

COURT OF APPEALS
EVIDENTIARY

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STATE OF WASHINGTON
BY _____
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No. 43865-8-II

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

DOUGLAS MERINO and KAY
MERINO, husband and wife and the
marital community composed thereof,

Appellants,

v.

THE STATE OF WASHINGTON and
ITS AGENCIES; THE WASHINGTON
STATE DEPARTMENT OF
RETIREMENT SYSTEMS; THE
WASHINGTON STATE PATROL and
JOHN R. BATISTE, Chief Thereof, and
DAVID J. KARNITZ, Deputy Chief
Thereof,

Respondents

SUPPLEMENTAL BRIEF OF
DOUGLAS AND KAY MERINO, APPELLANTS

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A. INTRODUCTION

This supplemental brief is filed on behalf of Douglas and Kay Merino (“Merino”) in order to comply with RAP 18.1 and permit a request for reasonable attorney’s fees on appeal should Merino prevail.

B. STATEMENT OF FACTS

Merino was placed on a job-related disability from the State Patrol in 1994. (CP 172-173). He continued on disability retirement status until August 2008, receiving compensation equal to one-half his patrol salary (CP 172-173).

In August 2008, Merino was discharged by the State Patrol, and his disability retirement was terminated (CP 228-233, 172-173). This appeal seeks reinstatement of his disability retirement compensation

C. ARGUMENT AND AUTHORITIES

Recovery of attorney’s fees in a successful claim for salary or wages is authorized by statute. RCW 49.48.030 provides:

In any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney’s fees, in an amount to be determined by the Court, shall be assessed against the employer or former employer:
PROVIDED, however, This section shall not apply if the amount of recovery is less than or equal to the

amount admitted by the employer to be owing for said wages or salary.

In this pending case, appellants seek recovery of pension benefits that have been terminated by the Washington State Patrol. The recovery of pension benefits is deemed a recovery of wage or salary under RCW 49.48.030.

The case of *Bates vs. City of Richland*, 112 Wn.App. 919, 51 P.3d 816 (2002) made reference to RCW 49.48.030 in relation to pension benefits. The *Bates* court held:

RCW 49.48.030 is a remedial statute that must be construed liberally in favor of the employee. *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 34, 42 P.3d 1265 (2002). A liberal construction requires that the provision's coverage be liberally construed in favor of the employee and that the provision's exceptions be narrowly defined. *Id.* (citing *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Employees of Peninsula*, 130 Wn.2d 401, 407, 924 P.2d (1996)). Moreover, the provision "should be liberally construed to advance the Legislature's intent to protect employee wages and assure payment." 146 Wn.2d at 35 (quoting *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 520, 22 P.3d 795 (2001)).

Although chapter 49.48 RCW contains no definition of "wage," courts have applied the definition contained in a related statute, RCW 49.46.010(2), which reads in pertinent part: "[w]age" means compensation due to an employee by reason of employment." *Hayes v. Trulock*, 51 Wn.App. 795, 806, 755 P.2d 830 (1988) (quoting RCW 49.46.010(2)); see also *Naches Valley Sch.*

Dist. No. JT3 v. Cruzen, 54 Wn.App. 388, 398-99, 775 P.2d 960 (1989).

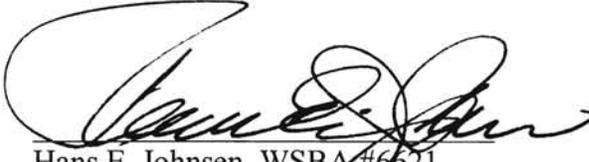
Washington courts have interpreted RCW 49.48.030 broadly, and attorney fees have been awarded for breach of an employment contract. *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 450-51, 815 P.2d 1362 (1991), and breach of labor contract, *Naches Valley*, 54 Wn.App. at 399. *Ass'n of Fire Fighters*, 146 Wn.2d at 34-35. Courts have also interpreted “wages or salary owed” to include back pay, front pay, commissions and reimbursements for sick leave. *Id.* at 35. These cases demonstrate that awards for attorney fees under RCW 49.48.030 are not limited to judgments for wages or salary earned for work performed, but, rather, that attorney fees are recoverable under RCW 49.48.030 whenever a judgment is obtained for any type of compensation due by reason of employment. Pensions are deferred compensation for work performed. *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 698, 296 P.2d 536 (1956). Consequently, the judgment here is for “wages” as the term is used in RCW 49.48.030.

Richland asserts that the remedies available under chapter 49.48 RCW are limited to employees. However, this reading ignores the plain wording of RCW 49.48.030, which states that attorney fees may be awarded “[i]n *any action* in which *any person* is successful in recovering judgment for wages or salary owed.” There is no requirement that the plaintiff be a current employee. Moreover, RCW 49.48.030 also provides that the award “shall be assessed against said employer or *former employer*.” (Emphasis added.) “Statutes must be interpreted and construed so that all the language used is given effect . . .” *City of Seattle v. State*, 136 Wn.2d 693, 698, 965 P.2d 619 (1998) (quoting *Whatcom County v. City of Bellingham*, 128 Wn.2d, 537, 546, 909 P.2d 1303 (1996)). Hence, there is

not support for the argument that an award of attorney fees under RCW 49.48.030 is proper only where the plaintiff is a current employee.

From the foregoing, it is apparent that a request for attorney's fees is appropriate in circumstances where there is a successful claim for recovery of pension benefits, as in the case before the Court.

RESPECTFULLY SUBMITTED this 13th day of May,
2013.



Hans E. Johnsen, WSBA #6621
Attorney for Appellants

DECLARATION OF SERVICE

I, Kathleen Johnsen, declare under penalty of perjury under the laws of the State of Washington that on May 3, 2013, I caused to be served on the persons listed below the following:

Appellant's Supplemental Brief

By way of:

- Federal Express Standard Overnight
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To:

Matthew T. Kuehn
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The original of Appellant's Supplemental Brief is being sent by Federal Express this date with the Court of Appeals, Division II.

DATED at Kirkland, Washington this 13th day of May, 2013.


 Kathleen Johnsen, Declarant