regular” means “usual, customary or general.” *Grabicki v. Dept. Ret. Sys.*, 81 Wn.App. 745, 751 n. 4, 916 P.2d 452 (1996). Moreover, it is undisputed that Harborview *actually scheduled* Lane to work in four-week blocks four to eight weeks in advance of the actual work, just as it scheduled the “classified” nurses without pre-set schedules to work four to eight weeks in advance. CP 53-62, 431-32, 393-94. For nine years, then, Harborview usually and customarily scheduled Lane to work more than 20 hours a week. CP 119-20, 399-400, 407. Harborview thus “regularly scheduled” Lane to work 20 hours a week in the ordinary meaning of those words, and she was thus a

“part-time” nurse eligible for benefits under the CBA.⁴

Harborview’s argument (pp. 1, 6, 13-14, 18, 19, 34, 36) that Lane was not a “part-time” nurse because of her purported lack of “commitment” to working regularly, so that she could supposedly retain “flexibility” or “control” over scheduling, is not only factually false (*see infra*, pp. 12-18), but is also the *same argument* the Supreme Court rejected in *Mader, supra*. Specifically, the issue in *Mader* was whether “temporary” instructors working “part-time” were eligible for health insurance as “career seasonal” employees under WAC 182-12-115(4).⁵ The non-tenured instructors in *Mader* were hired under short-term contracts to work for one academic quarter, followed by further quarterly contracts, resulting in them working for many years more than half-time on a nine-month seasonal basis, just as Lane here worked for many years more than half-time. The community college employers argued – and this Court of Appeals held – that the instructors could not be “career seasonal” employees because they had signed contracts for three months, or one quarter of

⁴ Harborview also argues that Lane did not meet the requirements for a “part-time” nurse position because it says she “was not in a classified position.” Resp., p. 34 (emphasis by Harborview). But the only job “classes” specified in the CBA are RN 1, RN 2, and RN 3, and Lane worked as an RN 2. CP 114, 478, 481. Harborview means that Lane was “not in a classified position” because she was a “temporary” employee. The fact Lane was not “classified” as “part-time” was simply the *result* of her classification as “temporary,” not the *cause* of it.

⁵ This regulation quoted in *Mader, supra*, said (149 Wn.2d at 471):
“Career seasonal/instructional employees[.]” Employees who work half-time or more on an instructional year (school year) or equivalent nine-month seasonal basis. . . . These employees are eligible to receive the employer contribution for insurance during the off-season following each period of seasonal employment.

work, stating they were “part-time” and “temporary” with no guarantee of future employment. *Mader*, 109 Wn.App. at 901, 911-12, 914. In other words, as Harborview rephrases that argument here, the part-time instructors were not “career seasonal” because they had no “commitment” to continue beyond one quarter at a time and thus they were not committed to working nine months every year.

The Supreme Court reversed this Court. *Mader*, 149 Wn.2d at 474-76. It rejected the employers’ argument because even if some part-timers might teach only occasionally, the *Mader* plaintiff part-time instructors’ “*actual work circumstances*,” *i.e.*, how much they had actually taught, showed they worked at least half-time on a nine-month seasonal basis for years and they were therefore not “temporary,” but “career seasonal” employees. 149 Wn.2d at 475.

Harborview also argues that Lane contends Harborview “intentionally” or “purposefully” misclassified her to deny her benefits. *Resp.*, pp. 23-24. But Harborview’s “intentions” are immaterial to Lane’s correct classification for benefits under the CBA because there is no intent element in the CBA’s three nurse categories. Instead, the CBA’s criteria are based on the objective facts of hours and duration of work.

Consistent with Harborview’s CBA, public employees are entitled to the benefits they should receive under their correct classification and there is no separate requirement concerning an employer’s intent. *See, e.g., Watkins v. City of Seattle*, 2 Wn.2d 695, 706-08, 99 P.2d 427 (1940)

(employee classified as a “laborer” was really performing the work of a “truck driver”); *Allard v. City of Tacoma*, 176 Wash. 441, 443, 29 P.2d 698 (1934) (employee classified as “power plant operator” was really performing the work of a “wireman.”). Rather than an employer’s intent, as *Allard* states, the “controlling feature” for whether an employee is correctly classified is the “nature of the work done, and not the name given the position[.]” 176 Wash. at 443.

The misclassification act also makes this point. The act defines “misclassify” in an *objective* way in RCW 49.44.170(2)(d):

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

Thus, Harborview need not “misclassify” an employee “intentionally” or “purposefully” to make the act apply. RCW 49.44.160 and .170(2)(d). Harborview need only “classify” or “label” Lane “incorrectly” as a “temporary” employee for the act to apply and whether Lane is “incorrectly classif[ied]” is determined “objectively” based on her “actual work circumstances.” There is no “purposeful” element for a misclassification to occur; it need only be “incorrect.” Indeed, a separate intent requirement to establish misclassification or mislabeling would nullify the purpose of the act to assure classifications are based on “objective standards” and to stop the employer practice of using “labels to justify pro-

viding different levels of benefits to employees who have rendered identical levels or service and periods of time, for the employer.” *Mader*, 149 Wn.2d at 475 and n. 8. Under the act, employees are entitled to the benefits for their *correct* classification. *Mader*, 149 Wn.2d at 475-77.

Thus, Harborview’s intentions are not pertinent in deciding Lane’s correct classification under the CBA.⁶ That determination is based on her actual work circumstances, which objectively show that she is not a “temporary” nurse.

C. Even if “Commitment” Were an Objective Basis for Classification under the Statute and the CBA, Harborview’s Contentions Concerning Janet Lane’s Purported “Flexibility” and “Control” are Fictions, Contrary to the Undisputed Facts in the Record Which Show that Harborview Had Flexibility, Not Lane.

Harborview’s arguments about Lane’s supposed “lack of commitment” to work and her supposed “flexibility” to come and go from work as she pleases are not only legally immaterial, they are also fictions contradicted by the record. Harborview *bases its entire brief* on these fictions, *i.e.*, that Lane had “ultimate control over her schedule” (p. 1), that Lane had “the flexibility of determining when she wanted to work” (p. 19), and

⁶ In any event, since the evident major effect of misclassifying Janet Lane as “temporary” (when she is not) is to deny her employee benefits received by other part-time employees working half-time or more, the logical inference is that Harborview intends to deny those benefits. Indeed, Harborview admits that it does not provide those benefits to any employee who is classified as a temporary/per diem nurse. *Resp.*, pp. 8, 11, 27, 28.

that Lane was “not committed to working a set schedule (p. 6).”⁷ According to Harborview, Lane did not want to (p. 36) pay “her dues” by working night or weekend shifts in a classified position to “get in line” to obtain a more desirable schedule (pp. 13-14, 16, 18).⁸

Harborview’s arguments are completely backwards. First, concerning “paying her dues,” the undisputed record shows that for many years Lane “*worked the night, weekend, and holiday shifts that nobody else wanted to work.*” CP 393 (emphasis added).⁹ See also CP 79-80, 261, 267, 283-85, 319 (Lane’s testimony). Harborview scheduled Janet Lane in these least desirable shifts. Harborview employs classified nurses with set schedules (those that work predetermined days and shifts) and classified nurses without set schedules (the days and shifts they work vary). Under Harborview’s four-weeks-in-advance scheduling method,

⁷ See also Harborview’s assertions that “per diem nurses work when they dictate if Harborview has need” (p. 7), “freedom and flexibility to decide to work or not work as one so chooses” (p. 24), Lane could “decide when [she was] available to work and when [she was] not” and she could “control [her] own schedules” (p. 25), Lane “desire[d] to avoid what she viewed as undesirable schedules assigned to classified positions” (p. 26), Lane chose not to “commit to a schedule she apparently did not want” (p. 32), “flexibility” in scheduling (p. 34), Lane was “not committed to any set shift, days, or schedule” (p. 35), Lane “did not want to commit to the schedule” of a classified position (p. 36), Lane “maintain[ed] the schedule she wanted” (p. 37-38).

⁸ Many of Harborview’s “facts” about Lane are really generalizations based on hypothetical per diem nurses, not facts about Lane. See, e.g., Resp., pp. 25-26. But Harborview’s reliance on other or hypothetical “per diem” nurses who may actually work less than Janet Lane is precisely what the misclassification statute forbids in determining an employee’s classification and eligibility for benefits. It is the *individual’s* “actual work circumstances” such as a continuing employment pattern – not contracts or labels – that determine the proper classification and their right to benefits. RCW 49.44.160 and .170(2)(a); *Mader, supra*, 149 Wn.2d at 475-76.

⁹ Lane does not rely on those portions of her declaration that were stricken.

Harborview “schedule[d] the work of all of the ‘classified’ nurses without pre-set schedules before [Harborview] would schedule [Lane’s] work because [she] was considered ‘per diem.’”¹⁰ CP 393 (emphasis added); see also CP 58-60, 283-85. Because Janet Lane was always scheduled after the schedules for these other nurses were set, CP 58-59, 283, 393, she was thus regularly scheduled for the least desirable night and weekend shifts. Therefore, *this scheduling process “typically resulted in [Janet Lane] working less desirable days and shifts than the ‘classified’ nurses without preset work schedules.”* CP 393; see also CP 261-67, 283-85 (emphasis added). Lane thus actually “paid her dues” by working the many night, weekend, and holiday shifts that Harborview scheduled her.¹¹

Furthermore, Lane was an extremely accommodating employee for

¹⁰ Harborview told Lane that “although per diem nurses are generally not required to work holidays and those holiday shifts generally rotate among classified nurses,” because Lane “worked more than 20 hours per week [she] was also required to work holidays.” CP 393.

¹¹ Harborview erroneously argues (p. 32) that Lane received “higher pay” as a “per diem” that she does not want to “repay,” while she “demands to be paid for leave” that was provided to classified nurses. Harborview admits that per diems, such as Lane, did not receive the paid leave, the automatic COLAs and step pay and the shift pay that classified nurses receive. Resp., pp. 8, 11, 27, 28. Although Harborview paid per diem nurses a 15% increase in their starting base hourly rate, this does not offset the loss in Lane’s employee benefits – paid leave (vacation, sick leave and holidays), automatic step pay, shift pay, and other benefits. Indeed, Lane should have been receiving vacation prorated at 22 days. CP 396. She should also receive prorated 12 days of sick leave and the paid 11 holidays that part-time nurses receive. CP 115. These constitute about 17.5% of pay. Thus, the paid leave that Lane did not receive is greater in value than the premium pay, even without considering the automatic step pay, COLAs, weekend, and night pay that she did not receive. Lane also agreed that “Harborview is entitled to an offset for the 15% premium pay.” CP 629. Certainly, Lane disputed that she was paid more (CP 86, 397) and in any event that was not the basis of Harborview’s motion.

Harborview, with Harborview having “flexibility,” not Lane. When hired she told Harborview she would work all types of shifts, days, evenings, nights, weekends, holidays, 8-hour and 12-hour shifts. CP 336. Her only request for many years was that she not work the two days a week when her firefighter husband worked 24-hour shifts. CP 266. Her husband’s schedule was predictable, set one year in advance, and thus Harborview knew one year in advance which were the two days a week that she preferred not to work. CP 266. Normally, Harborview had no need to schedule her to work on these days because it has a shortage of nurses and its classified nurses normally have “pretty varying” schedules from “full-time” to “.9, .8, .7, .6, .5 types of part-time schedules.” CP 97-98. But on those occasions when Harborview needed her to work when her husband was also scheduled to work, she worked for Harborview. CP 293.

Harborview did generally take into account Lane’s work preferences, but it does precisely the same for its other nurses (both full-time and part-time) who do not have predetermined days and shifts assigned to their positions. CP 59. The only difference was that the classified nurses’ preferences were taken into account *before* Lane’s virtually full-time schedule was set by Harborview. CP 58, 393. Thus, the record shows that Harborview had scheduling flexibility, not Lane. CP 58-60, 261-65, 283, 393.

Harborview also argues that Lane’s “flexible” come-and-go-as-she-pleases schedule and “lack of commitment to work” were shown by the fact that she worked Fridays through Sundays, but later decided “she

would not work those days.” Resp., p. 16. The undisputed facts, however, are that for *years* Lane worked, at Harborview’s direction, as the Weekend Charge Nurse supervising the “classified” nurses in the Operating Room – a supervisory position that a “per diem” nurse is not supposed to have. CP 396; see also CP 52-53, 121. Indeed, Lane’s manager confirmed that “she was the weekend charge nurse on weekends. *She was always willing to do that.*” CP 53 (emphasis added). Harborview scheduled Lane to work these three twelve-hour shifts on the weekend as the supervisory charge nurse because none of its classified nurses wanted to work that shift. CP 58-60; 283, 393.

Only after Lane worked in this supervisory weekend position for years without paid leave and at a lesser pay rate than “classified” nurses would have received if they had wanted to work those shifts, and only after Harborview hired non-employee “agency” nurses to work weekday shifts, Lane told Harborview that she could no longer work every weekend, just *some* weekends. CP 79-80, 318-19. Lane thought this was the “only bargaining chip [she] had” to try to get some weekend time with her school age children and husband. *Id.*¹²

After Lane told Harborview that she could not work every week-

¹² Harborview argues that Lane should have applied for the Weekend Charge Nurse job if she wanted a “classified” position. CP 16-17. But the record shows that not only did Lane actually fill the position for years without paid leave and at reduced pay, but the Weekend Charge Nurse position was also “vacant” for years and no nurse applied for the position because of the terrible hours and low pay for the responsibility. CP 396.

end as a “per diem” charge nurse and after Harborview finally “hired” Lane as a full-time nurse, Harborview substantially raised the pay for the weekend position from RN2 to RN3, and it finally hired a nurse to fill the “vacant” position. CP 396.

Harborview also argues that Lane had a “flexible” work schedule because she “generally made herself available to work only daytime shifts” (p. 14). But actually Lane “generally made herself available to work only daytime shifts” *after years of working night shifts* (CP 393). On her doctor’s recommendation, she asked not to change because she had worked so many night shifts that it caused sleep problems that had damaged her health. CP 267, 393.

Finally, Harborview’s argument that Lane was not “committed” to a regular schedule is also contradicted by her *actual work circumstances, i.e., Harborview regularly scheduled her workload four weeks to eight weeks in advance and Lane continuously worked for Harborview virtually full-time for nine years*. CP 53-62, 119-20, 393-94, 399-400, 407, 431-32. *Lane thus showed her commitment to work in the way that employees normally do, by working and doing good work.*¹³ CP 312. Accordingly, Harborview had the flexibility, not Janet Lane.¹⁴

¹³ Harborview also admits Lane’s nearly full-time work was consistent (p. 15) – “over the years . . . there does not appear to be a significant trend toward diminishing (or increasing) hours.”

¹⁴ As part of this “flexibility” argument, Harborview refers to the fact that sometimes Lane worked a few hours in other nursing jobs (true per-day contract work) but only *after* Harborview had scheduled her not to work on those days at the hospital.

(continued)

II. HARBORVIEW’S ARGUMENT THAT LANE HAS NO METHOD TO REMEDY HER MISCLASSIFICATION AND TO OBTAIN BENEFITS OTHER THAN TO APPLY FOR A CLASSIFIED POSITION IS CONTRARY TO THE PUBLIC EMPLOYEE MISCLASSIFICATION ACT.

Harborview argues that this Court has no “authority” to decide whether Lane was misclassified under the CBA. Resp., p. 35. And thus it says “Lane’s arguments based on the CBA provide no basis for this Court to reverse the trial court.” *Id.* According to Harborview, Lane cannot sue in court to obtain benefits owed under the CBA. *Id.* It argues that she had to start over and apply for another job with benefits as a new hire. Resp., pp. 23-24, 35-36.

Harborview’s arguments are foreclosed by the misclassification act. The act provides that Lane is entitled to those “benefits to which employees are entitled under collective bargaining agreements applicable to the employee’s correct classification.” RCW 49.44.170(1)(a) and (2)(b). And employees are expressly authorized to bring actions to correct a classification and obtain the benefits under the CBA under the correct classification. RCW 49.44.170(3) (“[a]n employee deeming himself or herself harmed in violation of subsection (1) of this section may bring a civil action in a court of competent jurisdiction.”).

Harborview also contends that it had no duty to correctly classify

CP 285-86. This moonlighting is irrelevant to whether Lane was a “part-time” nurse at Harborview because she was regularly scheduled by Harborview to work half-time or more. Indeed, there is nothing in Harborview’s CBA that prevents nurses from moonlighting to earn additional pay from other employers on days they are not scheduled to work.

her – “[t]he first issue is whether Harborview even determined Ms. Lane’s status. It did not.” Resp., p. 23. Rather than the employer having a duty to correctly classify Lane, Harborview argues (p. 36) “there *was* a means readily available to Ms. Lane to obtain a classified position: she could have applied for one of the numerous positions that came open.” Resp., p. 36 (emphasis by Harborview); p. 39 (“Lane had an opportunity to reclassify her position. She could have seriously looked, and applied, for a classified position years before she did.”).

But under the misclassification act it is the *employer’s statutory duty* to correctly classify employees for benefit eligibility. RCW 49.44.160 thus states that “[t]he legislature intends that public employers be prohibited from misclassifying employees....” [Emphasis added.] And it is therefore “an unfair practice for any public employer to ... [m]isclassify any employee to avoid providing or continuing to provide employment based benefits.” RCW 49.44.170(1)(a) (emphasis added). And “misclassify” is defined as (.170(1)(d)):

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

Even before the act, proper classification has been an employer responsibility. *See, e.g., State ex rel. Cole v. Coates, supra*, 74 Wash. at 37-38; *Watkins v. City of Seattle, supra*, 2 Wn.2d at 706-08; *Allard v. City of Tacoma, supra*, 176 Wash. at 443. The “controlling feature” in deter-

mining whether the employer has correctly classified an employee is the “nature of the work done, and not the name given the position[.]” *Allard*, 176 Wash. at 443.¹⁵

Harborview’s position is that once Lane is labeled a “temporary/per diem” employee when she is hired, she remains a temporary employee forever, regardless of her actual circumstances showing that she is not a temporary employee excluded from benefits under the CBA. This is precisely what the Legislature intended to prohibit in RCW 49.44.160 and .170. Employees do not have to start over by being “hired” by the employer in the correct classification to obtain benefits. They have a right under the act to correct their classification to obtain benefits. *Id.*

Harborview also argues that it would be “difficult” to correct her classification because it would have to keep track of hours and duration of work. *Resp.*, p. 38. This is a completely made-up “difficulty.” As Lane

¹⁵ Although it is an immaterial fact because Lane had no duty to apply for a correctly classified position, it is also contrary to the facts for Harborview to argue that Lane did not “seriously” look and apply for a classified position. For example, Harborview belittles Lane because she testified that during the time she worked as a “per diem” she looked in the Sunday newspaper to see if there were any “classified” nurse positions available in the Harborview Operating Room – (p. 17) “relying on the Sunday papers would not be a realistic way to look for a specific position” and the positions instead are “posted” at Harborview. But it is undisputed that “[a]vailable positions were ... *not posted* in the operating room *until July 2007*” – after this lawsuit was filed. CP 396 (emphasis added). And for the classified positions that were available, the undisputed facts are that Lane “repeatedly told [her] managers that [she] wanted a ‘classified’ position” and “[d]espite her repeated inquiries, [she] was not notified when such positions became available.” CP 395-96. “‘Classified’ positions were instead primarily given to nurses hired from outside Harborview.” CP 396.

pointed out in her opening brief (p. 27 n. 12), Harborview already keeps track of hours worked by “temporary” employees to determine their eligibility under other state laws on health insurance and retirement. Harborview does not dispute that it has this duty, nor does it deny that it tracks the hours worked by temporary employees to determine their eligibility for health insurance and retirement. Indeed, Harborview determined that it had to provide employer-paid health insurance for Lane after she had worked half-time or more for over six months. CP 169. But it did not start providing her with employee benefits under the CBA even though the eligibility requirements for CBA benefits and health insurance under state law are the same, working half-time or more.¹⁶

Accordingly, the Court should reject Harborview’s arguments that Lane cannot bring an action in court to correct her classification and to obtain the benefits earned under her correct classification under the CBA and that it had no duty to correctly classify Lane when her work hours and length of employment showed she was no longer a temporary per diem employee, but was a part-time employee.

¹⁶ The Legislature just this year reaffirmed that employees who were expected to work less than six months (temporary employees), but actually work longer are entitled to employer-paid health insurance if in fact they work half-time or more. Laws of 2009 Ch. 537, §7(a)(i) and (ii).

III. ALTHOUGH NOT MATERIAL TO THE ARGUMENTS ON WHY THE TRIAL COURT’S DECISIONS SHOULD BE REVERSED, THE COURT SHOULD ALSO REVERSE THE TRIAL COURT’S EVIDENTIARY RULINGS SO THAT THE ERRORS ARE NOT REPEATED ON REMAND.

Lane agrees with Harborview (p. 44) that under RAP 2.4(b) the trial court’s evidentiary rulings did not “prejudicially affect[] the trial court’s orders on the parties’ motions for summary judgment[.]” And this is because under the undisputed facts and law, the trial court should have granted Lane’s motion for partial summary judgment and denied Harborview’s motion.

But if the Court reverses the trial court and grants Lane’s motion for summary judgment (thereby remanding for a determination of damages) or the Court finds an issue of fact prevents either party from obtaining summary judgment on Lane’s classification (thereby remanding for a trial on the disputed facts), then whether the trial court erred in its evidentiary rulings will become material on remand.¹⁷

The RAPs recognize that issuing rulings in such situations is appropriate if the acts “repeated on remand would constitute prejudicial error” to the respondent. RAP 2.4(a). Although Lane is not the respon-

¹⁷ Because the trial court excluded Lane’s testimony concerning the amount of pay she received compared to what she would have received as a “classified” nurse, if the matter is remanded for a determination of damages, then the issue of whether Lane can testify to her damages is important to resolve – the trial court ruled that Lane could not testify to such matters for “[l]ack of foundation.” CP 601. Similarly, if how Harborview schedules “per diem” and “classified” nurses is a material fact in dispute, whether Lane can testify to the similarities after working for Harborview since 1998 is also an issue that is important to resolve.

dent, the reasons for having such a rule apply in these circumstances and the rules should be “liberally construed to promote justice and to facilitate the decision of the cases on the merits.” RAP 1.2(a).

Lane testified about the lower pay and benefits she received compared to a classified nurse. CP 394-95. And Lane’s testimony could be excluded “*only if, as a matter of law, no trier of fact could reasonably find that the witness had firsthand knowledge.*” *State v. Vaughn*, 36 Wn.App. 171, 173, 672 P.2d 771 (1983) (emphasis added, citation omitted), *affirmed*, 101 Wn.2d 604, 611-12, 682 P.2d (878) (1984).

Harborview does not argue that Lane’s testimony is factually wrong – instead, it argues there is no “foundation” for this testimony because months earlier Lane testified she did not know how her “hourly wage” compared to a classified nurse *when she was first hired nine years earlier*. Resp., p. 40, citing CP 274. The fact that Lane did not know the hourly wages for classified nurses when she was hired has nothing to do with the knowledge she later acquired – when she worked there – about their pay as compared to hers. Moreover, Lane’s stricken testimony concerned much more than her “hourly wage,” *e.g.*, she testified concerning benefits that classified nurses accrue, including paid leave, weekend pay, annual pay step increases, and an “equity pay adjustment.” CP 394-95.¹⁸

¹⁸ Lane’s deposition testimony on these points was not stricken. CP 86, 253, 274-75, 279-80, 297. Indeed, Harborview introduced nearly all of this testimony. CP 243.

A reasonable trier of fact could find that Lane had foundation for her testimony because she worked there for years and brought a lawsuit due to the differences in pay and benefits. Harborview's arguments, which do not even dispute the factual accuracy of Lane's testimony, go toward *impeachment*, not admissibility.

Similarly, the trial court struck Lane's testimony regarding the similarity between scheduling "classified" and "per diem" nurses, even though Lane worked at Harborview for more than nine years in both "classified" and "per diem" nurse positions.¹⁹ A reasonable trier of fact could thus find Lane had personal knowledge of how Harborview scheduled its nurses. Harborview's arguments against striking Lane's testimony are again matters of impeachment or disputes of fact. The Court should thus reverse the trial court on these evidentiary matters to prevent a material error on remand.²⁰

CONCLUSION

In *Mader* the Supreme Court said that a public employer errs when it labels a long-term employee who works more than half-time as "temporary." 149 Wn.2d at 475-77. Here, it is undisputed that Harborview scheduled Janet Lane to work virtually full-time for nine years.

¹⁹ Harborview also introduced Lane's deposition testimony about scheduling, CP 261-67, 283, the same testimony that it asked the trial court to strike in her declaration. Indeed, Harborview's own witness described the scheduling in the same way. CP 58-60.

²⁰ For the reasons stated in Lane's opening brief (p. 33), the trial court also erred in striking Lane's counsel's letter to Harborview requesting that it reclassify her.

Under the CBA, *Mader*, and the misclassification act, Harborview misclassified Lane because her *actual work circumstances* as proven by those nine years of work show that she was not a “temporary” nurse and she was actually a “part-time” nurse eligible for benefits. *Id.*; RCW 49.44.160 and .170.

Harborview’s arguments that Lane had a “flexible” work schedule and no “commitment” to work are not defenses to her misclassification, as well as contrary to the undisputed facts showing Lane’s commitment to work by working nearly full-time for nine years and the facts showing that for years she worked nights, weekends, and holidays, shifts that other classified nurses without pre-set schedules preferred not to work.

This Court should reverse the trial court’s decisions, grant summary judgment for Lane, and remand to the trial court for further proceedings concerning relief.

Respectfully submitted this 22nd day of July, 2009.

WIGGINS & MASTERS PLLC

BENDICH, STOBAUGH & STRONG, P.C.


CHARLES K. WIGGINS, WSBA #6948
241 Madison Avenue N.
Bainbridge Island, WA 98110
Attorneys for Plaintiff/Appellant


STEPHEN K. STRONG, WSBA #6299
STEPHEN K. FESTOR, WSBA #23147
701 Fifth Avenue, #6550
Seattle, WA 98104
Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that the original and one copy of the preceding Appellant's Reply Brief was filed by legal messenger in Division I of the Court of Appeals at 600 University St., One Union Square, Seattle, WA 98101.

I further certify that one copy was served *via* facsimile and U.S. mail, postage prepaid, on the following attorney for Respondent:

Helen Arntson
Assistant Attorney General
Attorney General's Office
University of Washington Division
4333 Brooklyn Ave. NE, Ste. 1800
UW Mailbox: 359475
Seattle, WA 98195-9475

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

DATED: July 22, 2009, at Seattle, Washington.



MONICA I. DRAGOIU

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 JUL 22 7:51 AM