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NO. 96990-6

IN THE SUPREME COURT FOR THE
STATE OF WASHINGTON

(COA No. 51823-6-II)

NICOLE BEDNARCZYK and CATHERINE SELIN, individually and on
behalf of all others similarly situated,

Appellants/Plaintiffs,

v.

KING COUNTY,

Respondent/Defendant.

**BRIEF OF *AMICUS CURIAE*
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION,
FAIR WORK CENTER, AND SEATTLE UNIVERSITY
WORKERS' RIGHTS CLINIC IN SUPPORT OF APPELLANT'S
ARGUMENT FOR REVERSAL**

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TABLE OF CONTENTS

I.	Interest of Amicus Curiae	1
II.	Introduction and Summary of Argument	1
III.	Argument	3
	A. The Opportunity to Serve on a Jury is Fundamental to Civic Society.....	3
	1. Lower Income Jurors Are Systematically Excluded from the Opportunity to Serve on King County Juries	4
	2. Systematic Exclusion of Lower Income Jurors Tangibly Harms the Excluded Jurors and the King County Jury and Court System	6
	B. There is an Implied Disparate Impact Claim under RCW 2.36.080(3).....	8
	C. Jurors are “Employees” Under the Minimum Wage Act	11
IV.	Conclusion	14

TABLE OF AUTHORITIES

Cases

<i>Anfinson v. FedEx Ground Package Sys., Inc.</i> , 174 Wn.2d 851, 281 P.3d 289 (2012).....	11, 12
<i>Ballard v. United States</i> , 329 U.S. 187 (1946).....	6
<i>Batson v. Kentucky</i> , 476 U.S. 79, 106 S. Ct. 1712 (1986).....	4
<i>Bennett v. Hardy</i> , 113 Wn.2d 912, 784 P.2d 507 (1990).....	2, 8, 10, 14
<i>Bolin v. Kitsap Cty.</i> , 114 Wn.2d 70, 785 P.2d 805 (1990).....	3, 12, 13
<i>Bostain v. Food Express, Inc.</i> , 159 Wn.2d 700, 153 P.3d 846 (2007).....	11, 13
<i>Brady v. Autozone Stores, Inc.</i> , 188 Wn.2d 576, 397 P.3d 120 (2017).....	11
<i>Carranza v. Dovex Fruit Co.</i> , 190 Wn.2d 612, 416 P. 3d 1205 (2018).....	13
<i>Drinkwitz v. Alliant Techsystems, Inc.</i> , 140 Wn.2d 291, 996 P.2d 582 (2000).....	11, 13
<i>Hill v. Xerox Bus. Servs., LLC</i> , 191 Wn.2d 751, 426 P.3d 703 (2018).....	13
<i>Hisle v. Todd Pac. Shipyards</i> , 151 Wn.2d 853, 93 P.3d 108 (2004).....	13
<i>Peters v. Kiff</i> , 407 U.S. 493 (1972).....	6, 7
<i>Powers v. Ohio</i> , 499 U.S. 400 (1991).....	3
<i>State v. Saintcalle</i> , 178 Wn.2d 34, 309 P.3d 326 (2013).....	3, 7
<i>Thiel v. S. Pac. Co.</i> , 328 U.S. 217 (1946).....	7

Statutes

RCW 2.36.080 2, 10
RCW 2.36.080(1)..... 8, 9
RCW 2.36.080(2)..... 10, 11
RCW 2.36.080(3)..... passim
RCW 49.46.010(3)..... 13

Other Authorities

Alexander Preller, *Jury Duty is a Poll Tax: The Case for Severing the Link
Between Voter Registration and Jury Service*, 46 Colum. J.L. & Soc.
Probs. 1, 2 (2012)..... 5
Kevin Quilty, Note, *The Unrecognized Right: How Wealth Discrimination
Unconstitutionally Bars Indigent Citizens From The Jury Box*, 24
Cornell J. L. & Pub. Pol'y 567 (2015) 4, 5
Samuel Sommers, *On Racial Diversity and Group Decision Making:
Identifying Multiple Effects of Racial Composition in Jury Deliberation*,
90 J. Personality & Soc. Psychol. 597, 608 (2006) 7

I. INTEREST OF AMICUS CURIAE

The Washington Employment Lawyers Association (“WELA”) is an organization of approximately 200 Washington lawyers devoted to protecting employee rights. WELA is a chapter of the National Employment Lawyers Association (“NELA”). WELA has appeared as amicus curiae numerous times before this Court.

The Fair Work Center (“FWC”) is a hub for workers to understand and exercise their legal rights, improve working conditions, and connect with community resources. FWC envisions a society in which workers are treated with dignity and respect, regardless of class, gender, or race.

The Seattle University School of Law Workers’ Rights Clinic (“Workers’ Rights Clinic”) works in partnership with the Fair Work Center’s Clinic and seeks to level the playing field between employers and low-wage workers by providing advice and representation to workers who would not otherwise find it. The Clinic focuses on the enforcement of workplace standards, such as minimum wage.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

RCW 2.36.080(3) provides that a citizen “shall not be excluded from jury service in this state on account of...economic status.” The parties and the Court of Appeals accept that the amount jurors are paid causes jurors of lower economic status to not be able to serve, and

therefore, has a disparate impact on people of lower economic status.

The Court of Appeals erred in concluding that there is no implied disparate impact claim under RCW 2.36.080. Under *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 507 (1990), there is an implied disparate impact claim under RCW 2.36.080(3). Jurors of lower economic status are a class for whose “especial” benefit the statute was enacted, and implying a remedy for their exclusion from jury service is both consistent with the legislature’s intent and with the underlying purpose of the statute. The *Bennett* factors need to be analyzed in light of the fundamental role that jury service plays in our civic society, both for litigants and citizens summoned to jury duty. By focusing only on the opportunity to be *called* for jury duty rather than on the meaningful and actual opportunity to *serve* as a juror, and by ignoring that jurors of lower economic status are compelled rather than choose to request hardship exclusions, the Court of Appeals’ decision undermines the intent of the legislature and purpose of RCW 2.36.080.

The Court of Appeals also erred in holding that King County jurors are not employees under the Minimum Wage Act (“MWA”). The Court of Appeals did not find that the any factors of the economic-dependence test were not met. Rather, the decision focused on semantics over substance, and found that because jury service is referred to as a “civic duty,” jurors

cannot be employees. But jurors can, and do, perform a civic duty while still meeting the elements of the economic-dependence test of the MWA. *Bolin v. Kitsap Cty.*, 114 Wn.2d 70, 785 P.2d 805 (1990) supports rather than undercuts that jurors are employees under the MWA.

III. ARGUMENT

A. The Opportunity to Serve on a Jury is Fundamental to Civic Society

As Justice Bjorgen articulated compellingly in his dissent below, the opportunity to serve on a jury is fundamental to civic society. Jury service, along with voting, is a cornerstone of our democracy. *Powers v. Ohio*, 499 U.S. 400, 400 (1991) (“Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life.”). Jury service is the most direct way that many citizens participate in our democracy. *Id.* at 407; *State v. Saintcalle*, 178 Wn.2d 34, 50, 309 P.3d 326 (2013) (“[w]e have juries for many reasons, not the least of which is...a ground level exercise of democratic values”). The “opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the system.” *Powers*, 499 U.S. at 407.

Jury service is both a civic duty and a civic *right*. *Saintcalle*, 178

Wn.2d at 50 (“The government does not get to decide who goes to the lockup or even the gallows. Ordinary citizens exercise that right as a matter of democracy.”).

And *Batson*¹ and its progeny, at both the state and federal level, make clear that the right in question is an actual, meaningful, and equal opportunity to serve on a jury, not just the opportunity to be summoned for jury duty.

The crucial role that compensation plays in safeguarding the right to serve as a juror has been recognized all the way back to our Founding of the United States. The First Congress set a jury daily pay rate at 50 cents, which was the average amount a laborer would make in a day in 1789. Kevin Quilty, Note, *The Unrecognized Right: How Wealth Discrimination Unconstitutionally Bars Indigent Citizens From The Jury Box*, 24 Cornell J. L. & Pub. Pol’y 567 (2015).

1. Lower Income Jurors Are Systematically Excluded from the Opportunity to Serve on King County Juries

The record in this case establishes that jurors of lower economic status are systematically excluded from the opportunity to serve on King County juries by the low pay for jury service. CP 420; CP 526-542. A

¹ *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986).

sizeable percentage of prospective jurors are either administratively excused prior to reporting based on financial hardship, or are given financial hardship excusals by a judge before being empaneled. CP 420; CP 526-542. And as Plaintiffs demonstrate, these hardship excusals are only the “tip of the iceberg.” Petition for Review (“Pet.”) at 8. Nationwide studies support that the reason a large percentage of prospective jurors do not respond at all to summons is that they cannot afford to serve. Quilty, *supra* at 574-76.

The financial inability to serve as a juror has a cascading effect on other fundamental rights of citizens of lower economic status. Registration to vote triggers placement on the master juror list in most states, including Washington, and low-income jurors who cannot afford to serve on a jury often do not register for fear of being placed on a jury. Alexander Preller, *Jury Duty is a Poll Tax: The Case for Severing the Link Between Voter Registration and Jury Service*, 46 Colum. J.L. & Soc. Probs. 1, 2 (2012) (“Many of those who simply cannot afford to serve on juries make the most logical choice under the circumstances: they do not register to vote”).²

² In 1975, in a nationwide survey of election boards, 75% of the responding boards reported that citizens were discouraged from registering

2. Systematic Exclusion of Lower Income Jurors Tangibly Harms the Excluded Jurors and the King County Jury and Court System

This systematic exclusion of an entire swath of the populace damages the jurors themselves, the deliberative process, and litigants. The effect of removing an identifiable segment of the community “is to remove from the jury room qualities of human nature, varieties of human experience, the range of which is unknown and perhaps unknowable.” Slip. Op. at 16 (Bjorgen, J. dissenting) (citing *Peters v. Kiff*, 407 U.S. 493, 503 (1972)). In *Ballard v. United States*, the U.S. Supreme Court made the same observation regarding the exclusion of women from juries as it did with regard to the exclusion of black jurors in *Peters*:

The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.

329 U.S. 187, 193-94 (1946).

This Court has reduced this issue down to its essence: “studies confirm what seems obvious from reflection: more diverse juries result in

to vote for fear of jury duty, and some boards estimated a disenfranchisement rate of 5-10% or more. *Id.* at 11.

fairer trials.” *Saintcalle*, 178 Wn.2d at 50. ““By every deliberation measure...heterogeneous groups outperformed homogeneous groups.”” *Id.* (quoting Samuel Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition in Jury Deliberation*, 90 J. Personality & Soc. Psychol. 597, 608 (2006)). Thus, it is “not necessary to assume that the excluded group will consistently vote as a class in order to conclude...that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.” *Peters*, 407 U.S. at 503-04.

And while the damage from the systematic exclusion of lower income jurors is not limited to those cases with low income litigants, there *is* additional harm to litigants with lower economic status, who are entitled under the state and U.S. constitutions to a jury of their peers. *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) (“The American tradition of trial by jury...necessarily contemplates an impartial jury drawn from a cross-section of the community.”).

[I]t is also fundamental that the defendant who looks at the jurors sitting in the box have good reason to believe that the jurors will judge as impartially and fairly as possible. Our democratic system cannot tolerate any less.

Saintcalle, 178 Wn.2d at 50.

B. There is an Implied Disparate Impact Claim under RCW 2.36.080(3)

Both parties and the Court of Appeals agree that because no remedy is explicitly provided in RCW 2.36.080(3), a court looks to the three-prong test outlined in *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 507 (1990), to determine whether a cause of action can be implied.

The Court of Appeals correctly found that the first prong of the test is satisfied: plaintiffs are in the class of people for whose “especial” benefit the statute was enacted because it specifically protects prospective jurors from being excluded based on economic status. Slip. Op. at 6. But its decision incorrectly concluded that the remedy of increased juror pay is not consistent with the legislative intent or the statute’s purpose.

As the Court of Appeals correctly noted, RCW 2.36.080(1) protects “the opportunity and obligation for jury service.” Slip. Op. at 6. But the court erred in determining what this means. The Court of Appeals and King County both urge that the “opportunity...for jury service” is satisfied by having one’s name placed on the master list of prospective jurors and being summoned for service. King County argues that as long as the County is not affirmatively and purposefully excluding prospective jurors of lower economic status, there is no violation of RCW 2.36.080(3).

But this position focuses on semantics at the expense of furthering legislative intent and protecting fundamental rights. As Judge Bjorgen noted, the essence of the guarantee of RCW 2.36.080(3) that “a citizen shall not be excluded from jury service in this state on account of...economic status” would be subverted if it is construed as merely a rule of summoning. Slip. Op. at 22. Given the central role that jury service plays in our civic society, the “opportunity...to be considered for jury service” that is safeguarded in RCW 2.36.080(1) must be interpreted as the meaningful opportunity to actually serve on a jury, not simply to be placed on a list of prospective jurors and summoned for duty.

Lower income jurors who are summoned for service but either are not able to respond or who require hardship excusals because they cannot afford to serve are denied a meaningful opportunity for jury service. The words “opportunity...to be considered for service” cannot be read in a vacuum when the right in question is a cornerstone of a functioning democracy. As Judge Bjorgen aptly noted, “to say that the opportunity to be considered for jury service is preserved by the opportunity to be in the jury pool leaves little of logic and even less of RCW 2.36.080(3).” Slip. Op. at 23 (Bjorgen, J., dissenting). Indeed, the *Bennett* test itself is structured to prevent such a formalistic interpretation, given that it requires interpreting the statute in light of its intent and purpose.

Interpreting RCW 2.36.080(3) to imply a disparate impact claim which addresses the *de facto* exclusion of lower income jurors and fashions a remedy of increased pay is consistent with the stated goals of RCW 2.36.080 to “maximize the availability of residents of the state for jury service” and “minimize the burden on the prospective jurors.” RCW 2.36.080(2). The Court of Appeals came to the opposite conclusion by interpreting the final sentences in RCW 2.36.080(2) as exclusive. But there is no indication that the legislature intended the methods it listed - that jury term and jury service should be set for as brief an interval as possible - to be the only ways in which the statute’s mandate could be furthered. Notably, King County does not dispute that increasing juror pay would further the intent of the legislature and purpose of the statute.

Where, as here, the statute is silent as to remedy, this Court “can assume that the legislature is aware of the doctrine of implied statutory causes of action.” *Bennett*, 113 Wn.2d at 919. Courts “assume that the legislature would not enact a remedial statute granting rights to an identifiable class without enabling members of that class to enforce those rights. Without an implicit creation of a remedy, the statute is meaningless.” *Id.* at 919-20. To give the right not to be excluded from consideration as a juror as set forth in in RCW 2.36.080(3) any meaning,

jurors must have legal recourse when they are excluded. Legislative intent and purpose supports implying a cause of action here.³

C. Jurors are “Employees” Under the Minimum Wage Act

This Court has observed often that Washington has a “long and proud history of being a pioneer in the protection of employee rights.” *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 712, 153 P.3d 846 (2007). Remedial statutes protecting employee rights, especially minimum employment standards, must be liberally construed. *Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 397 P.3d 120 (2017).

The Minimum Wage Act (“MWA”) is remedial legislation, and as such, must be broadly construed. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 867, 281 P.3d 289 (2012). Relatedly, exemptions from its coverage must be narrowly construed. *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 301, 996 P.2d 582 (2000). Under the MWA, an employee “includes any individual permitted to work by an employer. This is a broad definition.” *Anfinson*, 174 Wn.2d at 867. The

³ Both the Court of Appeals and King County postulate that if a remedy were implied, the appropriate remedy would be to prohibit economic hardship excusals rather than to increase juror pay. But this remedy adds insult to injury and would likely increase the already dismal response rate of jurors for service. This remedy also fails the *Bennett* test and the stated purpose of the legislature to “minimize the burden on the prospective jurors, their families...” RCW 2.36.080(2).

“economic-dependence” test is used to determine whether someone is an employee under the MWA:

the relevant inquiry is “whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself.” ... This articulation is particularly helpful because the inclusion of the phrase “in business for himself” clarifies the meaning of the otherwise-vague term “economically dependent.”

Id. at 871 (internal cites omitted).

Under Washington’s MWA, which must be construed liberally as a remedial wage statute, King County jurors should be deemed employees. Jurors are not “in business for [themselves]” when involuntarily serving on a jury. Jurors must report at specified times to specified places, they must take breaks when allowed, and they exert no control over the terms or conditions of their service. King County argues that jurors do not voluntarily serve and therefore cannot be employees. Answer at 14. But just as involuntary service can be employment under the IIA, *Bolin*, 114 Wn.2d at 72-73, it can be employment under the MWA.

The Court of Appeals listed the 13 non-exclusive factors for determining whether an employment relationship exists under the MWA’s “economic dependence” test. Slip. Op. at 10, n.6. The Court of Appeals did not dispute that the balance of factors supports the existence of an employment relationship between King County and its jurors while they

are serving. Rather, the Court of Appeals' primary reason for why jurors are not employees under the MWA is not a legal argument at all but a semantic one: that jury service is a "civic duty" and not a job. Slip. Op. at 11. That this argument has some traction in other states (*see* Answer at 15, citing non-Washington authorities) is of little relevance here. As this Court instructed in *Bolin*, "[t]his court must interpret Washington's statute, not those of other states." 114 Wn.2d at 75. Furthermore, as this Court has repeatedly recognized, Washington has "a long and proud history of being a pioneer in the protection of employee rights." *Hill v. Xerox Bus. Servs., LLC*, 191 Wn.2d 751, 760, 426 P.3d 703 (2018); *Carranza v. Dovex Fruit Co.*, 190 Wn.2d 612, 625, 416 P. 3d 1205 (2018); *Bostain*, 159 Wn.2d at 712; *Hisle v. Todd Pac. Shipyards*, 151 Wn.2d 853, 861, 93 P.3d 108 (2004); *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000).

Under Washington's MWA, which must be construed liberally as a remedial wage statute, King County jurors should be deemed employees. They satisfy the economic-dependence test and are not excluded from the MWA. RCW 49.46.010(3). Each of the bases for why jurors are employees under the IIA as set out in *Bolin v. Kitsap Cty.*, 114 Wn.2d 70, 785 P.2d 805 (1990), applies with equal force to the MWA and the Court of Appeals' decision holding otherwise conflicts with *Bolin*.

IV. CONCLUSION

In RCW 2.36.080(3), the legislature “enacted a remedial statute granting rights to an identifiable class” of jurors of lower economic status. *Bennett*, 113 Wn.2d at 919. “Without an implicit creation of a remedy, the statute is meaningless.” *Id.* Jury service is a central tenet of our democracy and a crucial part of our citizen’s interactions with and participation in their government. This Court has an opportunity and an obligation to ensure that the right and duty of jury service is available to all and that, as required by RCW 2.36.080(3), no juror is excluded based on economic class.

Respectfully submitted this 27th day of September, 2019.

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