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COURT OF APPEALS
DIVISION II

03 MAR 21 PM 2:09

STATE OF WASHINGTON

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NO. 28375-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WASHINGTON EDUCATION ASSOCIATION,

Appellants,

v.

GARY DAVENPORT, MARTHA LOFGREN, WALT PIERSON,
SUSANNAH SIMPSON, and TRACY WOLCOT

Respondents, individually, and on behalf of
all other nonmembers similarly situated.

RESPONDENTS' RESPONSE TO BRIEFS OF *AMICUS CURIAE* OF
WASHINGTON FEDERATION OF STATE EMPLOYEES AND
WASHINGTON STATE LABOR COUNCIL

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I. INTRODUCTION

Plaintiffs Gary Davenport et al. (“Davenport Plaintiffs”) brought this class action lawsuit to recover agency fees paid to the Washington Education Association (“WEA”) and used for political purposes without their affirmative authorization in violation of RCW 42.17.760. The WEA brought a CR 12(c) motion to dismiss Davenport Plaintiffs’ claims. The trial court denied the WEA’s motion to dismiss and certified Plaintiffs’ class. The WEA appeals these rulings.

The Washington Federation of State Employees (“WFSE”), a labor organization, and the Washington State Labor Council (“WSLC”), an association of labor organizations, have filed briefs of *amicus curiae* in support of the WEA’s appeal. Both *amicus* briefs bring to the court’s attention the recent case of Crisman v. Pierce County Fire Protection District No. 21, __ Wash. App. __, 60 P.3d 652 (2002), and warn the court of the “grave dangers” of exposing labor organizations to private causes of action for misused agency fees.

However, neither *amicus* brief explains how the Crisman decision applies to RCW 42.17.760, and both fail to acknowledge that the Supreme Court has already held in Nelson v. McClatchy Newspapers, Inc., 131 Wn.2d 523, 534, 936 P.2d 1123 (1997), that an implied private right of action exists under RCW 42.17. Further, their repeated and baseless argument that the enforcement mechanisms described in RCW 42.17.400

preclude an implied right of action ignores established caselaw to the contrary. The WFSE cites to several out of state cases, each of which are inapposite for various reasons. In addition, the WSLC's warning that a private right of action will render the citizen action provided by RCW 42.17.400 superfluous is both unsupported and illogical since the recoverable relief in a private action is significantly different from that recoverable under RCW 42.17.400. Finally, the WSLC's prediction that labor organizations will be besieged by private actions is unpersuasive since agency fee payers only have a right to recover their fees to the extent the labor organizations violate RCW 42.17.760. In sum, the *amicus* briefs filed by the WFSE and the WSLC are not helpful to the court in its consideration of the viability of Davenport Plaintiffs' claims.

II. ARGUMENT

A. CRISMAN DOES NOT APPLY TO DAVENPORT PLAINTIFFS' CLAIMS.

In Crisman, an unsuccessful candidate for county fire district commissioner brought private tort claims, claims under 42 U.S.C. §1983, and alleged violations of RCW 42.17.130, which prohibits the use of public facilities in support of an election candidate. 60 P.3d at 653-54. The trial court granted summary judgment for the defendant fire district and the Court of Appeals affirmed, holding that the plaintiff did not have a private right of action for violations of RCW 42.17.130. Id. at 656.

The Crisman holding is distinguishable because the Davenport Plaintiffs' claims are based on RCW 42.17.760, a statute enacted for the benefit of a specific class of people, and furthers the express statutory goals: ensuring that individuals have an equal opportunity to influence the political process and reducing the influence of large organizations.

- 1. The plaintiff in Crisman sued under RCW 42.17.130, which was not enacted to benefit a specific class of people; the Davenport Plaintiffs sued under RCW 42.17.760, which was enacted to benefit a specific class of people.**

The Crisman court concluded that RCW 42.17.130, the statute under which the plaintiff brought his claim, was enacted for the public benefit, rather than the benefit of a class of individuals. 60 P.3d at 655, citing Cowles Publ'g Co. v. Pierce County Prosecutor's Office, 111 Wash. App. 502, 510, 45 P.3d 620 (2002).¹ In making its determination, the court looked to the statutory declaration of purpose contained in RCW 42.17.010, noting:

. . . [T]he policy refers specifically to public disclosure of campaign finances and potential conflicts of interest. The statute also consistently refers to the "public" or "people," thereby expressing its goal of protecting the public rather than any individual candidate.

¹ In Cowles, a newspaper brought an action to compel disclosure of certain records from a county prosecutor's files under RCW 42.17.260, which requires disclosure of public records. 111 Wash. App. at 504-05. The trial court held that the prosecutor did not have to disclose the requested records because they were investigative records exempt from disclosure under RCW 42.17.310(1)(d), *id.* at 505, and the Court of Appeals affirmed. *Id.* at 511.

60 P.3d at 655 (citation omitted). The Crisman court's reliance on RCW 42.17.010 and Cowles was appropriate since RCW 42.17.010 and each of the statutes at issue in Crisman and Cowles were enacted by Initiative Measure No. 276 ("I-276"). 1973 Wash. Laws, ch. 3.

However, Davenport Plaintiffs' claims are made under a statutory provision enacted by a different initiative for a different purpose that clearly benefits a class of individuals, of which Davenport Plaintiffs are members. RCW 42.17.760 states:

A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

RCW 42.17.760. Initiative Measure No. 134 ("I-134") enacted RCW 42.17.610 through .790, and various other provisions, which were added to RCW 42.17. 1993 Wash. Laws, ch. 2. The voters' intent in enacting I-134 can be readily ascertained by examining its statements of findings and intent:

The people of the state of Washington find and declare that:

- (1) **The financial strength of certain individuals or organizations should not permit them to exercise a disproportionate or controlling influence on the election of candidates.**
- (2) Rapidly increasing political campaign costs have led many candidates to raise larger percentages of money from special interests with a specific financial stake in matters before state government. This has caused the public perception that decisions of elected officials are being improperly influenced by monetary contributions.

- (3) Candidates are raising less money in small contributions from individuals and more money from special interests. This has created the public perception that individuals have an insignificant role to play in the political process.

RCW 42.17.610 (emphasis added).

By limiting campaign contributions, the people intend to:

- (1) Ensure that **individuals and interest groups have fair and equal opportunity to influence elective and governmental processes;**
- (2) **Reduce the influence of large organizational contributors;** and
- (3) Restore public trust in governmental institutions and the electoral process.

RCW 42.17.620 (emphasis added).

A comparison of the statutory statements of purpose contained in RCW 42.17.010, and .610/.620 demonstrates that the voters' intent in enacting the two initiatives was significantly different. Voters enacted the provisions in I-276 to enhance public disclosure of and accountability for political activities. In contrast, voters enacted the provisions in I-134 to facilitate meaningful political participation by individuals, specifically including agency fee payers. Therefore, the Crisman finding that RCW 42.17.130 was not enacted for the benefit of the plaintiff in that case is not applicable to the Davenport Plaintiffs' claims.

The WSLC suggests that the above argument would support a private taxpayer lawsuit when public resources are used to support a candidate. WSLC Brief, at 8. In that case, under the first prong of the

Bennett test, taxpayers would not qualify as a specific class of individuals for whose benefit the statute was enacted. Therefore, the taxpayers could not maintain a private claim under Bennett. In this case, however, agency fee payers are specifically identified as the benefited party by RCW 42.17.760. Moreover, RCW 42.17.620 identifies the protection of individuals as a fundamental purpose of at least the portions of RCW 42.17 that were enacted by I-134.

- 2. Crisman's claims did not directly enhance public disclosure; Davenport Plaintiffs' private action is necessary to ensure agency fee payers' right to influence the political process, and not to have their own wages used by a large organization to further its own political agenda.**

Based on its finding that the statutory purpose of RCW 42.17.130 was public disclosure, the Crisman court concluded that Crisman's claims were not consistent with the statutory purpose:

. . . [A] private cause of action for damages would provide no additional public disclosure over and above the statute's express remedies.

60 P.3d at 656. This finding has no application to Davenport Plaintiffs' private cause of action because, as stated above, their claims are made under a statute enacted to further a different purpose. Returning to the Davenport Plaintiffs their own wages is consistent with the statutory purpose of "ensur[ing] that individuals . . . have fair and equal opportunity [to use their own wages] to influence elective and governmental processes." RCW 42.17.620(1). It will also prevent the union from using

non-members wages to fund the union's political agenda which may be adverse to their political views. If this court does not uphold the trial court's ruling, Davenport Plaintiffs will have been denied their "fair and equal opportunity" as to the misused agency fees, and the WEA will have thwarted the statutory purpose of RCW 42.17.

B. NEITHER CRISMAN NOR THE *AMICUS* BRIEFS ADDRESS MCCLATCHY, WHICH HELD THAT A PRIVATE RIGHT OF ACTION EXISTS UNDER 42.17.

The Crisman court did not consider McClatchy, which was the only prior case addressing whether a private action may be inferred from RCW 42.17. Relying on the voters intent behind the passage of I-134 (RCW 42.17.610 & .620), the Supreme Court held RCW 42.17.680, created a private right of action. The Crisman court relied on the voters intent of I-274. 60 P.3d at 656. Neither the WFSE nor the WSLC make any attempt to distinguish McClatchy, but urge this court to adopt a position that would overrule an apposite Supreme Court holding.

In McClatchy, Sandra Nelson, a newspaper reporter, brought a private action against her employer alleging a violation of RCW 42.17.680, which prohibits employment discrimination on the basis of political activity. 131 Wn.2d at 526-30. The newspaper argued that Nelson could not privately assert a discrimination claim based on RCW 42.17. Id. at 533. The Washington Supreme Court rejected the newspaper's argument and found that Nelson's right to be free from the

political control of her employer was “established by statute.” Id. at 543.

The Court cited to the voters’ intent set forth in RCW 42.17.610 as follows:

Taken as a whole, the provision in question means that employers may not disproportionately influence politics by forcing their employees to support their position or by attempting to force political abstinence on politically active employees. **The law is designed to restrict organizations from wielding political influence by manipulating the political influence of their employees** through employment decisions.

Id. at 534 (emphasis added). Ultimately, the Court held in favor of the newspaper because the statute unconstitutionally restricted freedom of the press. Id. at 543-44. Had the Court not implicitly recognized a private right of action under RCW 42.17, it could have avoided deciding the issue on constitutional grounds. “Where an issue may be resolved on statutory grounds, the court will avoid deciding the issue on constitutional grounds.” Tunstall ex rel. Tunstall v. Bergeson, 141 Wn.2d 201, 210, 5 P.3d 691 (2000). Therefore, McClatchy stands for the proposition that an implied cause of action exists under the provisions of RCW 42.17 enacted by I-134.

In the same way that RCW 42.17.680 protects employees, RCW 42.17.760 protects agency fee payers by requiring their authorization before their wages are used for political purposes. In this case, the WEA has wielded undue political influence by manipulating a portion of non-

union members' salaries for the political purposes of the union. The agency fee payers injured by the WEA must have a remedy to recover their agency fees.

RCW 42.17.680 and .760 were both enacted by I-134, and share the same underlying statutory purpose. And in McClatchy, the Supreme Court recognized a private cause of action under a closely parallel statutory framework. Therefore, to deny Davenport Plaintiffs a private right of action would be to contravene McClatchy.

C. THE OUT OF STATE CASES CITED IN THE WFSE'S AMICUS BRIEF ARE INAPPOSITE.

None of the out of state caselaw the WFSE cites is instructive as each case involves statutory provisions dissimilar in key respects to those forming the basis of Davenport Plaintiffs' claims.

1. Kansas

In Nichols v. Kansas Political Action Comm, 11 P.3d 1134 (Kan. 2000), a losing candidate filed a declaratory judgment action against a political action committee, alleging violations of campaign finance laws. The court concluded that Nichols had not exhausted his administrative remedies, and stated that further analysis was superfluous to whether the plaintiff had a private right of action. Id. at 1139, 1145. Nevertheless, in dicta, the court applied the two part test from Cort v. Ash, 422 U.S. 66, 78,

95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), and stated that the Kansas statute implied no private cause of action. Nichols, 11 P.3d at 1145.

Nichols is easily distinguishable from this case because the plaintiff did not claim damages based on a violation of a statute created for the benefit of a specific class of people analogous to RCW 42.17.760.

2. Florida

In Goff v. Ehrlich, 776 So.2d 1011 (Fla. App. 2001), a successful candidate sued his opponent for violations of Florida's campaign finance law. With no written analysis, the court stated that Florida's Campaign Finance Act "does not confer a private right of action." Id. at 1012. In support of its summary conclusion, the court cited to a case involving a private right of action for a plaintiff injured by a mental health professional. Fischer v. Metcalf, 543 So.2d 785 (Fla. App. 1989).

Goff is not instructive to this court because it contains no analysis whatsoever. Further, the Florida campaign finance law does not identify or benefit a particular class of individuals, as RCW 42.17.760 does. F.S.A. 106.011 et seq.

3. Colorado

In Common Sense Alliance v. Davidson, 995 P.2d 748 (Colo. 2000), a political organization brought a declaratory judgment action in federal court seeking a ruling that it was not an "issue committee" under the Colorado campaign practices law. The federal court certified

questions to the Colorado Supreme Court, which “addressed only the narrow issue of whether the CS Alliance falls within the purview of the FCPA’s reporting requirements for issue committees,” id. at 752, and held that the organization was not covered by the statute and therefore did not have to report the identity of its donors. Id. at 758.

Davidson is not helpful to this court as it does not address the private right of action issue.

4. Michigan

In Forster v. Delton Sch. Dist., 440 N.W.2d 421 (Mich. App. 1989), the plaintiff alleged that the District expended funds for a school newsletter advocating a particular vote on a ballot question and failed to comply with the Michigan campaign practice law. The Court held that plaintiff did not have a private right of action. Id. at 423-24.

The Forster holding is easily distinguishable because Forster does not involve a statutory provision that identifies a specific class of individuals, as RCW 42.17.760 does. M.C.L.A. 169.201 et seq.

5. Missouri

In Champ v. Poelker, 755 S.W.2d 383 (Mo. App. 1988), taxpayers brought suit to recover campaign contributions made by the industrial development authority of their city. The court held in part that the plaintiffs did not have a private right of action under Missouri's Campaign

Finance Disclosure Law because the statute provided for no such remedy and no such remedy could be implied. Id. at 389-90.

The Champ court's decision is of no help to this court because plaintiffs in that case conceded that the statute did not establish a private right of action and the plaintiffs did not point to any statutory language suggesting a private right of action. Id. at 389. Further, the plaintiffs in Champ did not claim to be members of a class of individuals protected by a statutory provision, as Davenport Plaintiffs do, but claimed that defendants violated provisions mandating financial disclosure.² Id. Therefore, the WFSE has not cited to any out of state cases that are helpful to the court's consideration of whether the Davenport Plaintiffs have a private right of action.

D. WASHINGTON CASELAW ESTABLISHES THAT THE INCLUSION OF EXPRESS REMEDIES IN A STATUTORY SCHEME DOES NOT PRECLUDE AN ADDITIONAL IMPLIED PRIVATE RIGHT OF ACTION.

Ignoring established law, both the WFSE and the WSLC repeatedly argue, without citing to authority, that the enforcement mechanisms described in RCW 42.17.400 preclude an implied private right of action. WFSE Brief, at 5, 6, 9, 10, 13; WSLC Brief, at 10, 11. As stated above, in McClatchy, the Washington Supreme Court recognized a private right of action despite the presence of RCW 42.17.400. Likewise,

in Bennett, the Court recognized a private right of action for age discrimination under RCW 49.44.090 despite the fact that RCW 49.44 provides expressly for civil remedies in some situations.

In Wingert v. Yellow Freight Systems, Inc., 104 Wash. App. 583, 13 P.3d 677 (2001), the defendant argued, just as the WEA, WFSE and WSLC have in this case, that the presence of both civil and criminal remedies in RCW 49.12 precluded an implied private right of action for violations of industrial welfare regulations. Id. at 593. Relying on Bennett, the court held that an implied private right of action existed to give effect to the right provided by the regulations. Id. at 593-94. In accordance with McClatchy, Bennett and Wingert, this court can, and should, imply a private right of action which would in no way undercut the enforcement mechanisms of RCW 42.17.400 designed to protect the public interest.

E. A PRIVATE RIGHT OF ACTION DOES NOT RENDER THE EXPRESS REMEDIES PROVIDED BY 42.17 SUPERFLUOUS.

Both the WSLC and the WFSE claim that an implied private right of action will render the citizen suit provision of RCW 42.17.400(4) superfluous. WFSE Brief, at 14; WSLC Brief, at 10, 11. Their arguments are without merit because a citizen suit under RCW 42.17.400(4) and a

² A 1994 Missouri initiative explicitly authorized a private right of action for certain campaign finance violations. V.A.M.S. 130.150.

private action are designed to achieve different purposes, afford different relief, and may be brought by different parties.

A citizen's suit may be brought under RCW 42.17.400(4) by anyone, even a person who has not been damaged by a violation. Successful plaintiffs may recover their attorneys' fees from the State; however, the State recovers any damages awarded. RCW 42.17.400(4). As the WEA and the WSLC concede, the citizen has no right to recover damages for a private harm. WSLC Brief, at 10, n.4. The citizen suit provisions of RCW 42.17.400(4) protect only the public interest.

Conversely, a private action, such as the one brought by Davenport Plaintiffs, can only be brought by a party who can show a private injury. The State will not reimburse plaintiffs for their attorneys' fees. Further, the private action is the only means available to a party aggrieved by a violation of RCW 42.17.

The WSLC argues that "a private right of action lets citizens sue any time they disagree with the specific remedy sought by the Attorney General." WSLC Brief, at 11. This is plainly false for two reasons. First, a private right of action is not available to any citizen, but only to those damaged by violations of RCW 42.17 and where it can be shown they fall within a special class of persons identified by the statute. Second, since

the Attorney General has stated that it will not seek restitution,³ damaged parties have no choice but to bring a private action to seek redress.

The citizen suit allowed by RCW 42.17.400(4) and the implied private action have different purposes and offer different remedies. Both are necessary to adequately protect the public and individual interests, and neither renders the other superfluous.

F. A PRIVATE RIGHT OF ACTION ONLY THREATENS LABOR ORGANIZATIONS TO THE EXTENT THEY VIOLATE THE LAW.

The WSLC warns that permitting agency fee payers who have suffered violations of RCW 42.17.760 to recover their agency fees would directly lead to “massive litigation costs on unions.” WSLC Brief, at 12. Labor organizations in Washington are only at risk of private actions under 42.17.760 to the extent they use agency fees for political purposes without authorization. The law provides various effective remedies for defendants subjected to frivolous lawsuits, including reimbursement of damages and attorney fees, and imposes sanctions against any party bringing an action in bad faith.

³ When the Attorney General filed its lawsuit in State ex rel. Public Disclosure Comm'n vs. Washington Educ. Ass'n, Thurston County Superior Ct. No. 00-2-018379, appeal pending (Case No. 2826401-II) (hereinafter PDC v. WEA), the AG stated: “The lawsuit is aimed at enforcing the law on behalf of the citizens of Washington and is not intended to recover fees paid by individuals to the WEA.” (CP 337). Similarly, in issuing its judgment against the WEA, the trial court in PDC v. WEA stated: “this court is not addressing what, if any monies or damages any individual or group of fee payers would be entitled to.” (CP 352). The WSLC argues, contrary to the WEA’s position, that no private recovery of damages is possible in any action. WSLC Brief, at 10, n.4.

In PDC v. WEA, Judge Tabor ruled that RCW 42.17.760 “requires affirmative authorization from agency fee payers [as opposed to a passive failure to object] before WEA may collect or use such fees for political purposes.” (CP 350). Nevertheless, the WSLC argues that the WEA’s current procedures, which require agency fee payers to affirmatively *object* to avoid having their fees spent for political purposes, are adequate. In accordance with RCW 42.17.760, labor organizations that wish to avoid lawsuits by agency fee payers should ensure that they do not spend agency fees for political purposes without affirmative authorization.

III. CONCLUSION

Because Crisman is distinguishable from this case, and overlooks McClatchy, this court is not bound by its ruling. Further, since the other arguments presented by the WFSE and the WSLC are unpersuasive, Davenport Plaintiffs reiterate their request that the trial court’s ruling be affirmed in its entirety and the case be remanded for trial.

DATED this 20 day of March, 2003.

Respectfully submitted,

ELLIS, LI & MCKINSTRY PLLC

A handwritten signature in black ink, appearing to read "Steven T. O'Ban", written over a horizontal line.

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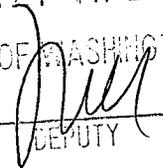
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03 MAR 21 PM 2:09
STATE OF WASHINGTON
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

WASHINGTON STATE EDUCATION
ASSOCIATION,

Petitioner,

vs.

GARY DAVENPORT, MARTHA
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SUSANNAH SIMPSON, and TRACY
WOLCOT,

Respondents.

NO. 28375-1-II

DECLARATION OF SERVICE

I declare that I caused to be served true and correct copies of the Respondents' Response to Briefs of *Amicus Curiae* of Washington Federation of State Employees and Washington State Labor Council on March 20, 2003, to the following persons:

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I declare under penalty of perjury of the laws of the State of
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