

19971-7

NO. 246370

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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MELANIE MORIN,

*Plaintiff-Appellant,*

v.

CLARENCE HARRELL & HAZEL HARRELL Et Ux. ,

*Defendant-Respondent*

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BRIEF OF APPELLANT

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## BRIEF OF MELANIE MORIN

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#### Assignments of Error

1. The trial court erred in entering the order of September 26, 2006 granting the defendants' motion for summary judgment and dismissing plaintiff's case with prejudice.

#### Issues Pertaining to Assignments of Error

Whether an individual employed in a private home as a care giver is exempt from overtime wages pursuant to RCW 49.46.130, and RCW 49.46.010(5)(b) because the 1988 amendment adding care givers to overtime wage eligibles by Initiative 518 enacted by the people is unconstitutional where the ballot title does not so state? (Assignment of Error 1.)

Whether the doctrine of Laches applies to the facts of this case when eighteen years have passed since Initiative 518 provided for overtime wages for thousands of domestic service workers without any challenge to the statute? (Assignment of Error 1.)

Whether a court, dismissing a complaint on state constitutional grounds when it invalidated a statute providing overtime wages under state law, notwithstanding notice pleading and where the complaint pleads for relief under the federal Fair Labor Standards Act providing a federal overtime wage entitlement for a care giver working in a private home, may dismiss the federal claim with prejudice? (Assignment of Error 1.)

B. Statement of the Case

Quoting from the trial court's Memorandum Decision, CP Pages 117, 118.

The plaintiff Morin filed suit against the defendants Harrell, claiming she was not paid for overtime wages earned totaling 1,978.5 hours and \$11,871. She seeks those wages, plus interest, reasonable attorney's fees and exemplary damages twice the amount of the wages claimed. The defendants Harrell claim the plaintiff Morin is not entitled to overtime wages as she was an exempt domestic service employee and that RCW 49.46.010(5)(b) is invalid because it removed the exemption from the domestic service employee to overtime wages. The defendants Harrell move for summary judgment of dismissal.

1. Uncontroverted Facts. Hazel Harrell suffered a debilitating stroke on January 26, 1996. After a hospital stay of approximately three weeks, her husband Clarence Harrell hired a caregiver to provide at home assistance for his wife. By March 2003, after Mrs. Harrell suffered additional and further

debilitating strokes, she needed 24 hour care, seven days a week. Plaintiff was a caregiver hired by Mr. Harrell in March 2001. Eventually Ms. Morin took over as the head caregiver. As head caregiver she was to provide care-giving services and assume responsibilities of coordinating the schedules for the other caregivers. In the summer of 2004 Ms. Morin raised the issue; of overtime compensation with Mr. Harrell. Mr. Harrell advised her she did not qualify. After Ms. Morin terminated from employment in January 2005 she again raised the issue of overtime wages. On May 31, 2005 she filed this lawsuit against the Harrells.

*Id.* The court heard oral argument on August 29, 2005. In his Memorandum Decision, Judge Cooper wrote Defendants' summary judgment motion concerned:

Issue Presented. Whether an individual employed to provide domestic services in or about a private home is exempt from overtime wage compensation pursuant to RCW 49.46.130 and RCW 49.46.010(5)(b) because the 1988 amendment to RCW 49.46.010(5)(b) pursuant to Initiative 518 is unconstitutional.

*Id.* And, the response was as follows, quoting the trial court, CP Pages 120-121.

#### CONCLUSION

Based upon the foregoing, the court concludes Initiative 518 as it relates specifically to the removal of the exemption from the Minimum Wage Act of any individual employed in domestic service in or about a private home is unconstitutional in violation of the ballot title rule, that Ms. Morin was an individual employed in the domestic service in or about a private home and

therefore exempt from the Minimum Wage Act pursuant to RCW 49.46.010(5)(b) as was provided prior to Initiative 518 and that because she was exempt from minimum wage, she failed to state a claim upon which relief can be granted. Summary judgment of dismissal should, therefore, be granted. Please present the appropriate order on summary judgment of dismissal and note the matter for presentation.

C. Argument of Appellant.

C.1. Standard of Review: This court reviews issues of statutory interpretation de novo. *Jesse Cerrillo, et al v. Cipriano Esparza, et al*, Docket 77283-5, Page 5, Wash. S.Ct., Filed August 31, 2006 ). citations omitted. This court also reviews orders granting summary judgment de novo. *Id.* Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* There are no material issues of fact in dispute in this case and the court's statement quoted above is sufficient for the purposes of the appeal.

C.2. Initiative 518 is Constitutional.

The parties agree Ballot Title for Initiative 518 was "Shall the state minimum wage increase from \$2.30 to \$3.85 (January 1, 1980) and then to \$4.25 (January 1, 1990) and include agricultural workers?" CP Page 012, Li 12-14 & Page 039. The parties agree the Initiative changed the wage and hour law because it included an exemption for casual labor in such a way as to end the exemption for domestic workers. The parties agree plaintiff was a domestic service worker. The parties agree plaintiff was exempt from Washington state wage and hour laws as a care giver before Initiative 518, plaintiff was covered and entitled to

overtime wages after the effective enactment of the Initiative, and plaintiff was not if the statute was never changed by Initiative 518.

The trial court found I-518 unconstitutional because of the ballot title rule. Const. art. 2, § 19 of the Constitution of the State of Washington provides that "[n]o bill shall embrace more than one subject, and that shall be expressed in the title." The second clause of art. II, § 19 requires that the subject of a measure appear in the title. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 192-193, 11 P.3d 762 (2000). The purpose of the requirement is to notify those voting on the measure of its contents. Obviously, the I-518 ballot title indicates to voters changes in wage and hour laws rather than, for example, a highway project.

The ballot title of an act complies with art. II, § 19 if it gives notice which would lead to an inquiry into the body of the act or indicates the scope and purpose of the law to an inquiring mind, but the title need not be an index to the contents, nor must it provide details of the measure. *Local 587* at 217. Yet, an index is just what Defendants insist the ballot title must contain, and the trial court agreed. The trial court simply noted the ballot title did not state domestic service workers previous exemption from the wage and hour laws would be changed so they would be covered after enactment of the Initiative. Judge Cooper's observation about what was not in the ballot title was correct. The question is should the ballot title have stated all of that just to pass muster?

The constitutional inquiry leads to asking if the words "minimum wage" and "includes agricultural workers" would provide notice to an inquiring mind indicating the scope and purpose of the proposed initiative. Clearly the inquiring mind can readily grasp that the

state's wage and hour laws are involved because the minimum wage will be changed and so will the class of workers for whom the laws apply.

The very same exemption Defendants wish they had for domestic service workers is the same exemption that applied to agricultural workers before Initiative 518 became law. Both are subsections of the same statute, RCW 49.46.130(2). Both agricultural workers and domestic service workers are classifications of workers either in or out of the wage and hour scheme. One cannot say the Ballot Title gives no indication worker exemptions will be affected by the initiative. Defendants demand an index because they insist the Ballot Title must contain ALL the changes to worker exemptions. Only that would have put the elimination of the domestic worker exemption and the inclusion of the casual labor exemption into the Ballot Title. The jurisprudence extant does not require more than reasonable notice of the statute's effect, or, in this case, it would require a index case law specifically mentions as being not necessary.

### C.3. Laches

The doctrine of Laches bars the claims of those who neglect to assert claims for an unreasonable time, leading the other party to alter position or otherwise to suffer damage from the delay.<sup>1</sup>

Washington courts have not had occasion to apply the doctrine of Laches in constitutional cases like this one, but the courts of other states have done so. In *Cole v. State*, 308 Mont. 265, 42 P.3d 760 (2002), legislators and voters brought a challenge nine years

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<sup>1</sup> For cases in Washington applying the doctrine, see *Stewart v. Johnston*, 30 Wn.2d 925, 195 P.2d 119 (1948) and *Edison Oyster Co., Inc. v. Pioneer Oyster Co.*, 22 Wn.2d 616, 157 P.2d 302 (1945).

later to a term limits law enacted in 1992, basing their challenge on Montana's version of the "double subject" provision in the state constitution. The Montana Supreme Court dismissed the claim due to Laches, holding that the nine-year delay was unconscionable, and that allowing the claim would prejudice those who had relied upon the statute's presumptive validity.

However, the doctrine must be applied more broadly in this case and the focus must be on the time more than on the actors' conduct. Ms. Morin sued for overtime wages on an eighteen year old statute, being advised she was owed too much for the state to assist her. Mr. Harrell did not raise the constitutional issue until just after he was sued for overtime wages. Defendants did not sleep on their rights nor wait for some change in circumstances adversely affecting plaintiff; they just made a Hail Mary Pass and it was caught.

Rather, the problem here is all domestic service workers and their employers presumptively relied on the effectiveness of I-518 in exempting casual labor but not excluding, or *including*, domestic service workers. Mr. Harrell should be equitably estopped from challenging I-518 and the equitable and policy support for the Laches Doctrine applies. No one thought it was a radical change and no one, as best we can find, challenged the constitutionality for eighteen years. This court must consider the consequences of allowing I-518 to fall.

The trial court found I-518 unconstitutional. Plaintiff was never covered by the overtime scheme. Without enumerating a parade of horrors, if Ms. Morin isn't covered, then is any domestic service worker covered. OR, what is the state of the law regarding all other persons affected. Are some casual laborers covered because I-518 exempted them but I-518 was never effective? It is the stupendous scope of the trial court's decision in this case

that presents a severe problem together with so many reading a labor law that is not effective as it reads.

Logically; the unconstitutionality cannot only affect Plaintiff Morin's quest for overtime. This must also effect the rights and obligations of tens of thousands of workers and employers, saved, it at all, by the statute of limitations, which is itself a statutory Laches policy. This court should reverse the trial court on this equitable ground.

#### C.4 Federal Claims.

The complaint contained a claim under federal and state law. CP Page 002 Li 3-6. The trial court dismissed both even though plaintiff's motion for reconsideration highlighted the claim under federal law. CP Page 125-131. Federal law provides if a worker providing companionship services spends more than twenty percent of the work time on domestic services, the exemption from FLSA does not apply and the employer must therefore pay time and one half for work over 40 hours per week, with certain adjustments for meals or overnight stays. This is an issue of fact we never even approached in the case.

Nevertheless the trial court dismissed with prejudice Plaintiff's claim because it concluded Plaintiff states a claim for which no relief can be granted. This is may be so, if I-518 is invalid regarding state law, but only under state law. The trial court did not consider, let alone hold, nor have the parties briefed, whether she may have a federal law entitlement.

As used in section 13(a)(15) of the Act [Fair Labor Standards Act], the term domestic service employment refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers,

governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes babysitters employed on other than a casual basis. This listing is illustrative and not exhaustive.

29 CFR 552.3 [TITLE 29—LABOR, CHAPTER V--WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR, PART 552 \_APPLICATION OF THE FAIR LABOR STANDARDS ACT TO DOMESTIC SERVICE

Federal regulations further provide:

As used in section 13(a)(15) of the Act, the term companionship services shall mean those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: Provided, however, That such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked. The term "companionship services" does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse. While such trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a private household.

29 CFR 552.6 [Companionship services for the aged or infirm.]

Then, Sec. 552.100 Application of minimum wage and overtime provisions.

(a)(1) Domestic service employees must receive for employment in any household a minimum wage of not less than that required by section 6(a) of the Fair Labor Standards Act.

(2) In addition, domestic service employees who work more than 40 hours in any one workweek for the same employer must be paid overtime compensation at a rate not less than one and one-half times the employee's regular rate of pay for such excess hours, unless the employee is one who resides in the employer's household.

Obviously, plaintiff had a facial overtime wage claim under federal law and the court should have permitted that case to proceed.

#### Conclusion

Appellant seeks reversal of the order dismissing her case. Plaintiff should proceed to trial on both state and federal claims. The trial court should be reversed because I-518 did violate the ballot title rule, and the doctrine of Laches stays the effect of the court's decision. It was improper for the court to dismiss plaintiff's claim under federal law.

October 13, 2006

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "William G. Simmons", written over a horizontal line.

William G. Simmons, WSBA 19071  
Attorney for Appellant