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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.

**SUPPLEMENTAL BRIEF OF RESPONDENT
PROVIDENCE SACRED HEART MEDICAL CENTER**

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I. THE COURT OF APPEALS CORRECTLY APPLIED THE DEFINITION OF “HOURS WORKED” UNDER MWA

Petitioners’ complaint asserts a claim “on pure MWA grounds.”

Washington State Nurses Ass’n et al. v. Sacred Heart Medical Center, 163 Wn. App. 272, 278 (2011). *See also* Petition for Review at page 2 (lawsuit “seeks overtime pay due pursuant to the Minimum Wage Act (“MWA”), RCW 49.46.130”). The Court of Appeals correctly concluded that no unpaid overtime was owed because the Sacred Heart Medical Center¹ nurses were paid satisfactorily for all “hours worked” as required by the MWA. *Washington State Nurses Ass’n et al. v. Sacred Heart Med. Ctr.*, 163 Wn. App. at 282.

The “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.” *Washington State Nurses Ass’n*, 163 Wn. App. at 281 (emphasis added). “Hours worked” is defined as “all hours during which the employee is authorized or required, by the employer to be on duty on the employer’s premises or at a prescribed work place.” WAC 296-126-002(8). This is the definition applied by this Court in MWA cases. *Stevens v. Brink’s Home Sec., Inc.*, 162 Wn.2d 42, 47, 169 P.3d 473 (2007). It is also incorporated in L&I’s Administrative Policy ES.C.2

¹ The medical center is now referred to as Providence Sacred Heart Medical Center. *Washington State Nurses Ass’n, et al. v. Sacred Heart Med. Ctr.*, 163 Wn. App. 272, 275 n.2 (2011).

(rev. 9/2/2008) (“[i]f any of the three elements is not satisfied, then the *time* . . . is not considered ‘hours worked’”) (emphasis added). It is also the definition that the Court of Appeals applied in this case. *Washington State Nurses Ass’n*, 163 Wn. App. at 279.

To determine whether “time is compensable, we must examine the undisputed facts and assess whether [employees] are ‘on duty’ at the ‘employer’s premises’ or ‘prescribed workplace’ within the meaning of WAC 296-126-002(8).” *Stevens*, 162 Wn.2d at 47. Here, the nurses’ MWA claim involved “only rest breaks that were missed *during* the first 40 hours of a Nurse’s workweek.” *Washington State Nurses Ass’n*, 163 Wn. App. at 276, 279 (emphasis added). Thus, the nurses did not remain “on duty on [Sacred Heart’s] premises or at a prescribed work place” for more than the length of their 40-hour shift due to missed rest breaks. Whether nurses took rest breaks during the shift or not, the length of the 40-hour shift did not change. Consequently, there were no additional unpaid “hours worked” under the MWA as the Petitioners claim.²

Washington State Nurses Ass’n, 163 Wn. App. at 282 (“the 40-hour

² If a nurse actually takes a rest break during the shift, Sacred Heart not only pays for the rest break but also counts the rest break that was taken as “hours worked” because the nurse was “on duty” at the “employer’s premises” and WAC 296-126-092(4) requires that state-mandated rest periods be “on the employer’s time.” *Washington State Nurses Ass’n*, 163 Wn. App. at 279-80 (*Wingert* recognized that “rest periods are already compensated” thus missed rest periods don’t result in lost wages). For MWA purposes, taking a rest period for 10 minutes is the same as working actively for 10 minutes. Either way, it is 10 minutes of paid time. Actively working is simply substituted for inactively working; it does not add another 10 minutes to the shift time.

workweek is not exceeded”). See attached illustrative exhibit that was used in oral argument before the Court of Appeals.

A. Working Actively For Eight Hours Is Not Working Longer Than Eight Hours.

When a Sacred Heart nurse misses her rest break during an eight-hour shift, the nurse arguably works harder *during* her eight-hour shift than a fellow nurse who takes rest breaks.³ However, the two nurses are each compensated for eight “hours worked” because, under the MWA, they each worked the same amount of time, albeit in different ways.

Because the additional labor is provided *during*, not after, the employee’s work assignment, and because the Nurses’ claims are for rest periods denied during the first 40 hours of a given workweek, *the 40-hour workweek is not exceeded* and neither the language of, nor the policy reflected by, the MWA comes into play.

Washington State Nurses Ass’n, 163 Wn. App. at 282.

B. Nurses Who Miss Their Rest Breaks Get Paid More Than Nurses Who Take Their Rest Breaks.

Nurses who miss their rest breaks get paid for eight hours under the MWA but they also receive an additional 15 minutes pay for each missed rest break under the IWA. For example, a Sacred Heart nurse

³ The trial court record shows that Sacred Heart nurses take intermittent breaks as well as block breaks and that missed block breaks are the exception. CP 472; 945. Nurses use professional judgment in deciding to skip a break and report a missed break. There is no evidence in the record showing additional exertion, if any, during the missed break.

working an eight-hour shift who takes no rest breaks receives eight and one-half hours pay, whereas the nurse who takes her rest breaks only receives eight hours pay. Because both nurses start and end their shift at the same time, the nurse who takes no rest breaks effectively earns double-time when foregoing her rest breaks.⁴ *Washington State Nurses Ass'n*, 163 Wn. App. at 280 (“[t]he Nurse thereby receives more than double time for the WAC-mandated rest period”).

C. A Nurse Who Missed Her Rest Breaks Does Not Have Eight and One-half “Hours Worked” Under the MWA.

In the example above, the nurse who worked an eight-hour shift without taking rest breaks had eight actual “hours worked” so she is entitled to eight hours pay under the MWA. She also is entitled to an additional 30 minutes of compensation under this Court’s decision in *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 58 P.3d 256 (2002), for missing her paid rest breaks required by the Industrial Welfare Act, RCW 49.12, and the regulation adopted pursuant thereto, WAC 296-126-092(4).⁵ *Washington State Nurses Ass'n*, 163 Wn. App. at 280-81.

⁴ Nurses are paid both for the 10 minutes of work performed during what otherwise would be a rest breaks (1.0 time) plus the additional 15 minutes for having missed the rest break (1.5 time). Thus, nurses receive 2.5 times their pay rate for every missed 10-minute break that they claim.

⁵ The Washington meal and rest break regulations, WAC 296-126-092, “were adopted [by the Department of Labor and Industries] under the authority of Chapter 49.12 RCW.” *Wingert*, 146 Wn.2d at 847, 5 P.3d at 260. The IWA does not address overtime pay for “hours worked.” Pay for “hours worked” is addressed by the MWA. The IWA addresses certain working conditions, one of which is rest/meal periods. *Wingert* determined what

Petitioners make no claim that Sacred Heart violated the IWA in compensating them for missed rest breaks.

D. But, Didn't *Wingert* Say That When Employees Miss Rest Breaks They Are Performing "Additional Labor" for Purposes of the IWA?

Yes, *Wingert* used the phrase "additional labor" in connection with an IWA private right of action for missed rest breaks. However, that phrase must be examined in the context it was used. *Wingert* pointed out that when an employee actively performs work instead of taking a paid rest break, the employee "in effect" performs additional labor *during* the work shift that the employer "would not have received had the rest periods been taken." *Washington State Nurses Ass'n*, 163 Wn. App. at 280-81. Thus, not taking a rest break doesn't extend the actual work day or workweek. As this Court said in *Wingert*, "failure to provide rest periods [did] not [result] in lost wages" under the MWA, 146 Wn.2d at 847, because the amount of time "worked" performing regular duties simply replaces the amount of time "worked" taking a rest break *during* the same length shift. Thus, "[f]or purposes of applying the MWA, the description of the foregone rest period as providing the employer with additional labor

happens when there is a violation of the IWA in connection with rest periods. It did not address MWA issues regarding "hours worked" or overtime pay because a missed rest break does not increase the number of "hours worked."

during the work day is more accurate than treating it as an extension [of the work day].” *Washington State Nurses Ass’n*, 163 Wn. App. at 281.

II. PETITIONERS’ MWA ARGUMENT IS MOOT BECAUSE THEY HAVE NO DAMAGES.

Assuming – which Sacred Heart does not – that Petitioners were to prevail on their MWA claim, Sacred Heart would owe a nurse 15 minutes pay for each missed rest break (1.5 x 10 minutes = 15 minutes pay).

Petitioners do not dispute that this is their damages formula. It is also undisputed that Sacred Heart paid each nurse 15 minutes for every missed rest break. *Washington State Nurses Ass’n*, 163 Wn. App. at 282 (“Sacred Heart . . . has in fact paid the Nurses 15 minutes’ worth of compensation for every rest break missed. This is undisputed.”). Consequently, Petitioner’s MWA claim fails because there are no unpaid wages.

Petitioners contend that Sacred Heart’s payment of 15 minutes for each missed rest break as sufficient overtime payment for a forgone 10-minute state-mandated rest period “would essentially leave the Nurses without pay for five minutes of their *contractually obligated* rest break.” *Washington State Nurses Ass’n*, 163 Wn. App. at 282.

Sacred Heart counters that applying the 15 minutes of compensation against Petitioners’ MWA claims would not violate the collective bargaining agreement.

The state judicial system has no authority to interpret or resolve this dispute concerning whether and how the 15 minutes of compensation for a missed rest break relates to the collective bargaining agreement. The U.S. Supreme Court has repeatedly emphasized that collective bargaining agreements are governed by federal law and federal common law under Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a); *Allis-Chalmers v. Leuck*, 471 U.S. 202, 208-09, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985). Accordingly, whenever disputes arise under a collective bargaining agreement, federal law preempts state law. “Section 301 governs claims founded directly on and rights created by collective bargaining agreements, and also claims substantially dependent on analysis of a collective bargaining agreement.” *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987).

Consequently, it is not surprising that the Court of Appeals rejected Petitioners’ request that the court interpret compliance with the collective bargaining agreement in determining whether nurses have suffered damages.

We see no way that the trial court or we can conclude that the CBA is thereby violated without interpreting the CBA. Clearly, Sacred Heart has a different view of the CBA. For this additional reason, we find no violation of the MWA. If the Nurses believe that their rights *under the CBA* are offended

by this application of the MWA, then they have a claim under the CBA, not the MWA.

Id.

III. PETITIONERS DID NOT “WILFULLY” DEPRIVE NURSES OF ANY PART OF THEIR WAGES

There is no dispute that Sacred Heart has complied with its collective bargaining agreement obligations, including rest breaks, and that Sacred Heart has complied with a 2006 arbitrator’s decision ordering that Sacred Heart “ensure that the Nurses get their 15-minute breaks and pay the Nurses for any rest breaks missed in the past at a straight time rate.” *Washington State Nurses Ass’n*, 163 Wn. App. at 275-76.

Similarly, there is no dispute that Sacred Heart has met its obligations to pay for missed rest breaks under the IWA, as required by this Court in the *Wingert* decision.

All three members of the Court of Appeals panel agreed that, even if it were determined that Sacred Heart violated the MWA based on the way it compensated nurses for missed rest breaks, such violation was not “wilful” because a bona fide dispute exists. The asserted “overtime” claim at issue in this case is “a remedy never discussed in *Wingert*.” *Washington State Nurses Ass’n*, 163 Wn. App. at 281.

[C]onsidering the lack of authority regarding missed rest periods as hours worked, . . . this is a bona fide dispute regarding the payment

of wages. *Shilling v. Radio Holdings Inc.*,
136 Wn.2d 152, 160, 961 P.2d 371 (1998).

Washington State Nurses Ass'n, 163 Wn. App. at 283 (Brown, J.
dissenting, but agreeing with majority regarding reversal of double
damages).

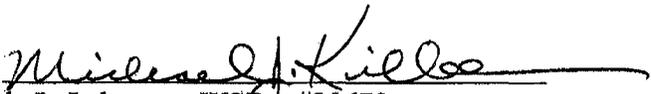
Petitioners' novel MWA claim goes beyond *Wingert* and any other
Washington appellate case. At the very least, there is a "fairly debatable"
dispute as to whether the MWA applies and, in any event, whether
payment of 15 minutes of time for each missed rest break satisfies any
obligation Sacred Heart would have under the MWA. This is not a
"contrived" legal argument as occurred in *Flower v. T.R.A. Industries,
Inc.*, 127 Wn. App. 13, 36, 111 P.3d 1192 (2005) or a situation that is
"absent meritorious argument . . . and absent citation to authority" that the
court found in *Department of Labor & Indus. v. Overnite Transp. Co.*, 67
Wn. App. 24, 834 P.2d 638 (1992). Here, there is both a meritorious legal
argument and authority supporting that argument. Accordingly, the
Petitioners have not satisfied the standard of "wilfully and with intent to
deprive" under RCW 49.42.050(2).

IV. CONCLUSION

The Court of Appeals decision is consistent with this Court's prior
decisions concerning the definition of "hours worked" for purposes of the

MWA, *Stevens v. Brink's Home Security*, 162 Wn.2d 42, 169 P.3d 473 (2007), and this Court's decision regarding compensation for missed rest breaks under the IWA. *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841 (2002). Accordingly, this Court should affirm the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED this 3rd day of February, 2012.

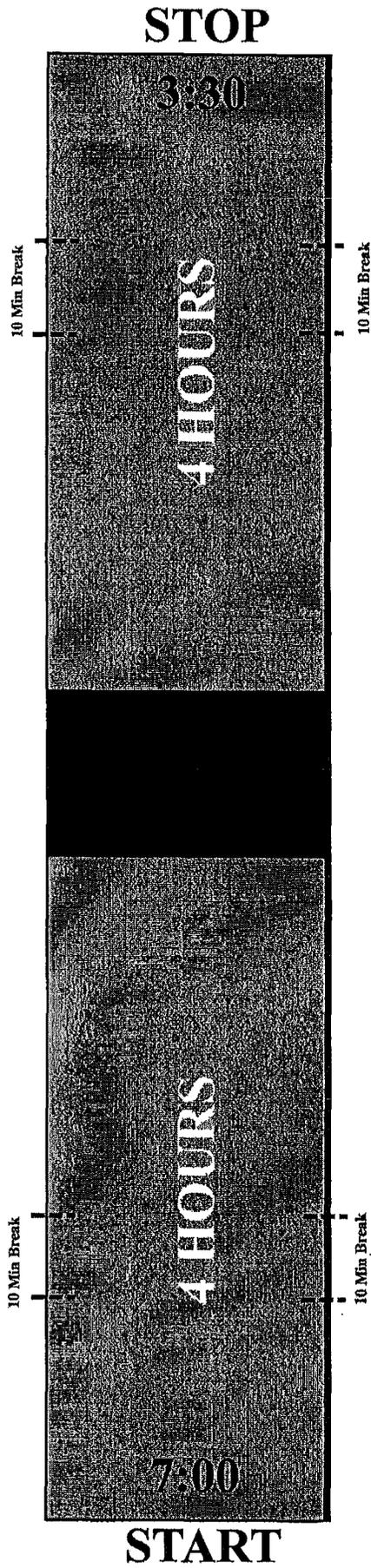
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Appendix

8-HOUR SHIFT

EXAMPLE



TOTAL DAY	8hrs 30mins
LUNCH	-30mins
BREAKS	-20mins
ACTIVE WORK	<u>7hrs 40mins</u>
PAY (w/breaks)	8hrs
PAY (w/o breaks)	8hrs 30mins

PROOF OF SERVICE

I, Valerie S. Macan, the undersigned, hereby certify and declare under that the following statements are true and correct:

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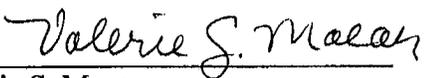
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