

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Nov 30, 2011, 10:21 am  
BY RONALD R. CARPENTER  
CLERK

RECEIVED BY E-MAIL

No. 86563-9

**SUPREME COURT  
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,

Petitioners,

v.

SACRED HEART MEDICAL CENTER,

Respondent.

**BRIEF OF THE UNITED FOOD AND COMMERCIAL WORKERS  
LOCAL NO. 21 AND UNITED FOOD AND COMMERCIAL  
WORKERS LOCAL NO. 141, UNITED STAFF NURSES UNION,  
*AMICI CURIAE***

Aaron Streepy, WSBA No. 38149  
James McGuinness, WSBA No. 23494  
McGuinness and Streepy Law Offices, LLC  
2505 South 320<sup>th</sup> St., Ste. # 670  
Federal Way, WA 98003  
Telephone: (253) 528-0278  
*Attorneys for Amici Curiae*

ORIGINAL

**FILED**  
DEC - 7 2011  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON  
*am*

**TABLE OF CONTENTS**

I. IDENTITY AND INTEREST OF AMICI CURIAE ..... 1

II. ISSUES OF CONCERN TO AMICI CURIAE..... 2

III. INTRODUCTION ..... 2

IV. STATEMENT OF THE CASE..... 3

V. ARGUMENT..... 3

    A. Washington State Has a Long and Proud History of Protecting  
    Workers from Oppressive Conditions of Labor..... 3

    B. The Purpose of the MWA and IWA are Consistent. .... 6

    C. The MWA and IWA Should Be Interpreted to Avoid Conflicts and  
    Achieve Harmony in the Statutory Scheme..... 7

    D. The Court of Appeal’s Decision is Inconsistent with the Purpose of  
    the Statutory Scheme. .... 8

VI. CONCLUSION..... 10

## TABLE OF AUTHORITIES

### Cases

<i>Am. Legion Post #149 v. Washington State Dept. of Health</i> , 164 Wash.2d 570, 590, 192 P.3d 306 (2008).....	5
<i>Bostain v. Food Exp., Inc.</i> , 159 Wash.2d 700, 711, 153 P.3d 846 (2007)..	5
<i>Drinkwitz v. Alliant Techsystems, Inc.</i> , 140 Wash.2d 291, 300, 996 P.2d 582 (2000).....	3, 6
<i>Employco Pers. Services, Inc. v. City of Seattle</i> , 117 Wash.2d 606, 614, 817 P.2d 1373 (1991).....	7
<i>Fahn v. Cowlitz County</i> , 93 Wash.2d 368, 374–75, 621 P.2d 1293 (1980).	5
<i>Hegwine v. Longview Fibre Co., Inc.</i> , 162 Wash.2d 340, 172 P.3d 688 (2007).....	5
<i>Hisle v. Todd Pac. Shipyards Corp.</i> , 151 Wash.2d 853, 867-68, 93 P.3d 108 (2004).....	6
<i>Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett</i> , 146 Wash.2d 29, 34, 42 P.3d 1265 (2002).....	3
<i>Kness v. Truck Trailer Equip. Co.</i> , 81 Wash.2d 251, 254-55, 501 P.2d 285 (1972).....	5
<i>Larsen v. Rice</i> , 100 Wash. 642, 171 P. 1037 (1918).....	4
<i>Parrish v. West Coast Hotel Co.</i> , 185 Wash. 581, 593, 55 P.2d 1083 (1936).....	4
<i>Peterson v. Hagan</i> , 56 Wash.2d 48, 54, 351 P.2d 127 (1960).....	5
<i>Pulcino v. Federal Express Corp.</i> , 141 Wash.2d 629, 640, 9 P.3d 787 (2000).....	5
<i>Schneider v. Snyder's Foods, Inc.</i> , 95 Wash.App. 399, 976 P.2d 134 (1999).....	5, 6
<i>Smaby et al. v. Shrauger et al.</i> , 9 Wash.2d 691, 115 P.2d 967.....	4
<i>State ex rel. Peninsula Neighborhood Ass'n v. Washington State Dept. of Transp.</i> , 142 Wash.2d 328, 342, 12 P.3d 134 (2000).....	7
<i>State v. Bash</i> , 130 Wash.2d 594, 602, 925 P.2d 978 (1996).....	7
<i>State v. Chester</i> , 133 Wash.2d 15, 21, 940 P.2d 1374 (1997).....	7
<i>State v. O'Neill</i> , 103 wash.2d 853, 862, 700 P.2d 711 (1985)).....	8

*U.S. Tobacco Sales & Mktg. Co. v. Dep't of Revenue*, 96 Wash.App. 932, 938, 982 P.2d 652 (1999)..... 7

*Washington State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 163 Wash. App. 272, 282, 258 P.3d 96 (2011)..... 9

*Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 50 P.3d 256 (2002)..... passim

**Statutes**

RCW 49.12.010. .... 3, 7

RCW 49.12.270 ..... 4

RCW 49.46 (MWA)..... passim

RCW 49.46.005 ..... 7

RCW 49.60 ..... 4

RCW 70.160 ..... 4

**Regulations**

WAC 296-126-092(4) (IWA) ..... passim

**I. IDENTITY AND INTEREST OF AMICI CURIAE**

The United Food and Commercial Workers Union, Local No. 21 (“UFCW 21”) is the largest private sector labor union in the state of Washington representing more than 38,000 workers in retail, health care, and other industry jobs. Over 12,000 of its members work in the health care industry for employers such as Group Health Cooperative, Children’s Hospital, Sacred Heart Medical Center and Providence Health System. UFCW 21 represents the interests of its members by negotiating wages and conditions of employment as well as enforcing its members’ contractual rights.

The United Food and Commercial Workers Local 141, United Staff Nurses Union (“UFCW 141”), is a statewide labor union of registered nurses and other healthcare professionals. UFCW 141 represents approximately 5,000 workers at small rural and larger urban hospitals, medical centers, long term care facilities, and clinics. UFCW 141 negotiates and enforces collective bargaining agreements, serve on worksite committees, and are involved in legislative and political action through lobbying. UFCW 141 works to maintain professionalism in nursing while advancing the welfare of its members.

Both UFCW 21 and UFCW 141 represent thousands of health care workers who will be directly affected by the Court’s interpretation and application of the Washington Minimum Wage Act. Therefore, both organizations have a significant interest in the outcome.

## **II. ISSUES OF CONCERN TO AMICI CURIAE**

Amici address the following issues:

- (1) Whether the Court should uphold Washington's long history of protecting workers from oppressive labor practices.
- (2) Whether the purpose of the MWA and IWA are consistent and should be construed to avoid conflict and achieve harmony in the statutory scheme.
- (3) Whether the Appeal's Court ruling is consistent with the statutory scheme.

## **III. INTRODUCTION**

The Division III Court of Appeal's Opinion of August 25, 2011 incorrectly held that an employer guilty of violating WAC 296-126-092(4) should be shielded from the pay obligation they would have incurred had they complied with the law on the day of the violation.

RCW 49.46 is Washington's Minimum Wage Act ("MWA") and requires employers to pay overtime for hours worked over 40. The Industrial Welfare Act ("IWA") through WAC 296-126-092(4) requires employers to provide 10 minute rest breaks for every four hours worked. This Court's ruling should give force and effect to both MWA and the IWA.

The effect of the Court of Appeal's ruling is to create an incentive for employers to violate the rest breaks rule in order to avoid overtime obligations under RCW 49.46 (MWA). This is inconsistent with the intent of the statutory scheme aimed at protecting employees "from conditions of

labor which have a pernicious effect on their health” and promoting “the immediate and future health, safety and welfare of the people of this state.” RCW 49.12.010; RCW 49.46.005. It is also at odds with the Court’s previous ruling in *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 50 P.3d 256 (2002).

This brief discusses the long and proud history in Washington of protecting workers from oppressive conditions of labor. It further discusses the interaction of the MWA and IWA and argues that they should be read to avoid conflict.

#### IV. STATEMENT OF THE CASE

Amici accepts the Statement of the Case in the Plaintiff-Petitioners Petition for Review at pages 2-5.

#### V. ARGUMENT

##### A. Washington State Has a Long and Proud History of Protecting Workers from Oppressive Conditions of Labor.

The State’s effort to protect employees from unsafe and oppressive conditions of labor is not new. Nearly 125 years ago the people of this State enacted a wage protection statute making it illegal to withhold wages from workers. See *Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett*, 146 Wash.2d 29, 34, 42 P.3d 1265 (2002); RCW 49.48.030. In 1899, Washington “had a law requiring an eight hour workday.” *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wash.2d 291, 300, 996 P.2d 582 (2000) (relying upon RCW 49.28). In 1913, a quarter century before the United States Congress passed a minimum wage law, the people of Washington

made it unlawful to “employ any person ... under conditions of labor detrimental to their health; and ... to employ workers ... at wages which are not adequate for their maintenance.” *Id.* That same year the State also created special protections for women and child labor. *See, e.g., Larsen v. Rice*, 100 Wash. 642, 171 P. 1037 (1918).

While the effort to protect workers is not new, neither has the effort been abandoned. More recently, this state passed a Family Care Act in 1989. RCW 49.12.270. Similarly, the state has recently passed the Washington Law Against Discrimination (RCW 49.60), banned smoking in public and private work places (RCW 70.160), and protected employee privacy by banning pre-employment polygraph tests (RCW 49.44.120).

This Court has a long history of enforcing protections for workers. In 1918 this Court ruled on the constitutionality of a minimum wage for women and children. *Larsen, supra*, 100 Wash. at 642-43. In 1936, the Court denied another challenge to the same statute ruling that “if it corrects a known and stated public evil ... it is a reasonable exercise of the police power-it is constitutional and it is a proper exercise of legislative power.” *Parrish v. West Coast Hotel Co.*, 185 Wash. 581, 593, 55 P.2d 1083 (1936).

In 1941, the Court broadly construed a statute that protected workers from being paid in forms of payment that were not redeemable for United States currency. *Smaby et al. v. Shrauger et al.*, 9 Wash.2d 691, 115 P.2d 967 (statute’s purpose was to allow workers to collect money

owed in a timely manner so that they were free to pursue work elsewhere). In 1960, this Court held, “the right of the legislature to regulate hours and wages is not open to serious question.” *Peterson v. Hagan*, 56 Wash.2d 48, 54, 351 P.2d 127 (1960). In 1972, the Court once again protected children by ruling that it is the employer’s obligation to understand child labor laws. *Kness v. Truck Trailer Equip. Co.*, 81 Wash.2d 251, 254-55, 501 P.2d 285 (1972).

More recently, the Court has upheld a law banning smoking in workplaces. *Am. Legion Post #149 v. Washington State Dept. of Health*, 164 Wash.2d 570, 590, 192 P.3d 306 (2008). It has liberally construed the provisions of the Washington Law Against Discrimination (WLAD) while narrowly defining its exceptions. *Hegwine v. Longview Fibre Co., Inc.*, 162 Wash.2d 340, 172 P.3d 688 (2007). In *Pulcino v. Federal Express Corp.*, 141 Wash.2d 629, 640, 9 P.3d 787 (2000), this Court ruled that disparate treatment claims by a disabled employee are appropriate. Additionally, the WLAD has been ruled to prohibit discrimination in pre-employment inquiries. *Fahn v. Cowlitz County*, 93 Wash.2d 368, 374–75, 621 P.2d 1293 (1980).

More relevant to this case, Washington courts have broadly construed the MWA. In *Bostain*, interstate truck drivers were credited for hours worked outside the state for purposes of determining whether they were owed overtime. *Bostain v. Food Exp., Inc.*, 159 Wash.2d 700, 711, 153 P.3d 846 (2007). In *Schneider*, an appeals court narrowly interpreted

the “outside salesperson” exemption to the MWA so that route drivers were entitled to overtime pay. *Schneider v. Snyder's Foods, Inc.*, 95 Wash.App. 399, 976 P.2d 134 (1999). In 2000, the Court ruled in favor of workers who were improperly categorized as exempt. *Drinkwitz, supra*, 140 Wash.2d at 306. Finally, the Court construed the MWA broadly enough to cover a contract ratification bonus that employer and union negotiators had tied to the actual number of hours worked. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wash.2d 853, 867-68, 93 P.3d 108 (2004). As noted in *Drinkwitz* and *Hisle*, the Court should “render a result consistent with Washington’s long and proud history of being a pioneer in the protection of employee rights.” *Hisle, supra*, 151 Wash.2d at 883, *Drinkwitz, supra*, 140 Wash.2d at 300.

**B. The Purpose of the MWA and IWA are Consistent.**

The Washington Minimum Wage Act (MWA) and Industrial Welfare Act (IWA) are but two examples of this state’s history of protecting workers. The MWA protects workers by requiring employers to pay overtime for hours worked over 40 in a week. The IWA requires employers to provide 10 minute rest breaks for every four hours worked. Both purposes indicate intent to advance the interests of workers and protect against certain labor practices.

The MWA was enacted to protect, “the immediate and future health, safety and welfare of the people of this state.” RCW 49.46.005. It specifically applies to workers. Similarly, the IWA was enacted to protect

employees “from conditions of labor which have a pernicious effect on their health.” RCW 49.12.010.

Clearly, any fair interpretation of the MWA and IWA is that they were enacted to protect Washington workers. Their purposes are similar. Both statutes, on their face, are concerned about “health.” Both statutes address conditions of labor. There are no inconsistencies of purpose and when read together the MWA and IWA (1) require rest breaks for every four hours of work, and (2) overtime to be paid for hours worked in excess of forty per week.

**C. The MWA and IWA Should Be Interpreted to Avoid Conflicts and Achieve Harmony in the Statutory Scheme.**

When interpreting a statute a court’s duty is to ascertain and implement the legislature’s intent. *State v. Chester*, 133 Wash.2d 15, 21, 940 P.2d 1374 (1997); see also, *U.S. Tobacco Sales & Mktg. Co. v. Dep’t of Revenue*, 96 Wash.App. 932, 938, 982 P.2d 652 (1999). “The construction of two statutes shall be made with the assumption that the legislature does not intend to create an inconsistency.” *State ex rel. Peninsula Neighborhood Ass’n v. Washington State Dept. of Transp.*, 142 Wash.2d 328, 342, 12 P.3d 134 (2000) (relying upon *State v. Bash*, 130 Wash.2d 594, 602, 925 P.2d 978 (1996)). Statutes are to “be read together to determine legislative purpose to achieve a ‘harmonious total statutory scheme ... which maintains the integrity of the respective statutes.’” *Employco Pers. Services, Inc. v. City of Seattle*, 117 Wash.2d 606, 614,

817 P.2d 1373 (1991) (*quoting State v. O'Neill*, 103 wash.2d 853, 862, 700 P.2d 711 (1985)).

As discussed above, the purposes of the MWA and IWA are consistent. Both statutes were created in order to protect the workers of this state from certain labor practices. If possible, the statutes should be read together to require pay for hours worked over forty while still encouraging employers to provide mandated rest breaks. The only way to incentivize employers to comply with the IWA is if violating the IWA costs at least as much complying with it.

**D. The Court of Appeal's Decision is Inconsistent with the Purpose of the Statutory Scheme.**

Washington has a history of construing the statutes broadly to protect workers. Here, the Court should construe the statute broadly and consider missed breaks "hours worked" that "extend" the work week that may give rise to a violation of the MWA. Such a construction is consistent with *Wingert*, the history of protecting workers and promoting safety in Washington, and the purpose of the MWA.

Imagine two competing enterprises employing the same compliment of workers with the same economic and market forces. Both employers find themselves under-staffed for the demands of the business and realize that the regular 8-hour work day (assuming a 40-hour work week) will be insufficient to meet its needs.

The first employer complies with the IWA by providing 10 minute paid breaks for every four hours worked. However, in order to meet the

demands of the business, each employee has to extend their work day by twenty minutes. Such an employer, assuming a 40-hour work week, would therefore pay each employee twenty minutes of overtime because it exercised the proper and legal option of complying with *both* RCW 49.46 (requiring overtime for work over 40 hours) and WAC 296-126-092(4) (requiring paid rest breaks).

However, under the Court of Appeal's decision, if the second employer, in order to meet the demands of the business, violates the IWA by working employees through their statutorily required rest breaks, no overtime payment is required because "neither the language of, nor the policy reflected by, the MWA comes into play." *Washington State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 163 Wash. App. 272, 282, 258 P.3d 96 (2011). Under the analysis of *Wingert*, both employers have gained twenty minutes of additional labor each day, yet only the first employer – which is complying with the IWA – is obligated to pay the higher overtime rate. This is because the Court of Appeal's decision permits the second employer to pay the straight time rate for the eight hours worked and twenty minutes of straight time pay for the missed breaks.

Both employers received the same amount of actual labor. The law-abiding employer pays more for that labor because it complied with the law. Therefore, under the Appeals Court's reasoning, the MWA has been transformed from an Act protecting "the immediate and future health, safety and welfare of the people of this state" into a loophole that

allows employers to violate the IWA and actually pay less than if they had complied with both obligations initially. Thus, the law-abiding employer is at a disadvantage.

There is no indication anywhere, in any statute, statutory history, administrative ruling, or court decision that indicates intent so inconsistent with the purported purpose of Minimum Wage Act. As this Court did in *Wingert*, the statutes may be construed to enforce both the letter of the law and the spirit of the law. That is accomplished by holding exactly as the Court did in *Wingert* that missed breaks are additional "hours worked" that extend the work week.

## VI. CONCLUSION

On behalf of UFCW 21 and UFCW 141, and for the reasons set forth above, Amici requests this Court to reverse the Court of Appeals decision.

Respectfully submitted this 23<sup>rd</sup> day of November, 2011.



---

Aaron Streepy, WSBA # 38149  
Jim McGuinness, WSBA # 23494  
McGuinness and Streepy, Law Offices, LLC  
2505 South 320<sup>th</sup> Street, Ste. #670  
Federal Way, WA 98003  
(253) 528-0278 (phone)  
(253) 528-0276 (fax)  
aaron@northwestlaborlaw.com  
jim@northwestlaborlaw.com

*Attorneys for Amici Curiae*

CERTIFICATE OF SERVICE

---

RECEIVED BY E-MAIL

I hereby certify that on this 30<sup>th</sup> day of November, 2011, I caused the revised Brief of Amici Curiae, to be sent via E-Mail to:

Clerk of the Court  
Washington Supreme Court  
Supreme@courts.wa.gov

And a true and correct copy of the same to be sent via First Class Mail to:

Paula L. Lehman  
Michael J. Killeen  
Davis Wright Tremaine LLP  
1201 Third Avenue, Ste. 2200  
Seattle, WA 98101-3405

And:

David Cambell  
Dmitri Iglitzen  
Carson Glickman-Flora  
Schwerin Campbell Barnard & Iglitzin, LLP  
18 W. Mercer Street, Suite 400  
Seattle, WA 98119-3971

And:

Timothy J. O'Connell  
Karin Jones  
Stoel Rives LLP  
600 University Street, #3600  
Seattle, WA 98101

Executed at Federal Way, Washington.



---

Aaron Streepy, WSBA #38149

## OFFICE RECEPTIONIST, CLERK

---

**To:** Aaron Streepy  
**Subject:** RE: 86563-9 Amicus Curaie Revised Brief

All received.

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

---

**From:** Aaron Streepy [<mailto:aaron@northwestlaborlaw.com>]  
**Sent:** Wednesday, November 30, 2011 10:21 AM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Subject:** 86563-9 Amicus Curaie Revised Brief

Clerk of the Court:  
Please accept the attached (1) Revised Amicus Brief; and (2) Certification of Service.

Case Name: Washington State Nurses Association and Vivian Mae Hill, Petitioners v. Sacred Heart Medical Center, Respondent.

Case No: 86563-9

Thank you for your assistance with this today.

Sincerely,

Aaron Streepy  
WSBA #38149  
[aaron@northwestlaborlaw.com](mailto:aaron@northwestlaborlaw.com)

McGuinness & Streepy Law Offices, LLC  
2505 South 320<sup>th</sup> Street, Suite 670  
Federal Way, WA 98003  
253-528-0278  
253-528-0276 (fax)