

NO. 86563-9

SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners,

v.

SACRED HEART MEDICAL CENTER,

Respondent.

FILED
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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
[Signature]

**AMICUS CURIAE MEMORANDUM OF THE
DEPARTMENT OF LABOR AND INDUSTRIES**

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. IDENTITY AND INTEREST OF AMICUS2

III. SPECIFIC ISSUE ADDRESSED BY AMICUS CURIAE2

IV. ARGUMENT3

 A. The Decision By The Court of Appeals Appears to
 Conflict With *Wingert* Because It Concludes That a
 Missed Rest Break Resulting In Additional Labor Does
 Not Extend the Work Week Over 40 Hours3

 B. Substantial Public Interest Is At Stake Necessitating
 Review By The Court Because the Rest Break Regulation
 Applies To a Large Number of Washington Employees
 And Creates Uncertainty for L&I6

V. CONCLUSION8

TABLE OF AUTHORITIES

Cases

Int'l Ass'n of Fire Fighters Local 46 v. City of Everett
146 Wn.2d 29, 42 P.3d 1265 (2002)..... 5

State v. Watson
155 Wn.2d 574, 122 P.3d 903 (2005)..... 6

Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.
163 Wn. App. 272, 258 P.3d 96 (2011)..... 1, 5

Wingert v. Yellow Freight Sys., Inc.
146 Wn.2d 841, 50 P.3d 256 (2002)..... 1, 3, 4, 5

Statutes

RCW 43.22.270(4)..... 2

RCW 49.12.005(5)..... 3

RCW 49.12.010 3

RCW 49.12.091 3

RCW 49.46.130 1

RCW 49.46.130(1)..... 1

Rules

RAP 13.4(b)(1) 2

RAP 13.4(b)(4) 2, 6

WAC 296-126-002(8)..... 4

WAC 296-126-092..... 2, 6

WAC 296-126-092(4)..... 3

I. INTRODUCTION

The Department of Labor and Industries (L&I) asks this Court to accept review of this case to clarify the Court of Appeals' interpretation of *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 50 P.3d 256 (2002).

For workers subject to the overtime provisions of the Minimum Wage Act (MWA), overtime hours must be paid at time and one-half. RCW 49.46.130. Overtime hours are considered those hours worked in excess of 40 hours in a workweek. RCW 49.46.130(1). *Wingert* held that employees who work through their break provide their employer "with an additional 10 minutes of labor" and "their workday is extended by 10 minutes." *Wingert*, 146 Wn.2d at 849. The Court of Appeals held that a missed rest break that occurs "during the first 40 hours that a nurse works in a given workweek" only requires "their regular rate for any 10-minute rest break they were unable to take." *Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 163 Wn. App. 272, 279-80, 258 P.3d 96 (2011). The Court of Appeals appears to have diverged from the standard set forth in *Wingert* that a missed rest break is "hours worked" and that those additional hours worked extend the work day accordingly. Instead, the Court of Appeals creates confusion by adopting a standard that a missed rest break during the first 40 hours of labor provides the employer with

additional labor that occurs *during* the work day rather than treating it as an extension of the workday. *Id.* at 280-81. This apparent conflict necessitates review by the Supreme Court. RAP 13.4(b)(1). The potential confusion and uncertainty regarding the remedy for a rest break violation potentially caused by the Court of Appeals' interpretation of *Wingert* also presents an issue of substantial public interest that requires resolution because the rest break regulation applies to a large number of Washington employees. RAP 13.4(b)(4).

II. IDENTITY AND INTEREST OF AMICUS

L&I is responsible for administering and enforcing "all laws respecting the employment and relating to the health, sanitary conditions, surroundings, hours of labor, and wages of employees employed in business and industry." RCW 43.22.270(4). L&I interprets, administers, and enforces the rest break regulation, WAC 296-126-092, and therefore has an interest in ensuring that the Court correctly interprets remedies for violations of regulation.

III. SPECIFIC ISSUE ADDRESSED BY AMICUS CURIAE

Does the Court of Appeals decision diverge from the "hours worked" standard set forth in *Wingert*, potentially confusing the law as to every employee covered by the rest break regulation?

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IV. ARGUMENT

A. The Decision By The Court of Appeals Appears to Conflict With *Wingert* Because It Concludes That a Missed Rest Break Resulting In Additional Labor Does Not Extend the Work Week Over 40 Hours

The legislature has mandated “all employees be protected from conditions of labor which have a pernicious effect on their health.” RCW 49.12.010. Conditions of labor include the provision of rest breaks, which the legislature directs L&I to prescribe through rule. RCW 49.12.005(5); RCW 49.12.091. WAC 296-126-092(4) requires employers to provide their employees with rest breaks, 10 minutes for every four hours of working time. *See Wingert*, 146 Wn.2d at 849.

This case involves nurses who missed rest breaks.¹ The question is how to compensate them. This Court has already provided a remedy for unpaid missed rest breaks in *Wingert*. *Id.* In that case, the employees alleged that they were entitled to receive a third rest break when they worked two hours of overtime at the end of their regular shift. *Id.* at 844-45. The *Wingert* Court agreed that they were entitled to the third rest break and decided that they must be paid for the missed rest breaks. *Id.* at 848. The Court held that employees who miss rest breaks provide their employers with “an additional 10 minutes of labor”:

¹ L&I relies on the facts as stated in the Washington State Nurses Association’s petition for review.

Employees who must work through their overtime break are, in effect, providing Yellow Freight with an additional 10 minutes of labor during the first two hours of their overtime assignments. When the employees are not provided with the mandated rest period, *their workday is extended by 10 minutes*. Taking the regulation into account, the employees are entitled to be compensated by Yellow Freight for 2 hours and 10 minutes of work.

Id. at 849 (emphasis added) (citation omitted).

When an employee misses a rest break, the employee's workday is "extended by 10 minutes." *Wingert*, 146 Wn.2d at 849. Hours worked are all hours during which the employee is authorized or required by the employer to be on duty on the employer's premises or prescribed workplace. WAC 296-126-002(8). *Wingert* treats the missed rest break as additional "hours worked" beyond the time that an individual is actually present on the worksite.² While *Wingert* remanded the case back for a determination of damages, and therefore did not reach the issue of the amount of wages for the missed breaks, the Court clearly construed a missed rest break as "hours worked" that extended the work day for purpose of wage and labor violations regardless of when that occurs. *Wingert*, 146 Wn.2d at 848-49. *Wingert's* approach is consistent with the

² This is consistent with L&I's definition in its policy of rest period:

The term "rest period" means to stop work duties, exertions, or activities for personal rest and relaxation. Rest periods are considered hours worked . . .

Wash. Dep't of Labor & Indus., Administrative Policy ES.C.6., § 10 at 4 (June 24, 2005), available at <http://www.lni.wa.gov/WorkplaceRights/files/policies/esc6.pdf>.

required liberal construction of the laws governing wages and conditions of employment. *Int'l Ass'n of Fire Fighters Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002).

The Court of Appeals characterizes the *Wingert* Court's approach to missed rest breaks as the employee "providing the employer with additional labor *during* the workday." *Wash. State Nurses Ass'n*, 163 Wn. App. at 281. The Court of Appeals states this interpretation is more accurate "than treating it as an extension, since entitlement to time and one half under the MWA turns on the amount of time an employee is actually required to spend at the prescribed workplace, with no reference to a number of hours she or he is 'deemed' to have worked." *Id.*

Under the Court of Appeals' analysis, the employee's additional labor during a missed rest break is treated differently than the same work at the end of the day. This approach appears inconsistent with the *Wingert* Court's holding that the "workday is extended by 10 minutes" when a break is missed. *Wingert*, 146 Wn.2d at 849. The Court of Appeals also limits the analysis to how much time the worker was physically present on the job site. But the *Wingert* Court was concerned with how much labor an employee provided by missing a rest break, not how many hours the employee was physically present. *See id.* at 848. Because the Court of Appeals' decision appears to conflict with *Wingert's*

premise that the “additional labor” is provided when there is a missed break and the “workday is extended by 10 minutes,” the Court should accept review to clarify the law.

B. Substantial Public Interest Is At Stake Necessitating Review By The Court Because the Rest Break Regulation Applies To a Large Number of Washington Employees And Creates Uncertainty for L&I

The Supreme Court may grant review when there is substantial public interest because a Court of Appeals holding has the potential of affecting many others not party to the proceeding. RAP 13.4(b)(4); *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). The Court of Appeals decision potentially affects not only nurses employed by Sacred Heart, but also every employee and employer covered by the rest break regulation, WAC 296-126-092.

L&I routinely receives inquiries from employers and employees on the consequences of missed rest breaks. In response, L&I has consistently reiterated *Wingert*'s holding that a missed break results in the extension of a worker's day by an additional 10 minutes. As a result, L&I advises employers that they either need to reduce a worker's work time accordingly to provide the breaks and maintain non-overtime status, or pay them for the missed rest period at the overtime rate under the MWA. The apparent conflict between *Wingert* and the decision by the Court of

Appeals has created uncertainty for L&I. In its decision, the Court of Appeals introduced new concepts that contribute to the uncertainty created by the conflict with *Wingert*.

The Court appears to create a distinction between rest periods missed during an 8-hour workday and rest periods missed outside of an 8-hour workday: “*For an 8-hour workday*, the Nurses’ clear entitlement under *Wingert*, then, is to be paid at the regular rate for any 10-minute rest period they were unable to take.” *Id.* at 280 (emphasis added).

The Court of Appeals has also introduced the concept of “work assignment,” a term not defined under the MWA, the IWA, and the rules under these statutes. It is unclear how an employee’s “work assignment” relates to an employee’s “workday.” Under the decision of the Court of Appeals, for example, an employee may miss a rest break every workday in a week without triggering payment at the overtime rate. However, it is unclear whether an employee may also miss a rest break after an employee’s “work assignment” without triggering payment at the overtime rate.

L&I is uncertain about how these concepts interact with the ultimate holding of the case – that when a rest break is denied during the first 40 hours of a given workweek, the 40-hour workweek is not extended. The Department will be asked by employers and employees

how those first 40 hours of a given workweek will be calculated. Under the language of the Court of Appeals decision, the Department does not have a clear answer.

V. CONCLUSION

L&I asks this Court to accept review for the reasons stated above.

RESPECTFULLY SUBMITTED this 28th day of November,
2011.

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I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

DATED this 28th day of November, 2011, at Tacoma, WA.



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