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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

GEORGIANA ARNOLD,

Plaintiff/Respondent,

vs.

CITY OF SEATTLE, d/b/a HUMAN SERVICES DEPARTMENT,

Defendant/Petitioner.

Filed
Washington State Supreme Court

DEC - 8 2015

Ronald R. Carpenter
Clerk

BRIEF OF AMICUS CURIAE

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 ORIGINAL

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WS AJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to Washington State Trial Lawyers Association (WSTLA), now renamed WS AJ. WS AJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the proper interpretation of RCW 49.48.030, providing for an award of attorney fees when a person successfully recovers a judgment for wages or salary.

II. INTRODUCTION AND STATEMENT OF THE CASE

This review provides the Court with the opportunity to answer the question reserved in International Ass'n of Fire Fighters, Local 46 v. City of Everett, 146 Wn.2d 29, 42, n.11, 42 P.3d 1265 (2002) (Fire Fighters)—namely, whether RCW 49.48.030 applies to recovery of wages or salary in an administrative proceeding? Georgiana Arnold (Arnold) commenced this action against the City of Seattle d/b/a Human Services Department (City) pursuant to RCW 49.48.030. Arnold seeks to recover attorney fees

related to her successful appeal of an adverse employment action before the Seattle Civil Service Commission, which included an award of back pay and related employee benefits.

The underlying facts are set forth in the Court of Appeals opinion and the briefing of the parties. See Arnold v. City of Seattle, 186 Wn. App. 653, 345 P.3d 1285, *review granted*, — Wn.2d —, 357 P.3d 665 (2015); Arnold Br. at 2-4; City Br. at 2-4; Arnold Reply Br. at 2-4; City Pet. for Rev. at 4-8; Arnold Ans. to Pet. for Rev. at 1-5; City Supp. Br. at 4-9; Arnold Supp. Br. at 2-5.¹ For purposes of this amicus curiae brief, the following facts are relevant: Arnold successfully challenged a demotion in an administrative hearing before the Seattle Civil Service Commission. As a result, she was reinstated to her former position (with a two-week suspension without pay), and awarded back pay and related benefits. Arnold's fee request before the commission was denied. Thereafter, she initiated this separate action pursuant to RCW 49.48.030, contending she is entitled to an award of attorney fees because the commission proceedings constituted an "action" under this statute.

The superior court dismissed Arnold's claim for attorney fees on summary judgment, and the Court of Appeals, Division I, reversed.

¹ The Attorney General of Washington submitted an amicus curiae memorandum in support of the City's petition for review in this case. See Amicus Curiae Memorandum of the Attorney General of Washington in Support of Petition for Review (Attorney General ACM).

Relying on Fire Fighters, the Court of Appeals concluded that the civil service commission administrative proceeding constitutes an "action" under RCW 49.48.030, and that Arnold is therefore entitled to an award of attorney fees. See Arnold, 186 Wn. App. at 659-65. Specifically, the court held:

Just as the *Fire Fighters* court found no reason to interpret "action" as excluding arbitration proceedings, we find no reason to interpret it as excluding civil service appeals. Like an arbitration, such an appeal is judicial in nature. This conclusion is supported by the Rules of Practice and Procedure for the Seattle Civil Service Commission. Under rules 5.13 and 5.15 respectively, the parties had the right to cross-examine witnesses and present evidence. We hold that "action" as used in RCW 49.48.030 includes civil service appeals in which wages or salary owed are recovered. The decision of the commission awarding Arnold back pay was equivalent to a "judgment" as that term was interpreted in *Fire Fighters*.

Id. at 664. The Court of Appeals also determined that, because Cohn v. Dep't of Corrections, 78 Wn. App. 63, 895 P.2d 857 (1995), and Trachtenberg v. Dep't of Corrections, 122 Wn. App. 491, 93 P.3d 217, *review denied*, — Wn.2d —, 103 P.3d 801 (2004), hold to the contrary, they were incorrectly decided. See Arnold at 662-64.

The Court of Appeals also rejected the City's argument that RCW 49.48.030 is inapplicable to its civil service commission hearings because the Seattle municipal code provides that employees' legal

representation is at their own expense. See City Br. at 4-10. In this regard, the Court of Appeals concluded:

we find no reason to hold that a superior court's authority to award attorney fees incurred in an administrative proceeding depends on whether the administrative agency had authority to award attorney fees.

Arnold at 664.

This Court granted the City's petition for review.

III. ISSUES PRESENTED

- 1.) Is a municipal civil service commission administrative proceeding an "action" under RCW 49.48.030?
- 2.) If so, is RCW 49.48.030 rendered inapplicable because the governing municipal code provides that employees contesting an adverse action before the municipality's civil service commission do so at their own expense?

IV. SUMMARY OF ARGUMENT

Re: Meaning of "Action" in RCW 49.48.030.

The Court of Appeals below correctly applied the holding and analysis in Fire Fighters, supra, in concluding that Arnold is entitled to attorney fees under RCW 49.48.030 because a municipal civil service commission administrative proceeding is sufficiently similar to a judicial proceeding to constitute an "action" under this statute. This interpretation of the undefined term "action" is further supported by reading RCW 49.48.030 in pari materia with RCW 49.48.085, a statute post-dating Fire

Fighters that recognizes an administrative proceeding as one type of "action" under Ch. 49.48 RCW.

Re: Application of RCW 49.48.030 to Municipal Administrative Proceedings.

The City's argument that RCW 49.48.030 is inapplicable to municipal civil service commission proceedings which do not allow for an award of attorney fees to a prevailing employee should be rejected. RCW 49.48.080 specifically provides that Department of Labor and Industries enforcement of employee claims under RCW 49.48.040-.080 cannot be pursued against municipalities (or the State). RCW 49.48.030 contains no similar exemption, and no other statute limits the scope of this statute. When RCW 49.48.030 is read in pari materia with RCW 49.48.080, it is apparent that the Legislature intended to make RCW 49.48.030's attorney fee provision applicable to actions against both private and public employers. In any event, any doubt on this question must be resolved in favor of employees under the governing rule of liberal construction.

Re: Court of Appeals Precedent.

To the extent Cohn v. Dep't of Corrections, 78 Wn. App. 63, 895 P.2d 857 (1995), Trachtenberg v. Dep't of Corrections, 122 Wn. App. 491, 93 P.3d 217, *review denied*, 103 P.3d 801 (2004), and International Union of Police Association, Local 748 v. Kitsap County, 183 Wn. App. 794,

333 P.3d 524 (2014), are inconsistent with the above analysis, they must be disapproved.

V. ARGUMENT

Introduction.

The Court of Appeals below correctly concluded RCW 49.48.030 applies in this case, based upon this Court's analysis in Fire Fighters, *supra*. See Arnold, 186 Wn. App. at 659-65. The argument below focuses on the impact of two statutes in Ch. 49.48 RCW that further support this analysis, RCW 49.48.080 and 49.48.085.²

A. **RCW 49.48.085 Recognizes An Administrative Proceeding As One Type Of "Action" Under Ch. 49.48 RCW, Including For Purposes Of The Attorney Fees Recovery Statute, RCW 49.48.030.**

This appeal raises the question whether a municipal administrative proceeding qualifies as an "action" under RCW 49.48.030, an issue left unresolved in Fire Fighters, 146 Wn.2d at 42, n.11.³ RCW 49.48.030 provides:

² RCW 49.48.080 and 49.48.085 are not discussed in the parties' briefing. They are nonetheless properly considered, and may be called to the attention of the Court by amicus curiae. See Maynard Inv. Co. v. McCann, 77 Wn.2d 616, 623, 465 P.2d 657 (1970) (addressing compliance with provision of mandatory statute even though not raised below); Harris v. Dept. of Labor & Indus., 120 Wn.2d 461, 467-68, 843 P.2d 1056 (1993) (addressing issue raised only by amicus curiae when necessary to reach a proper decision); Filo Foods, LLC v. City of SeaTac, 183 Wn.2d 770, 792, 357 P.3d 1040 (2015) (reaching issue not addressed by parties raised by Washington State Attorney General as amicus curiae).

³ This question appears to be properly before the Court. See City Pet. for Rev. at 3-4, 8; Arnold Ans. to Pet. for Rev. at 1, 6-10; see also City Br. at 12.

In any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer: PROVIDED, HOWEVER, That this section shall not apply if the amount of recovery is less than or equal to the amount admitted by the employer to be owing for said wages or salary.

(Emphasis added.)⁴ The term “action” is undefined in Ch. 49.48 RCW. To determine the meaning of this term, and whether it includes administrative proceedings, it is helpful to look at the remedial scheme of this chapter.

An employee deprived of wages or salary may bring a direct court action under RCW 49.48.030 and recover attorney fees incurred in vindicating his or her rights. See Fire Fighters at 43-44. This action need not be the same proceeding in which entitlement to wages or salary is established. See id. Alternately, the Department of Labor and Industries (DLI) may pursue a court action on behalf of an employee, either directly or based upon an assignment of the employee's rights. See RCW 49.48.040(1)(b), (c); see also Labor & Indus. v. Overnight Transp., 67 Wn. App. 24, 36, 834 P.2d 638 (1992) (recognizing DLI de jure right

⁴ Before the Court of Appeals, the City also argued that the civil service commission order is not a “judgment” within the meaning of RCW 49.48.030. See City Br. at 12-13. The court rejected this argument. See Arnold, 186 Wn. App. at 662-64. This argument does not appear to be renewed in the City’s briefing before this Court. See City Pet. for Rev. at 3-4; City Supp. Br. at 3. In any event, Fire Fighters rejected a similar argument in connection with an arbitration award and that analysis should be dispositive here. See 146 Wn.2d at 34-35, 36 n.8. To the extent Cohn v. Dep’t of Corrections, 78 Wn. App. at 70, Trachtenberg v. Dep’t of Corrections, 122 Wn. App. at 496-97, and Local 748 v. Kitsap County, 183 Wn. App. at 801, suggest otherwise, they must be disapproved.

to pursue employee claim under RCW 49.48.040(1)(b)), *review denied*, 120 Wn.2d 1028 (1993).

An employee deprived of wage or salary may also obtain administrative relief through DLI. RCW 49.48.040-.080 provides a means for DLI investigation and enforcement. After 2006, DLI also is authorized to enforce Ch. 49.48 RCW through a citation/assessment mechanism based upon an employee "wage complaint," as set forth in RCW 49.48.082-.087. See Laws of 2006, Ch. 89; see also 2010 Wash. Atty. Gen. Op. No. 6 (describing aspects of these alternative administrative remedies, and DLI authority to investigate *wage complaints* against certain public employers).⁵

Notably, RCW 49.48.085, part of the 2006 amendments to Ch. 49.48 RCW, addresses what happens when an employee who has filed a wage complaint under RCW 49.48.083 elects to terminate this means of DLI administrative enforcement. Subsection (3) of the statute provides that termination of a DLI wage complaint does not limit or affect other rights, as follows:

Nothing in this section shall be construed to limit or affect:
(a) The right of any employee to pursue *any judicial, administrative, or other action* available with respect to an employer; (b) the right of the department to pursue *any judicial, administrative, or other action* available with

⁵ The cited Attorney General Opinion is reproduced in the Appendix to this brief.

respect to an employee that is identified as a result of a wage complaint; or (c) the right of the department to pursue *any judicial, administrative, or other action* available with respect to an employer in the absence of a wage complaint. For purposes of this subsection, “employee” means an employee other than an employee who has filed a wage complaint with the department and who thereafter has elected to terminate the department's administrative action as provided in subsection (1) of this section.

(Emphasis added.)⁶

This passage was enacted in 2006, after Fire Fighters was decided. The ordinary meaning of the recurring phrase “any judicial, administrative, or other action,” highlighted above, indicates that the Legislature recognizes an administrative remedy as one type of “action” under Ch. 49.48 RCW. When read in *pari materia* with RCW 49.48.085(3), it is evident that the phrase “any action” in RCW 49.48.030 includes an administrative proceeding such as a civil service commission hearing. See Diaz v. State, 175 Wn.2d 457, 466, 285 P.3d 873 (2012) (stating “[w]e interpret statutes in *pari materia*, considering all statutes on the same subject, taking into account all that the legislature has said on the subject, and attempting to create a unified whole”); State v. Blilie, 132 Wn.2d 484, 492, 939 P.2d 691 (1997) (recognizing Legislature is

⁶ The full text of the current version of RCW 49.48.085 is reproduced in the Appendix to this brief.

presumed to know the rules of statutory construction).⁷ The Seattle Civil Service Commission administrative proceeding qualifies as an "action" under RCW 49.48.030.⁸ To the extent Cohn at 69, Trachtenberg at 497, and Local 748 at 801 provide otherwise, they must be disapproved.

B. RCW 49.48.080 Exempts Municipalities From Certain DLI Enforcement Proceedings, But There Is No Similar Exemption Regarding RCW 49.48.030, Indicating That Municipalities Are Subject To An Award Of Attorney Fees Under This Statute.

The City's principal argument before this Court is that RCW 49.48.030 should not apply to its civil service commission proceedings because employees are responsible for their own attorney fees under its municipal code. See City Supp. Br. at 5, 10-12. In particular, the City argues:

there is no clear intent for RCW 49.48.030 to limit the conditions a city imposes as part of its voluntary civil service administrative proceedings. Nor is there a conflict between the language of the statute and the city's code.

City Supp. Br. at 12.

⁷ This reading of the term "action" in RCW 49.48.085 is also consistent with the canon of statutory construction that a word is known by its associates (*noscitur a sociis*). See e.g. Jongeward v. BNSF Ry., 174 Wn.2d 586, 601, 278 P.3d 157 (2012); Selles v. Local 174 of Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., 50 Wn.2d 660, 663, 314 P.2d 456 (1957).

⁸ To the extent that slightly different language is used to describe the impact of certain events on enforcement proceedings, see RCW 49.48.085(2) ("in any court action or other judicial or administrative proceeding") and RCW 49.48.083(4)(b) ("any court action or other judicial or administrative proceeding"), any resulting ambiguity would still be resolved in favor of employees under the governing rule of liberal construction. See Fire Fighters, 146 Wn. 2d at 34-35.

The City's analysis is incorrect. RCW 49.48.030 contains no exemption for municipalities or other governmental entities, and no other statute limits the scope of this statute. On the other hand, the Legislature has clearly limited certain aspects of *DLI enforcement* of Ch. 49.48 RCW with respect to municipalities (and the State). RCW 49.48.080, entitled “Public employees excluded,” provides:

Nothing in *RCW 49.48.040 through 49.48.080* shall apply to the payment of wages or compensation of employees directly employed by any county, incorporated city or town, or other municipal corporation. Nor shall anything herein apply to employees, directly employed by the state, in a department, bureau, office, board, commission or institution thereof.

(Emphasis added).

Under the plain language of this statute, the Legislature made a calculated policy decision not to allow DLI to employ certain enforcement measures against other governmental entities.⁹ The exemption created by this statute is limited to RCW 49.48.040-.080. Reading RCW 49.48.030 in pari materia with RCW 49.48.080, the Legislature clearly intended the attorney fees recovery statute to apply in both the private and public sector. See Diaz, 175 Wn.2d at 466. This same analysis is suggested in several Court of Appeals opinions, including the opinion below. See

⁹ 2010 Wash. Atty. Gen. Op. No. 6 at 3 suggests that, unlike RCW 49.48.040-.080, the citation/assessment enforcement method provided in RCW 49.48.082-.087, applies to many, but not all, public employers.

Naches Vly. Sch. Dist. v. Cruzen, 54 Wn. App. 388, 399, 775 P.2d 960 (1989) (concluding RCW 49.48.030 applies to public employees, noting the limitation in RCW 49.48.080); McIntyre v. State, 135 Wn. App. 594, 599, 141 P.3d 75 (2006) (similar; citing Cruzen); Arnold, 186 Wn. App. at 657 (similar; citing McIntyre); see also Cohn at 69 & n.15 (citing RCW 49.48.080). Accordingly, RCW 49.48.030 applies to municipal civil service commission proceedings.¹⁰

Under the above analysis, the City is foreclosed from overriding RCW 49.48.030 with its municipal code provision. See Washington Constitution, Art. XI § 11 (providing “[a]ny county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations *as are not in conflict with general laws*”; brackets & emphasis added); see also Arnold Supp. Br. at 11-14. To the extent the Court of Appeals opinions in Cohn, Trachtenberg, and Local 748, supra, hold to the contrary, they must be disapproved.

Lastly, the City argues that its code provision requiring employees to cover their own attorney fees is consistent with RCW 49.48.030, relying on the statement in Fire Fighters that an employee can waive the right to the benefits of this statute in the course of collective bargaining,

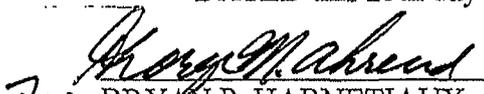
¹⁰ The argument of the Attorney General, as amicus curiae, that RCW 49.48.030 should not apply to State administrative proceedings is also incorrect under this analysis, although this question is not before the Court. See Attorney General ACM at 2-4.

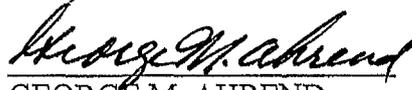
suggesting that this analysis fits here. See City Supp. Br. at 10; Fire Fighters, 146 Wn.2d at 49. However, enactment of a municipal code is entirely different than a knowing and voluntary waiver of a right by employees or their representatives during the course of contract negotiations. Moreover, the statement in Fire Fighters is arguably dicta, and also questionable in light of Brown v. MHN Gov't Servs., Inc., 178 Wn.2d 258, 274-75, 306 P.3d 948 (2013), holding that a fee-shifting provision in an arbitration agreement is substantively unconscionable as inconsistent with Washington's Minimum Wage Act (Ch. 49.46 RCW), and RCW 49.48.030.

VI. CONCLUSION

The Court should adopt the analysis advanced in this brief in the course of resolving this appeal.

DATED this 25th day of November, 2015.


For BRYAN P. HARNETIAUX


GEORGE M. AHREND

On Behalf of WSAJ Foundation

APPENDIX

Wash. AGO 2010 NO. 6 (Wash.A.G.), 2010 WL 3463083

Office of the Attorney General

State of Washington

AGO 2010 No. 6

September 1, 2010

WAGES-DEPARTMENT OF LABOR AND INDUSTRIES-PUBLIC EMPLOYEES Application Of Wage Payment Act To Employees Of State And Local Governmental Agencies

*1 The Wage Payment Act applies to complaints by state and local public employees.

Judy Schurke
Director
Department of Labor & Industries
PO Box 44000
Olympia, WA 98504-4000

Dear Ms. Schurke:

By letter previously acknowledged, you have requested our opinion on the following question:

Is the Department of Labor and Industries is required to investigate wage complaints against public employers under the Wage Payment Act?

BRIEF ANSWER

Yes. The Wage Payment Act defines the terms employee and employer, such that public employees and public employers are contemplated under that act. Therefore, the Department of Labor and Industries is required to investigate wage complaints against public employers under the Wage Payment Act.

BACKGROUND

Your question arises from two different legislative acts, enacted decades apart, but codified in the same RCW chapter. Each of these acts, in turn, cross-references other statutes. A brief background regarding the two acts provides necessary context for the analysis that follows.

In 1935, the legislature permitted the Department to become involved in wage claims between private employers and private employees. In that year, the legislature passed the Collection Of Wages In Private Employment Act, which allowed the Department to investigate and prosecute private employee wage claims. Laws of 1935, ch. 96, §§ 1, 4. The act specifically excludes public employees.¹ Laws of 1935, ch. 96, § 5. The act is codified in its present form at RCW 49.48.040.070, .080, with RCW 49.48.080 containing the public employee exemption. Pursuant to these statutes, the Department has discretionary authority to investigate wage claims but may not investigate wage claims made by public employees. RCW 49.48.080.

In 2006, the legislature passed an act, entitled Wage Payment Requirements Violations, commonly known as the Wage Payment Act. The Wage Payment Act is codified at RCW 49.48.082 through .087. Under the Wage Payment Act, the Department is required to investigate wage complaints made by individual employees regarding violations of certain statutes. While the earlier Collections Of Wages In Private Employment Act vested discretion in the Department as to whether to pursue a particular claim, the Wage Payment Act requires the Department to investigate claims. *Compare* RCW 49.48.040 (using the discretionary

word may) *with* RCW 49.48.083 (using the mandatory word shall). However, the Wage Payment Act neither expressly includes nor excludes public employees.

ANALYSIS

You ask whether the Department must investigate wage complaints by public employees under the Wage Payment Act, even though it was expressly precluded from doing so under the earlier-enacted Collection Of Wages In Private Employment Act. For the reasons that follow, we conclude that it must.

*2 The 1935 legislature expressly prohibited the Department from applying the Collection Of Wages In Private Employment Act to public employees. RCW 49.48.080 (enacted by Laws of 1935, ch. 96, § 5). As currently codified, that statute provides: Nothing in RCW 49.48.040 through 49.48.080 shall apply to the payment of wages or compensation of employees directly employed by any county, incorporated city or town, or other municipal corporation. Nor shall anything herein apply to employees, directly employed by the state, any department, bureau, office, board, commission or institution hereof.

RCW 49.48.080.

The Wage Payment Act, enacted in 2006, is codified at RCW 49.48.082 through .087. Laws of 2006, ch. 89. It does not fall within the range of statutes addressed by RCW 49.48.080. Accordingly, the exclusion of public employees from the earlier Collection Of Wages In Private Employment Act does not extend to the recently-enacted Wage Payment Act.

This becomes clear when we examine the definitions of employee and employer in the Wage Payment Act. That act defines the terms as follows:

(5) Employee has the meaning provided in: (a) RCW 49.46.010 for purposes of a wage payment requirement set forth in RCW 49.46.020 or 49.46.130; and (b) RCW 49.12.005 for purposes of a wage payment requirement set forth in RCW 49.48.010, 49.52.050, or 49.52.060.

(6) Employer has the meaning provided in RCW 49.46.010 for purposes of a wage payment requirement set forth in RCW 49.46.020, 49.46.130, 49.48.010, 49.52.050, or 49.52.060.

RCW 49.48.082(5), (6).

Each of the definitions incorporated by reference in the Wage Payment Act includes public employees. The first of the two definitions of employee includes any individual employed by an employer but shall not include specific listed individuals. RCW 49.46.010(5) is attached for ease of reference. Several of the listed individuals excluded from this definition of employee are individuals who might otherwise be considered public employees. For instance, the definition of employee excludes individuals engaged in forest protection and fire prevention, RCW 49.46.010(5)(h); individuals who hold public elective or appointive offices of the state, any county, city, town, or municipality, or any employee of the state legislature, RCW 49.46.010(5)(l); and all vessel-operating crews of the Washington State Ferries operated by the Department of Transportation, RCW 49.46.010(5)(m). *See also* RCW 49.46.010(5)(d), (e). Aside from these specific listed exemptions, the statute does not exclude public employees.

Under the maxim of *expressio unius est exclusio alterius* to express one thing in a statute implies the exclusion of the other omissions are deemed to be exclusions. *In re Detention of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002). Following this canon of statutory construction, the express exemption of specific types of public employees implies the inclusion of all other public employees. Thus, for wage complaints made under RCW 49.46.020 and .130, public employees are included within the definition of employee and the Department is required to investigate.

*3 The second definition of employee incorporated by reference in the Wage Payment Act comes from RCW 49.12.005(4). Under this definition, [e]mployee means an employee who is employed in the business of the employee's employer whether by way of manual labor or otherwise. RCW 49.12.005(4). This definition does not separate various types of employees; instead, it refers to a general class of employees. The meaning of a statute must be construed by reading it in its entirety and considering its relation with other statutes. *ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993). As the general definition of employee refers to the employee-employer relationship, it is helpful to consider the definition of employer in determining the meaning of employee. The corresponding definition of employer in the same statutory chapter specifically includes public employers. RCW 49.12.005(3)(b). In fact, the legislature intentionally amended the definition of employer to include the state, any state institution, state agency, political subdivisions of the state, and any municipal corporation or quasi-municipal corporation. Laws of 2003, ch. 401, § 2. Therefore, the definition of employee for wage complaints made pursuant to RCW 49.48.010, RCW 49.52.050, or RCW 49.52.060 includes public employees.

The definition of employer used for all wage complaints under the Wage Payment Act defines the term to include any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee[.] RCW 49.46.010(4). This definition does not explicitly include or exclude public employers. It is worth noting that the legislature chose to use this definition as opposed to the definition in RCW 49.12.005(3)(b), which specifically includes public employers. However, this fact alone is not dispositive as the statute must be construed in its entirety. *ITT Rayonier*, 122 Wn.2d at 807. Construing the statute in its entirety requires reading the definition of employer with the definition of employee, which, as shown above, includes public employees.

When the legislature enacted the Wage Payment Act, it chose the Wage Payment Act over other proposed legislation, which would have excluded public employees. In construing statutes, proposed legislation may be considered in helping determine the legislature's intent. *See In re Marriage of Kovacs*, 121 Wn.2d 795, 804-09, 854 P.2d 629 (1993) (tracing history of the Parenting Act over several years of proposed legislation and considering legislative history from those prior bills); *Buchanan v. Simplot Feeders, Ltd.*, 134 Wn.2d 673, 688, 952 P.2d 610 (1998) (finding that legislative history regarding failed 1991 legislation amending a statute was relevant to construing intent of identical 1992 amendment that passed).

In the 2003 and 2005 legislative sessions the sessions directly prior to the enactment of the Wage Payment Act several bills were proposed that would have amended specific sections of the existing statutory scheme and supplemented various provisions of RCW 49.48. See Substitute S.B. 5240, 59th Leg., Reg. Sess. (Wash. 2005) (amending RCW 49.48.040, .060, and .070; and adding new sections to RCW 49.48); Substitute H.B. 1311, 59th Leg., Reg. Sess. (Wash. 2005); H.B. 1548, 58th Leg., Reg. Sess. (Wash. 2003) (nearly identical to Substitute S.B. 5240 in 2005). The bills proposed in 2005 did not pass. However, the next year, the legislature enacted the Wage Payment Act.

*4 Several differences exist between the bills that did not pass the legislature in 2003 (H.B. 1548) and 2005 (S.B. 5240 and H.B. 1311) and the Wage Payment Act. The most noteworthy difference for our analysis is that S.B. 5240 and H.B. 1548 would have amended the existing statutory scheme, whereas the Wage Payment Act did not amend any existing statutes; it created new sections.² Substitute H.B. 3185, 59th Leg., Reg. Sess. (Wash. 2006) (AN ACT Relating to violations of wage payment requirements; adding new sections to [RCW] 49.48; creating a new section; and prescribing penalties.). This fact is significant for the present analysis because the exclusion of public employees, pursuant to RCW 49.48.080, would have continued had S.B. 5240 or H.B. 1548 been enacted, for the ease that the bills amended existing statutes that specifically did not apply to public employees. In enacting the Wage Payment Act, the legislature created new sections and used definitions that included public employees and public employers. The failure of the 2003 and 2005 proposed legislation, and the success of the Wage Payment Act, demonstrate that the legislature did not intend to exclude public employees from the provisions of the Wage Payment Act.

Furthermore, the codification of these new sections as RCW 49.48.082.087, as opposed to anywhere else in RCW 49.48, does not affect the meaning of the statutes. *See* RCW 1.08.013, .015(2); RCW 44.20.060. [T]he meaning of a statute is determined by the intent of the legislature that enacted it ... the Code Reviser cannot alter such meaning by the way in which he codifies it. *Durrah v. Wright*, 115 Wn. App. 634, 646, 63 P.3d 184 (2003) (analyzing the history of enactment and codification of quiet

title provisions and finding that the Code Revisers placement of a provision did not alter the meaning); *see also State v. Galen*, 5 Wn. App. 353, 357, 487 P.2d 273 (1971) (holding that the Code Revisers changing of a position of a statute within the RCW did not change the meaning of the statute).

Based on the statutory framework analyzed above, the Department is required to investigate wage complaints made by public employees.

We trust that the foregoing will be useful to you.

Rob McKenna
Attorney General
Jennifer S. Steele
Assistant Attorney General

RCW 49.46.010(5)

*5 (5) Employee includes any individual employed by an employer but shall not include:

- a) Any individual (i) employed as a hand harvest laborer and paid on a piece rate basis in an operation which has been, and is generally and customarily recognized as having been, paid on a piece rate basis in the region of employment; (ii) who commutes daily from his or her permanent residence to the farm on which he or she is employed; and (iii) who has been employed in agriculture less than thirteen weeks during the preceding calendar year;
- b) Any individual employed in casual labor in or about a private home, unless performed in the course of the employers trade, business, or profession;
- (c) Any individual employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesman as those terms are defined and delimited by rules of the director. However, those terms shall be defined and delimited by the director of personnel pursuant to chapter 41.06 RCW for employees employed under the director of personnels jurisdiction;
- (d) Any individual engaged in the activities of an educational, charitable, religious, state or local governmental body or agency, or nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to such organizations gratuitously. If the individual receives reimbursement in lieu of compensation for normally incurred out-of-pocket expenses or receives a nominal amount of compensation per unit of voluntary service rendered, an employer-employee relationship is deemed not to exist for the purpose of this section or for purposes of membership or qualification in any state, local government or publicly supported retirement system other than that provided under chapter 41.24 RCW;
- (e) Any individual employed full time by any state or local governmental body or agency who provides voluntary services but only with regard to the provision of the voluntary services. The voluntary services and any compensation therefor shall not affect or add to qualification, entitlement or benefit rights under any state, local government, or publicly supported retirement system other than that provided under chapter 41.24 RCW;
- (f) Any newspaper vendor or carrier;
- (g) Any carrier subject to regulation by Part 1 of the Interstate Commerce Act;
- (h) Any individual engaged in forest protection and fire prevention activities;

(i) Any individual employed by any charitable institution charged with child care responsibilities engaged primarily in the development of character or citizenship or promoting health or physical fitness or providing or sponsoring recreational opportunities or facilities for young people or members of the armed forces of the United States;

(j) Any individual whose duties require that he or she reside or sleep at the place of his or her employment or who otherwise spends a substantial portion of his or her work time subject to call, and not engaged in the performance of active duties;

*6 (k) Any resident, inmate, or patient of a state, county, or municipal correctional, detention, treatment or rehabilitative institution;

(l) Any individual who holds a public elective or appointive office of the state, any county, city, town, municipal corporation or quasi municipal corporation, political subdivision, or any instrumentality thereof, or any employee of the state legislature;

(m) All vessel operating crews of the Washington state ferries operated by the department of transportation;

(n) Any individual employed as a seaman on a vessel other than an American vessel;

(o) Any farm intern providing his or her services to a small farm which has a special certificate issued under section 1 of this act[.]

Footnotes

1 In addition, the title states that it relates only to private employmentCollection Of Wages In Private Employmentand the statement of purpose confirms that the act regulate[s] the payment of wages or compensation for labor or service in private employments. Laws of 1935, ch. 96.

2 Another difference is that the Wage Payment Act requires the Department to investigate wage complaints, while under S.B. 5240 and H.B. 1548 the Department would have had discretion whether to accept a complaint, and whether to investigate a complaint. See RCW 49.48.083; Substitute S.B. 5240, § 3; H.B. 1548, § 3. S.B. 5240 and H.B. 1548 also would have amended RCW 49.48.070 to include complaints of violations of RCW 49.48.010 among those the Department was required to investigate. Substitute S.B. 5240; H.B. 1548, § 3.

Wash. AGO 2010 NO. 6 (Wash.A.G.), 2010 WL 3463083

West's Revised Code of Washington Annotated
Title 49. Labor Regulations (Refs & Annos)
Chapter 49.48. Wages--Payment--Collection (Refs & Annos)

West's RCWA 49.48.085

49.48.085. Wage complaints--Employee termination of administrative action

Effective: June 7, 2006
Currentness

(1) An employee who has filed a wage complaint with the department may elect to terminate the department's administrative action, thereby preserving any private right of action, by providing written notice to the department within ten business days after the employee's receipt of the department's citation and notice of assessment.

(2) If the employee elects to terminate the department's administrative action: (a) The department shall immediately discontinue its action against the employer; (b) the department shall vacate a citation and notice of assessment already issued by the department to the employer; and (c) the citation and notice of assessment, and any related findings of fact or conclusions of law by the department, and any payment or offer of payment by the employer of the wages, including interest, assessed by the department in the citation and notice of assessment, shall not be admissible in any court action or other judicial or administrative proceeding.

(3) Nothing in this section shall be construed to limit or affect: (a) The right of any employee to pursue any judicial, administrative, or other action available with respect to an employer; (b) the right of the department to pursue any judicial, administrative, or other action available with respect to an employee that is identified as a result of a wage complaint; or (c) the right of the department to pursue any judicial, administrative, or other action available with respect to an employer in the absence of a wage complaint. For purposes of this subsection, "employee" means an employee other than an employee who has filed a wage complaint with the department and who thereafter has elected to terminate the department's administrative action as provided in subsection (1) of this section.

Credits

[2006 c 89 § 4, eff. June 7, 2006.]

West's RCWA 49.48.085, WA ST 49.48.085

Current with all laws from the 2015 Regular Session and 2015 1st, 2nd, and 3rd Special Sessions

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Dear Mr. Carpenter:

On behalf of the WSAJ Foundation, an Amicus Curiae Brief is attached to this email for filing. Counsel for the parties and other Amicus Curiae are being served simultaneously by copy of this email, per prior arrangement.

Respectfully submitted,

--

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