

FILED

MAY 12 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 293661

COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

WASHINGTON STATE NURSES ASSOCIATION, on behalf of certain
employees it represents, and VIVIAN MAE HILL, individually and on
behalf of others similarly situated,

Plaintiffs-Respondents,

v.

SACRED HEART MEDICAL CENTER,

Defendant-Appellant.

RESPONDENTS' REPLY TO AMICUS BRIEF

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I. INTRODUCTION

On April 8, 2011, the Washington State Hospital Association, Multicare Health System, and Franciscan Health System filed an amicus brief in support of an appeal by Sacred Heart Medical Center (or “SHMC,” a member organization of the Hospital Association) from a superior court decision which held that SHMC’s nurses must be paid overtime for missed rest breaks resulting in overtime hours worked.

The Superior Court’s decision rests upon the Washington Supreme Court’s decision in *Wingert v. Yellow Freight*, 146 Wn.2d 841, 50 P.3d 256 (1996). There, the Court held that an employee’s day is extended by ten minutes when he or she works through the legally mandated paid ten-minute rest break. *Id.* at 849. Based on *Wingert*, the superior court found that SHMC violated the Minimum Wage Act when it failed to pay the required overtime rate for missed rest breaks resulting in overtime hours worked by its nurse employees.¹ The lower court ordered double damages pursuant to RCW 49.52.070 for unpaid wages and attorneys fees.

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¹ The missed rest breaks, hours worked per week, and rate of pay for each nurse was provided by SHMC to determine the amount of unpaid wages for the nurses.

II. ARGUMENT

A. **When A Nurse Works Through A Legally Mandated Ten-Minute Rest Break, His or Her Day Is Extended By Those Ten Minutes, And Any Time Worked Over Forty Hours A Week As A Result Must Be Compensated At Overtime Rates.**

The Amici request that this Court disregard the Washington Supreme Court decision of *Wingert, supra*, 146 Wn.2d at 849, which held “[w]hen the employees are not provided with the mandated rest period, their workday is extended by 10 minutes.” The “mandated” rest period referenced was the Washington Administrative Code, which requires “a rest period of not less than 10 minutes, on the employer’s time, for each 4 hours of working time.” WAC 296-126-092(4). The Washington Minimum Wage Act requires that employers compensate employees at overtime rates for any time over forty hours worked in a week. RCW 49.46.130(1).

Amici’s attempt to characterize the missed rest break time as time that should not be considered “hours worked” under the law is unavailing in light of the *Wingert* decision holding directly the contrary.² *Wingert, supra*, 146 Wn.2d at 849 (“[w]hen the employees are not provided with

² For example, Amici suggest that a nurse would need to remain “on the premises at the end of the...shift in order to ‘make up’ his or her missed rest breaks” in order to be entitled to the additional overtime pay associated with a rest break that results in overtime hours. Amicus Br. at 5; Amici Br. at 10. Amici miss the point: nurses have already put in additional “time worked” by missing their rest break – the length of the shift is irrelevant to their entitlement to overtime pay if their weekly hours exceed 40.

the mandated rest period, their workday is extended by 10 minutes”). *See also* Department of Labor and Industries Administrative Policy No. ES.C.6 (“Rest periods are considered hours worked.”).

The cases cited by the Amici do not suggest that *Wingert* does not control because those cases either (1) do not address Washington State legally mandated paid rest periods, or (2) the employees in those cases did not work through their paid rest periods. *See York v. Wichita Falls*, 763 F. Supp. 876, 884-85 (N.D. Tex. 1990) (city’s new payment scheme whereby firefighters were paid the same wages, but were shown to have worked more overtime, violated the Federal Labor Standards Act (“FLSA”)); *Am. Fed. of Govt. Employees v. Dist. of Columbia*, 715 F. Supp. 391, 392 (D.D.C. 1989) (holding legally mandated paid vacation time does not count toward overtime pay under the FLSA, but not addressing scenario where employees work through their vacation time); *Lanehart v. Horner*, 818 F.2d 1574, 1578 (Fed. Cir. 1987) (same); *O’Hara v. Menino*, 253 F. Supp. 2d 147, 152 (D. Mass. 2003) (paid lunch hours mandated by the collective bargaining agreement did not count towards overtime pay under the FLSA).

Amici cite *York*, *supra*, 763 F. Supp. at 885, for the proposition that “the wage and hour laws do not require that an employer pay overtime for vacation, holiday and sick leave time off, and such time need not be

counted as ‘hours worked’ for overtime compensation.” The “wage and hour laws” the *York* court was concerned with are not any Washington state laws, but rather the FLSA, and can not direct this Court to reverse *Wingert*. Likewise, in *O’Hara, supra*, 253 F. Supp. 2d at 152, the court held that police officers were not entitled to overtime for working during a paid half-hour, on-call, lunch mandated by their collective bargaining agreement. Here, the nurses are enforcing their state law rights to ten-minute paid rest breaks, not a right deriving from their collective bargaining agreement. Even if *York* or *O’Hara* were factually similar to this case, as neither construe the Washington State Minimum Wage Act or Industrial Welfare Act (which authorized the state Department of Labor & Industries to mandate a rest break requirement), they are not controlling or even persuasive authority for this Court.

The Amici cite only one case in support of their alternative interpretation of *Wingert* that deals with Washington state law, *Berrocal v. Fernandez*, 155 Wn.2d 585, 121 P.3d 82 (2005). Amici conclude that *Berrocal* held that “it is undoubtedly true that the MWA does not require workers to be paid for time not spent working[.]” Amicus Br. at 12. *Berrocal*, however, involved a pair of shepherders who were required to eat, sleep, and live at the ranch they were employed by, and who Washington’s Supreme Court held were exempt from the MWA under

49.46.010(5)(j). *Id.* at 594. The special and exclusive nature of the Supreme Court’s use of that phrase in that case to speak to employment where the employees are exempt from the MWA because they are *always* available to work is exemplified by its analysis of section (5)(j):

[the theory] that [the shepherders] were nonemployees under the MWA while they were sleeping, became employees for a short time when awoken to ward off predators, and then reverted back to nonemployees upon returning to sleep . . . conflicts with the exclusion’s focus on the overall status of the “individual,” rather than minute-by-minute variations between activity and inactivity.

Id. at 594. In other words, the Washington State Supreme Court’s use of the phrase “the MWA does not require workers to be paid for time not spent working[.]” was completely outside the context of ten-minute paid rest breaks required by WAC 296-126-092(4).

B. Double Damages Are Warranted Here Because The “Narrow” Bona Fide Dispute Exception Does Not Apply.

The Appellant has never argued that its failure to pay the nurses overtime was the result of carelessness or error. Instead, the Appellant and the Amici argue that because they can present an alternative interpretation of the law, there is a “bona fide dispute.” App. Br. at 25-27; Amicus Br. at 14-15. However, as Respondent argued in its Brief at p. 33, in *Department of Labor and Industries v. Overnite Transp. Co.*, 67 Wn.

App. 24, 834 P.2d 638 (1992), the court rejected the employer's argument that a "bona fide dispute" existed because the employer was unable to provide specific case law supporting its position. *Id.* at 36 (employer's argument did "not amount to a bona fide dispute which justify[ed] invoking the narrow exception to the statute providing for double damages") (*see also Flower v. T.R.A. Industries, Inc.*, 127 Wn. App. 13, 36, 111 P.3d 1192 (2005)).

As in *Overnight*, here there is no law supporting SHMC's position that it was not required to pay overtime for missed rest breaks that resulted in overtime hours worked, and thus the "narrow" exception to the double damages requirement does not apply.³

C. A Letter From The Department Of Labor & Industries Regarding A Totally Separate Matter Involving A Different Employer Does Not Forever Bar The WSNA From Seeking Redress For Minimum Wage Violations On Behalf Of Its Members At Other Employers.

Amici cite *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 328, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979), in support of their proposition that because WSNA did not contest the Department of Labor & Industries ("DLI") decision not to pursue action against a different hospital (Tacoma

³ Amici repeats the Appellant's erroneous argument that SHMC can evade double damages on the basis that it was following an "express" rule of an Arbitrator's decision in 2006. This decision is part of the record at CP 286 - 300, and, as part of a going forward remedy, stated that SHMC must provide and record any rest breaks missed by its nurses. The Arbitrator made no holding regarding the Washington Minimum Wage Act.

General Hospital) in a totally separate matter, WSNA “may no longer contest the principle decided by L&I” in this proceeding. Amicus Br. at 19.⁴ By deciding to decline enforcement against a particular hospital, the DLI did not decide a principle relevant here. Instead, the relevant DLI “principle” is the DLI’s administrative policy that states that “rest breaks are considered hours worked.” Department of Labor and Industries Administrative Policy No. ES.C.6.

Assuming, *arguendo*, that the DLI’s decision to decline enforcement action against a different hospital is relevant to this Court’s review of a superior court’s decision involving a different hospital, the DLI’s decision to decline enforcement does not control this Court’s decision. In *Parklane, supra*, 439 U.S. 322, the case relied upon by Amici for this section of their argument, the U.S. Supreme Court did not direct that a state agency’s declination to take enforcement action against an employer precludes different employees from seeking relief from the courts involving a different employer and different violation.

Instead, *Parklane* held that where the facts of a particular claim have been previously adjudicated, then collateral estoppel bars defendants

⁴ The Respondents again object not only to the inclusion of a new legal issue in an amicus curiae brief, *Schnall v. AT&T Wireless Serv. Inc.*, --- Wn.2d ---, --- P.3d ---, No. 80572-5, slip op. at 15 n.4 (2011) (en banc) (citing *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 819, 225 P.3d 213 (2009)), but to appending matters not included in the record below to an appellate brief, *Ochoa Ag Unlimited, L.L.C. v. Delanoy*, 128 Wn. App. 165, 172, 114 P.3d 692 (2005). See Mot. to Strike Amicus Br. at 6-7.

from contesting those facts in another claim against it by an unrelated plaintiff. 439 U.S. at 326. Here, DLI did not make factual conclusions in the letter cited by the Amici, rather DLI only decided not to use its enforcement powers to sue Tacoma General Hospital, a totally separate hospital than Sacred Heart Medical Center. Amici cite no authority for the proposition that DLI decisions not to prosecute a particular employer preclude other employees from seeking relief from different employers in other forums, as WSNA seeks on behalf of the nurses at Sacred Heart Hospital in this case.

II. CONCLUSION

For the foregoing reasons, the Respondents respectfully request this Court deny the Appellant's request for relief.

RESPECTFULLY SUBMITTED this 9th day of May, 2011.



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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May, 2011, I caused the original Respondent's Reply to Amicus Brief, and a copy thereof, to be to be sent via US First Class Mail to:

Clerk of the Court
Washington State Court of Appeals, Division III
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And true and correct copies of the same to be sent via legal messenger to:

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