

FILED
SUPREME COURT
STATE OF WASHINGTON
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BY SUSAN L. CARLSON
CLERK

No. 97201-0

SUPREME COURT
OF THE STATE OF WASHINGTON

JEOUNG LEE and SHERRI MCFARLAND on their own behalf and on
behalf of all persons similarly situated,

Respondents,

v.

EVERGREEN HOSPITAL MEDICAL CENTER a/k/a KING COUNTY
PUBLIC HOSPITAL DISTRICT #2,

Appellant

King County Superior Court No. 16-2-27488-9 SEA,
the Honorable Catherine Shaffer presiding

—

Court of Appeals, Division I, No. 77694-1-I

RESPONSE OF APPELLANT
KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 2,
D/B/A EVERGREENHEALTH MEDICAL CENTER TO *AMICI*
CURIAE WASHINGTON STATE NURSES ASSOCIATION AND
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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I. INTRODUCTION

Amici Washington State Nurses Association (“WSNA”) and Washington Employment Lawyers Association (“WELA”) fundamentally misconstrue the narrow question before the Court. As a result, their briefs tend to muddy the waters and mislead, not aid the Court. Both *amici* assiduously avoid addressing the role of practice under the WSNA – Hospital District collective bargaining agreement (“CBA”).

The Washington Employment Lawyers Association brief leaves unacknowledged the basic employment law doctrine that *practice* under a CBA is part of its terms. “Practice” under the CBA appears not once in its brief.

WSNA gives passing mention to the doctrine but ignores the specific, decades-long *practice* under its CBA with the District and its officers’ and members’ testimony regarding the single meal period under the CBA. And, ignore it must. Otherwise, WSNA’s suggestion that the CBA’s express term providing one meal period *really* means two meal periods – one unpaid, the other paid – would be more than merely misleading.¹

¹ The Appendix includes (1) excerpts from documents in a prior case in which WSNA was a party, including the deposition of its Assistant Executive Director of Labor, Christine Himmelbach, acknowledging that the District’s nurses get their meal breaks, (2) relevant portions of nurse

Both *amici* extensively discuss unpaid “missed” rest and meal breaks. WELA Br., *passim*; WSNA Br., *passim*. The District uses a simple, push-button system for nurses to report and be paid for missed breaks. More importantly, however, the District does not seek to arbitrate claims for “missed” rest or meal breaks, only the late-developed claim about the timing of the CBA’s single meal period and whether the CBA varies from the general regulation that would require two. The District was prepared to try the missed rest and meal break claims. *Amici’s* extensive discussion of claims not before the Court muddies the issue instead of clarifying it.

A represented employee must first use the CBA’s grievance procedures before recourse to the courts is permitted. Plaintiffs never even tried to use the CBA’s grievance and arbitration provisions. This Court should direct them to do so and uphold Washington’s strong policy in favor of arbitrating public employment disputes.

declarations and deposition confirming that a single meal under the CBA is the long-standing practice, and (3) motion for partial summary judgment and the trial court’s order that the CBA lawfully provided for a single meal period.

II. DISCUSSION

A. By both its express terms and long-standing practice, the single meal period under the District’s CBA negotiated with *amicus curiae* WSNA varies from the general regulation.

WAC 296-128-092 requires two meal periods for 12-hour shifts.

The CBA provides only one. CP 93. In prior litigation in which WSNA intervened, the trial court granted summary judgment to the District on precisely the question whether the single meal period violated state wage and hour laws. “[P]laintiffs’ claim that meal periods outside the fifth hour for nurses working twelve hour shifts violate the law is dismissed.” CP 929-31; App. 35-App. 37. WSNA is well aware of the historical practice under the CBA and construction of the provision. App. 05, App. 11, App. 16, App. 20, App. 23, App. 26, App. 31.

RCW 49.12.187 authorizes public employers and public employees (and their exclusive bargaining representatives) to enter into agreements, including CBAs, that specifically vary from the regulations. WSNA seeks to add language to both the statute and the CBA.

The statute does not include “waiver” language that WSNA asks the Court to impose – there is no requirement under RCW 49.12.187 for a “clear and unmistakable” waiver of the meal break requirements under WAC 296-

128-092. Under the statute, the CBA terms need only “vary” from the requirements. As noted in WSNA’s brief, “vary” is defined as

1. To change in some usu. small way; to make somewhat different <by editing the contract, he varied its standard terms>. 2. To cause to alter; to transmute <to vary one's routines>. 3. To be altered in some way; to become different <stock prices vary from moment to moment>. 4. (Of things fundamentally similar) to differ in details; to be subtly dissimilar <the facts vary with each witness’s memory>. . . .

BLACK’S LAW DICTIONARY, *Vary* (11th ed. 2019). Under this standard and the impossibility of a single meal to comply, the meal break provision in the CBA varies from the regulation.

WSNA seeks to avoid this result by asking the Court to add language to the CBA, suggesting various additional provisions that do not appear in the CBA: “ ‘an unpaid meal period’ for each five hours of work (e.g., 2 unpaid meal periods), . . . ‘an unpaid meal period’ and a second, paid, on duty meal period, or (with WSNA’s consent) . . . allowing nurses to individually waive their right to a second meal period.” WSNA Br. at 12.

B. The practice under a CBA is part of its terms, as is the broader practice of the industry.

The flaw in WSNA’s argument is that it ignores decades of practice under the CBA that contradicts its newly-fashioned interpretation.² The

² CP 93 (WSNA 2009-2012 CBA), CP 133 (WSNA 2012-2015 CBA), CP 175 (WSNA 2015-2018 CBA).

parties' practice, unaltered by numerous re-negotiations of the CBA, is part of the terms of the CBA.

It calls into being a new common law – the common law of a particular industry or of a particular plant. In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements.

Transp.-Comm'n Emps. Union v. Union Pac. R.R., 385 U.S. 157, 160-61 (1966) (citations and internal quotations omitted). The brief of *amicus curiae* Association of Washington Public Hospital Districts points out that the single meal period is part of “the practice, usage and custom” among public hospital districts across Washington. Nurses prefer a single unpaid meal period because a second meal period would extend the length of their workday from 12.5 hours to 13 hours (a 12-hour shift plus two unpaid meals). AWPHD Br. at 5-8.

The rule is applied at all levels, from arbitration boards to the U.S. Supreme Court. The terms of a CBA include the practices under it:

We find no indication in the record that the Board ignored ***the terms of the collective bargaining agreement*** – as ***derived both from its express provisions and from the customary practices of the industry*** – and dispensed its “own brand of industrial justice.”

Rossi v. Trans World Airlines, 507 F.2d 404, 405 (9th Cir. 1974) (*quoting United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593,

597, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960)) (emphasis added) (arbitration board appropriately considered, not disregarded, CBA and customary practices). Interpretation of a CBA requires consideration of “the contract language, the meanings suggested by counsel, and the extrinsic evidence” such as “the structure of the contract, the bargaining history, *and the conduct of the parties* that reflects their understanding of the contract’s meaning.” *Teamsters Indus. Emps. Welfare Fund v. Rolls-Royce Motor Cars*, 989 F.2d 132, 135 (3d Cir. 1993) (emphasis added).

C. The decades-old practice under the District’s CBA with WSNA is for a single, unpaid meal period – a specific variance from the regulation – to which WSNA has acquiesced.

Both WELA and WSNA cite to a portion of this Court’s decision in *Pasco Police Officers’ Ass’n v. City of Pasco*, 132 Wn.2d 450, 462, 938 P.2d 827 (1997),³ but not the language immediately following:

A waiver can be found by specific action, such as agreeing to particular contract language, . . . or by inaction, such as failing to raise timely objection to an act or proposal.

Courts will not infer a waiver unless it is clear that the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them.

³ *Pasco* addresses a waiver of the statutory right to collectively bargain. Despite WSNA’s quotation of a portion of RCW 49.12.187, the Court did *not* address that statute (or similar statute allowing for a variance from statutory rights), rendering WSNA’s citation to *Pasco* for the proposition misleading at best.

Id. (quoting *N.L.R.B. v. New York Tel. Co.*, 930 F.2d 1009, 1011 (2d Cir. 1991)) (internal cite and quotation marks omitted) (emphasis added).

WSNA, until its recent *amicus* brief, has never raised, suggested or hinted at the CBA interpretation it now proffers. WSNA's union representative, its bargaining teams and unit officers at the District were "very strong." Appendix 04. WSNA took action on "missed" breaks in its 2010 lawsuit against the District because "the evidence was there." *Id.* The evidence of the CBA's single meal period was also there and WSNA has long concurred in the practice. WSNA understood the CBA provided a single meal period. As WSNA's Assistant Executive Director of Labor testified, "Most nurses get their meal breaks." App. 03, App. 05.

Testimony from WSNA members in the 2010 cases confirms the single meal period practice. App. 10, App. 11, App. 28, App. 16, App. 20,⁴ App. 23, App. 26. While some testified they were always paid, and others

4

This was a twelve-hour shift during which I was supposed to take a 30-minute lunch or meal break.

* * *

During my time at Evergreen Hospital, I was able to take a single thirty-minute meal break approximately 60-70% of the time during my twelve hour shift. I never received two 30-minute meal breaks during a single shift.

(Emphasis in original)

asserted they went unpaid for a missed “meal period,” *none* suggested that they were entitled to the second, on-duty meal that WSNA avers. *Compare, e.g., App. 26 with App. 16 & App. 17.*

In addition to its 2010 lawsuit against the District for alleged missed and unpaid rest breaks, WSNA intervened in the other 2010 lawsuit against the District where the timing of the single meal period under the identically-worded CBA was at issue. WSNA raised no objection in response to the District’s motion for partial summary judgment, when the District asserted that the plaintiffs both “worked 12-hour shifts and were entitled to one meal period, but not necessarily within the first five hours of their shifts.” App. 31. It suggested no contrary interpretation. Washington applies Section 201(2) of the Restatement (Second) of Contracts⁵ in construing disputed contract terms:

Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made (a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party

WSNA has long been aware of the construction ascribed to the single meal period by the District. WSNA is bound by the contract language and its actions and inactions over the many years of implementation.

⁵ *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990).

This Court has been called upon previously to refer to practice under public employer CBAs and adopted the common-sense construction of both language and practice. In *Champagne v. Thurston County*, 163 Wn.2d 69, 178 P.3d 936 (2008), the County’s practice was to pay overtime wages “at the end of the month subsequent to the month in which it is earned,” *id.* at 73-74, which was memorialized in a collective bargaining agreement.⁶ The practice violated a regulation that prohibited such delayed payment of overtime wages if earned more than seven days before the end of the current pay period. *Id.* at 77. The regulation, however, allowed its rules to “be superseded by a [public employer] collective bargaining agreement . . . if the terms of, or recognized custom and practice under, the collective bargaining agreement” vary from the rules. *Id.* at 78 & n.7.

Although the CBA in *Champagne* did not specifically negate the wage payment timing requirements under the regulation (within seven days versus the end of the pay period), the Court still concluded that the CBA, as interpreted by its language and the parties’ “regular practice,” varied from the regulation. *Id.* at 82. WSNA’s position is directly contrary to the

⁶ “It shall normally be the practice to pay overtime in money during the pay period following the pay period in which overtime is worked.” *Id.* at 74, n.3.

Court's approach in *Champagne*, the longstanding practice, and any fair reading of the CBA language.

WSNA's and WELA's *amicus* briefs are fundamentally flawed because they are premised on the assumption that the claim for *late* meal periods is a statutory claim – it is not. Instead, it is a contractual claim because the CBA's single meal period is a contractual variance from WAC 296-128-092.

D. WSNA is the exclusive bargaining representative for its represented employees. The nurses are bound by the terms of their *Collective Bargaining Agreement*, including the obligation to follow its grievance and arbitration provisions.

The CBA recognizes WSNA as “the sole and exclusive bargaining representative for all regularly scheduled full-time, regularly scheduled part-time and per diem registered nurses in patient care at the Hospital.” CP 82. Under the CBA, “[i]f a grievance arises, it *shall be* submitted to the following grievance procedure.” CP 106 (emphasis added).

WSNA misreads the CBA, asserting that its “grievance procedure allows nurses to file grievances if they believe Evergreen has violated their contractual rights.” WSNA Br. at 14. The CBA provides the *only* procedure for the nurses (and WSNA) to resolve questions regarding an alleged breach of the CBA or interpretation of the CBA. “Shall” is mandatory. “[W]here a collective bargaining agreement establishes

grievance and arbitration procedures for the redress of employee grievances, an employee must exhaust those procedures before resorting to judicial remedies.” *Lew v. Seattle Sch. Dist. 1*, 47 Wn. App. 575, 577, 736 P.2d 690 (1987). WELA devotes its discussion to the purely statutory “missed” meal and rest break claims that are not before this Court.

“[W]here a collective bargaining agreement has provisions for grievances, ‘unless the contract provides otherwise, there can be no doubt that the employee must afford the Union the opportunity to act on his behalf.’ ” *Minter v. Pierce Transit*, 68 Wn. App. 528, 531, 843 P.2d 1128 (1993) (quoting *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653, 85 S. Ct. 614, 13 L. Ed. 2d 580 (1965)). Both *amici* ignore this rule of law. Here, no nurse has ever afforded WSNA the opportunity to act. WSNA has never pursued the issue on its own. App. 06.⁷ WSNA’s new position, expressed in its *amicus* brief, that the long-standing practice of a single meal period for 12-hour shifts contradicts the CBA’s language, as well as WSNA’s suggested competing interpretations, provide compelling evidence that the matter is ripe for grievance and arbitration.

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Q. . . . To your knowledge, have there been any grievances under the collective bargaining agreement regarding rest of meal breaks since 2007?

A. Not to my knowledge, no.

Under RCW 41.56.122(2), a CBA involving public employees may “[p]rovide for binding arbitration of a labor dispute arising from the application or the interpretation of the matters contained in a collective bargaining agreement.” The Public Employees’ Collective Bargaining Act (“PECBA”), Chapter 41.56 RCW, prevails over conflicting statutes and regulations, and is “liberally construe[d] . . . to accomplish its purpose.” *Municipality of Metro. Seattle v. Pub. Emp’t Relations Comm’n*, 118 Wn.2d 621, 633, 826 P.2d 158 (1992); RCW 41.56.905. PECBA’s purpose “is to promote the continued improvement of the relationship between public employers and their employees by providing a uniform basis for implementing the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers.” RCW 41.56.010. WSNA is the labor organization representing Emergency Department nurses. This action, and WSNA’s new position, undercuts its role as “the sole and exclusive bargaining representative” and the strong public policy advanced by PECBA.

WSNA’s new position and plaintiffs’ claim regarding “late” meal periods would affect hundreds of non-party nurses, who are also not class members (who work only in the Emergency Department). WSNA’s new interpretation would affect every nurse currently employed at the hospital

and change the terms and conditions of their employment outside the PECBA and contract negotiation process.

III. CONCLUSION

The *amici* briefs of WSNA and WELA are irrelevant and unhelpful, addressing issues that are not before the Court – missed breaks and statutory claims. The express terms of the CBA – a single meal during 12-hour shifts as historically administered and mandatory grievance procedures for disaffected members of the bargaining unit – should be respected. The decisions below should be reversed and an order compelling arbitration of “late meal” claims should be entered.

Respectfully submitted this 31st day of January, 2020.

/s/ John J. White

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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on January 31, 2020, I caused service of the foregoing to the following counsel of record:

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Dated: January 31, 2020

/s/ Susannah Hanley
Susannah Hanley, Paralegal
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APPENDIX

SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF KING

DEBRA PUGH, AARON BOWMAN, and)
FLOANN BAUTISTA on their own behalf)
and on behalf of all persons similarly situated,)
)
Plaintiffs,)
v.) NO.
) 10-2-
EVERGREEN HOSPITAL MEDICAL) 33125-
CENTER a/k/a KING COUNT PUBLIC) 5 SEA
HOSPITAL DISTRICT #2,)
)
Defendant.)
v.)
)
WASHINGTON STATE NURSES)
ASSOCIATION "WSNA,")
)
Intervenor-Defendant)

30(B)(6) DEPOSITION UPON ORAL EXAMINATION
OF
CHRISTINE HIMMELSBACH

Taken at 1000 Second Avenue, Suite 3670
Seattle, Washington

DATE TAKEN: December 20, 2016
REPORTED BY: KATHLEEN HAMILTON, RPR, CRR, CCR 1917

1 SEATTLE, WASHINGTON; DECEMBER 20, 2016

2 1:44 p.m.

3 -o0o-

4

5 (Exhibit No. 42 marked.)

6

7 CHRISTINE HIMMELSBACH witness herein, having been
8 first duly sworn on oath,
9 was examined and testified
10 as follows:

11

12 E X A M I N A T I O N

13 BY MS. HEIDELBERG:

14 Q. Hello.

15 A. Hello.

16 Q. I'm Cindy Heidelberg, counsel for the
17 plaintiffs.

18 Can you state your name and your address for the
19 record.

20 A. Christine Himmelsbach. 4701 Smithers Avenue
21 South, Renton, Washington 98055.

22 Q. Perfect.

23 MS. HEIDELBERG: And do you need the last
24 name spelling or you've got it from the caption?

25 Perfect. Okay.

1 A. No.

2 Q. Okay. Did you do anything else to prepare for
3 today?

4 A. No.

5 Q. So we'll be focusing primarily on the surveys,
6 but since it's been five years since we were here last,
7 I'm just going to do a little bit of background and then
8 we will get back to the surveys.

9 So what's your position?

10 A. Assistant executive director of labor for the
11 Washington State Nurses Association.

12 Q. And how long have you had that role?

13 A. Since 2009.

14 Q. And where were you before 2009?

15 A. 2007 to 2009 I was at the Washington State
16 Nurses Association.

17 Q. In a different role?

18 A. Yes, as a nurse representative.

19 Q. How many nurses approximately does WSNA
20 represent?

21 A. Approximately 17,000.

22 Q. And approximately how many hospitals does this
23 include?

24 A. 48. Well, let me clarify. 48 bargaining units.
25 Hospitals, I would say approximately 45.

1 THE WITNESS: I would -- I don't appreciate
2 it being called a guinea pig. It's -- I believe that it
3 was definitely one of the areas where we were hearing
4 about issues. We in particular had a very strong nurse
5 rep in that facility. We had strong nurses that were on
6 the bargaining teams and as local unit officers that
7 brought the issue forward to us. And we saw reflected
8 in the surveys as well as our conversations that nurses
9 were willing to stand up and, you know, give testimony
10 and fight for appropriate staffing. And we consider a
11 whole host of, you know, factors that go into deciding
12 whether we're going to take action.

13 And it wasn't that Evergreen was a guinea
14 pig. It was that the evidence was there. We knew we
15 needed to do something, and this was one tool that we
16 used in making that assessment and moving forward.

17 BY MS. HEIDELBERG:

18 Q. What led WSNA, after that lawsuit, to begin
19 focusing more on uninterrupted breaks?

20 MR. IGLITZIN: I'm going to object to the
21 outside the scope of the 30(b)(6) notice.

22 THE WITNESS: So one of the factors were
23 reports that we were beginning to hear that management
24 had, in some cases, actually started focusing on the
25 fact that intermittent breaks were appropriate for

1 Q. So you don't know whether -- it's not your
2 testimony that nurses feel fear of retaliation for
3 reporting missed meal breaks?

4 MR. HANSEN: Object to form.

5 THE WITNESS: It would be my assessment that
6 that's true.

7 BY MS. HEIDELBERG:

8 Q. That they may fear retaliation for reporting
9 missed meal periods?

10 A. No, it would be my assumption that they do not
11 fear reporting missed meal breaks as much as they fear
12 reporting missed rest breaks.

13 Q. And why is that?

14 A. It's the culture. Most nurses get their meal
15 breaks. Most nurses miss their rest breaks.

16 Q. Okay.

17 A. It's much easier to have relief, appropriate
18 relief for a meal break versus a rest break.

19 Q. Uh-huh. Okay. I'm going to ask the same
20 question I asked about the 2009 survey. So I note that
21 I guess first, this survey was anonymous; correct?

22 A. That's correct.

23 Q. And I note that it's broken up by department or,
24 rather, we know how many nurses from each department
25 responded, but we don't know which answers align with

1 Q. Okay. To your knowledge, have there been any
2 grievances under the collective bargaining agreement
3 regarding rest or meal breaks since 2007?

4 A. Not to my knowledge, no.

5 Q. Okay. You testified earlier about some
6 hospitals making policies about intermittent breaks, and
7 if you go to the bathroom or get a drink, that that's an
8 intermittent break. Were you referring specifically to
9 Evergreen as part of your testimony?

10 A. No, I was not.

11 Q. Okay. Okay. I have no further questions.

12 MR. HANSEN: Counsel?

13 MR. IGLITZIN: I did have one question. Can
14 you go back to that question that I asked you to make a
15 mark on with some ease?

16 THE REPORTER: Sure.

17 MS. HEIDELBERG: I do have a couple
18 follow-ups to your follow-up when we're done.

19 MR. IGLITZIN: Okay.

20 (Record was read back.)

21

22 E X A M I N A T I O N

23 BY MR. IGLITZIN:

24 Q. When I heard you answer that question, what I
25 heard you say was that a problem had come to your

C E R T I F I C A T E

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STATE OF WASHINGTON
COUNTY OF KING

I, Kathleen Hamilton, a Certified Shorthand Reporter and Notary Public in and for the State of Washington, do hereby certify that the foregoing transcript of the deposition of CHRISTINE HIMMELSBACH, having been duly sworn, on DECEMBER 20, 2016, is true and accurate to the best of my knowledge, skill and ability.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 29TH day of DECEMBER, 2016.


KATHLEEN HAMILTON, RPR, CRR, CCR 

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

DEBRA PUGH and AARON BOWMAN on their own)
behalf and on behalf of all persons)
similarly situated,)

Plaintiffs,)

vs.)

Case No.
10-2-33125-5 SEA

EVERGREEN HOSPITAL MEDICAL CENTER a/k/a)
KING COUNTY PUBLIC HOSPITAL DISTRICT #2,)

Defendant.)

DEPOSITION UPON ORAL EXAMINATION

OF

JERUSCHIA HORTON

Taken at 1000 Second Avenue, Suite 3670

Seattle, Washington

DATE TAKEN: January 16, 2015

REPORTED BY: KATHLEEN HAMILTON, RPR, CRR, CCR 1917

BUELL REALTIME REPORTING, LLC

App. 08

SEATTLE 206.287.9066 OLYMPIA 360.534.9066 SPOKANE 509.624.3261 NATIONAL 800.846.6989

1 SEATTLE, WASHINGTON; JANUARY 16, 2015

2 1:04 p.m.

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4
5 (Exhibit Nos. 1-3 marked.)
6

7 JERUSCHIA HORTON witness herein, having been
8 first duly sworn on oath,
9 was examined and testified
10 as follows:
11

12 E X A M I N A T I O N

13 BY MS. HEIDELBERG:

14 Q. Okay. Can you please state your name for the record.

15 A. Jeruschia Horton.

16 Q. Can you spell that?

17 A. J-e-r-u-s-c-h-i-a. The last name is H-o-r-t-o-n.

18 Q. Great. And what is your address? I know you just
19 wrote it down.

20 A. 4605 152nd Place Southeast.

21 Q. Okay.

22 A. Bothell, 98012.

23 Q. Perfect. And are you aware of what this case is
24 about, generally?

25 A. Generally I know that it's about rest breaks or meal

1 when needed, if we're able to do that. And then we also make
2 the staffing for the oncoming shift, so the night shift in our
3 case.

4 Q. Can you explain what low census is for me?

5 A. When there's less patients in the hospital or in our
6 unit specifically.

7 Q. Great. And do you always work the day shift
8 currently?

9 A. Currently, yes.

10 Q. Okay. I thought, in your declaration, that you at
11 some point have worked the night shift.

12 A. Correct.

13 Q. When -- when was the last time you worked the night
14 shift? Let's see. If you look at paragraph 4.

15 A. It does not say in paragraph 4. And I don't remember
16 approximately when I changed to the day shift. It was more
17 than two years ago.

18 Q. Okay. So from 2009 until you -- sorry. Let me
19 rephrase. Strike that.

20 Did you always work the night shift from 2009 until
21 you switched to the day shift or did you at some point do both
22 types of shifts?

23 A. No, I did not do both types of shifts at Evergreen.

24 Q. Okay. Great. Okay. Let's see. So for your 12-hour
25 shifts that you work two of those a week, how many rest breaks

1 are you entitled to on a 12-hour shift?

2 A. Rest breaks or meal breaks?

3 Q. Rest breaks.

4 A. Three 15-minute breaks, one for every four hours
5 worked.

6 Q. And how many meal breaks are you entitled to in a
7 12-hour shift?

8 A. One 30-minute meal break.

9 Q. So how does CCU provide coverage for nurses to take
10 rest and meal breaks?

11 A. Staff nurses or charge nurses?

12 Q. We'll go through both. Staff nurses?

13 A. We primarily use the buddy system, so you pair up with
14 a nurse who is working in close proximity with you and cover
15 each other. We also have other resources. We can ask our
16 manager to come cover us. We can ask the charge nurse to come
17 cover us. We can occasionally ask the stat nurse to come cover
18 us. So we have a lot of options.

19 Q. Okay. Can you explain what a stat nurse is?

20 A. They are a nurse who is available, it's a
21 critically -- it's a critical-care-skilled level nurse or
22 sometimes an ER-skill-level nurse who is available to the
23 entire hospital via phone, and they respond to rapid responses,
24 which are -- the best way to explain those is like a pre-code
25 situation.

1 A. I help. I also come up with other solutions. For
2 example, I recently had a nurse who felt like she couldn't go
3 because she had three patients and another nurse had two. So I
4 explained to her that she could pass one of her patients off to
5 this nurse and two off to another nurse, And that way she was
6 able to provide coverage for all her patients and still get her
7 meal break.

8 Q. Okay. If you can, can you estimate how often your
9 staff nurses miss their meal break?

10 A. I have no idea what the estimate of that would be.

11 Q. Okay.

12 A. I personally, when I am charge nurse, ask the nurses
13 that, if they're starting to get -- have problems getting their
14 meal breaks, to call me. And so I can't remember the last time
15 a nurse came up to me and said she missed her meal break.

16 Q. Okay.

17 A. He or she.

18 Q. Okay. And to your knowledge, is that similar for
19 other charge nurses?

20 A. I have no idea.

21 Q. Okay.

22 A. I'm taking care of my own patients when others are
23 doing that role.

24 Q. So as a charge nurse, how are charge nurses covered to
25 take lunch breaks?

1 have had enough downtime or enough other rest breaks throughout
2 the shift to be able to feel like I could respond to an e-mail,
3 call someone I needed to, quick text my husband and check on
4 the children, work on my schedule, check personal e-mail, go to
5 the bathroom, get drinks, take, you know, segments of breaks
6 where I could get something to eat, for me if those times were
7 enough to add up to where I felt like I had enough rest
8 throughout the shift, then I was fine with not having gotten a
9 very specific 30-minute time in the break room doing my break.

10 There is also occasions where we do have downtime on
11 the unit and so again, that's also a time where you're resting.
12 So it's my own personal choice that if I've had enough of those
13 down times throughout the shift to get done what I need to do
14 for my own personal self and my own personal well-being, then I
15 am happy with that.

16 Q. Do you have any idea if this is a common practice with
17 other nurses --

18 A. I have no idea.

19 Q. -- in your unit? Okay.

20 MS. BUNDY: Just a reminder to let her finish her
21 question before you answer.

22 MS. HEIDELBERG: Thank you.

23 BY MS. HEIDELBERG:

24 Q. Okay. So when you get a meal break, how often is it
25 within five hours of the beginning of your shift?

1 A. Five hours would put us at 1:00 p.m.

2 Q. Yes.

3 A. I'm just calculating. It's the exception to the rule
4 that I wouldn't take a meal break before that.

5 Q. Okay. Can you estimate how often this exception would
6 happen?

7 A. No. There's no way to estimate that.

8 Q. Okay.

9 A. We work with people, not machines, so it's very
10 variable.

11 Q. So on those occasions that the meal break has not been
12 within five hours of the beginning of your shift --

13 A. Uh-huh.

14 Q. -- are you instructed to enter "no lunch" into
15 Laborworkx?

16 A. Did I get a meal break any time the rest of my shift?

17 Q. Yes.

18 A. I don't know what the rule is, but for my personal
19 self, if I got a meal break, I would not punch "missed lunch,"
20 because I received my meal break.

21 Q. Okay.

22 A. That would seem like lying to me.

23 Q. Okay. Do you know if there's anyplace in Laborworkx
24 or in the accompanying log to note if the meal break was after
25 five hours from the beginning of your shift?

Honorable Carol A. Schapira

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

DEBRA PUGH and AARON BOWMAN on
their own behalf and on behalf of all
persons similarly situated,

Plaintiffs,

v.

EVERGREEN HOSPITAL MEDICAL
CENTER a/k/a KING COUNTY PUBLIC
HOSPITAL DISTRICT #2,

Defendant.

NO. 10-2-33125-5 SEA

DECLARATION OF AARON BOWMAN,
R.N.

I, AARON BOWMAN, R.N., declare as follows:

1. I am over the age of 18, have personal knowledge of the matters set forth in
this declaration, and am competent to testify.

2. I am one of the named Plaintiffs in this case.

3. I worked at Evergreen Hospital as a registered nurse from September 2007
to December 2010 in the Emergency Department.

4. Generally I worked three to four shifts per week. With few exceptions, I
worked a 12-hour daytime shift.

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7. During the three years of my employment, I often did not receive a thirty-minute meal break during my twelve hour shifts.

8. I worked between six and eight shifts per pay period and I estimate I missed two or three meal breaks per pay period.

9. When I was able to take a thirty-minute meal break, it was very rarely in the first five hours of my 12-hour shift.

10. In fact, I often worked up to 8 hours without a meal break.

11. There was no way to record in Kronos or Laborworkx, or on any other form, if my meal break was not in the first five hours of my 12-hour shift.

15. During the three years of my employment, I can only remember a handful of shifts during which I got a meal break *and* all three of my rest breaks.

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26. When my meal break was interrupted, I never got to take the rest of my break later in the day.

27. When my meal break was interrupted, I did not get paid for the meal break.

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I declare under penalty of perjury of laws of the State of Washington that the foregoing is true and correct.

DATED this 26 day of January, 2015

By: Aaron Bowman RN
Aaron Bowman, R.N.

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SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

DEBRA PUGH and AARON BOWMAN on
their own behalf and on behalf of all
persons similarly situated,

Plaintiffs,

v.

EVERGREEN HOSPITAL MEDICAL
CENTER a/k/a KING COUNTY PUBLIC
HOSPITAL DISTRICT #2,

Defendant.

NO. 10-2-33125-5 SEA
DECLARATION OF PING NIP

I, PING NIP declare as follows:

1. I am over the age of 18, have personal knowledge of the matters set forth in this declaration, and am competent to testify.
2. I am a registered nurse formerly employed at Evergreen Hospital.
3. I worked at Evergreen hospital as a registered nurse from approximately May 2002 to August 2010, when I was laid off.

DECLARATION OF PING NIP

BRESKIN JOHNSON TOWNSEND PLLC
1111 Third Avenue, Suite 2230

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5. My shifts at Evergreen Hospital were from 7:00 p.m. to 7:30 a.m. the next morning. This was a twelve-hour shift during which I was supposed to take a 30-minute lunch or meal break.

9. During my time at Evergreen Hospital, I was able to take a single thirty-minute meal break approximately 60-70% of the time during my twelve hour shift. I never received two 30-minute meal breaks during a single shift.

10. When I was able to take a thirty-minute meal break, it was almost always after approximately eight hours into my twelve-hour shift.

DECLARATION OF PING NIP

BRESKIN, JOHNSON, TOWNSEND PLLC
1732 Third Avenue, Suite 2720

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

DEBRA PUGH and AARON BOWMAN on
their own behalf and on behalf of all
persons similarly situated,

Plaintiffs,

v.

EVERGREEN HOSPITAL MEDICAL
CENTER a/k/a KING COUNTY PUBLIC
HOSPITAL DISTRICT #2,

Defendant.

NO. 10-2-33125-5 SEA

DECLARATION OF
JESSYAMMA ADIMATHRA

I, JESSYAMMA ADIMATHRA declare as follows:

1. I am over the age of 18, have personal knowledge of the matters set forth in this declaration, and am competent to testify.
2. I am a registered nurse formerly employed at Evergreen Hospital.
3. I worked at Evergreen hospital as a registered nurse from approximately March 2008 to September 2009.
4. I worked in the Critical Care Unit at Evergreen Hospital.
5. In the Critical Care Unit, I worked the night shift, from 7:00 p.m. to 7:30 a.m. These were twelve-hour shifts during which I was supposed to take a 30-minute lunch or meal break.

DECLARATION OF JESSYAMMA ADIMATHRA

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7. During my time at Evergreen Hospital, I was able to take a thirty-minute meal break approximately 50% of the time during my twelve-hour shift. I never received two 30-minute meal breaks during a single shift.

9. I normally took my meal break about five hours into my shift.

DECLARATION OF JESSYAMMA ADIMATHRA

BRESKIN | JOHNSON | TOWNSEND ^{PLLC}
1111 Third Avenue, Suite 2230
Seattle, Washington 98101 Tel: 206-652-8660 App. 23

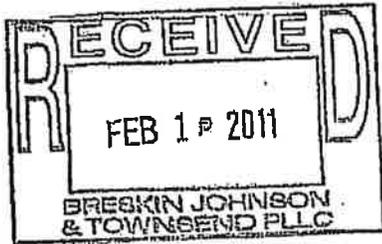
1 I declare under penalty of perjury of laws of the State of Washington that the foregoing
2 is true and correct.

3
4 DATED this 27th day of APRIL, 2011 at 1500.

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6 By: Jessyamma Adimathra
7 JESSYAMMA ADIMATHRA

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DECLARATION OF JESSYAMMA ADIMATHRA

BRESKIN | JOHNSON | TOWNSEND PLLC
1111 Third Avenue, Suite 2230
Seattle, Washington 98101 Tel: 206-652-8660



HONORABLE LAURA GENE MIDDAUGH

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

WASHINGTON STATE NURSES
ASSOCIATION,

Plaintiff,

NO. 10-2-32896-3

**DECLARATION OF LINDA
MORRILL STERRITT**

v.

KING COUNTY PUBLIC HOSPITAL
DISTRICT NO. 2 d/b/a EVERGREEN
HOSPITAL MEDICAL CENTER,

Defendant.

Linda Morrill Sterritt declares and states as follows:

1. I am employed as a registered nurse ("RN") at Evergreen Hospital Medical Center ("Evergreen") and make the following statements based on my personal knowledge.
2. My employment at Evergreen began in September 1997. I have been an RN since 1994. I work in the Emergency Room ("ER").
3. There are approximately 14 RNs working in the ER on my shift. I work evening shift, 2:00 p.m. to 2:30 a.m. My position is a .9 FTE.

Declaration of Linda Morrillsterritt - 1
Case No. 10-2-32896-3 SEA

LAW OFFICES OF
SCHEWEN CAMPBELL
DARNARD IGLITZIN & LAVITT LLP
18 WEST MEDICAL STREET SUITE 400
SEATTLE, WASHINGTON 98119-3971

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7. I almost always get my meal break and I get one 15-minute break about 25% of the time. If I take my first 15 minute break before lunch then I often do not get my lunch.

10. If I miss my meal break I let the charge nurse know and have not had a problem getting paid for my missed meal break.

13. I think that the settlement agreement between WSNA and Evergreen in this case is fair and that WSNA has fairly represented me and my coworkers.

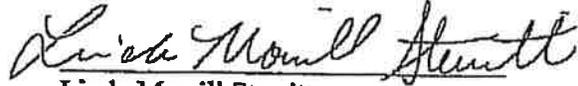
14. I think WSNA has done good job of keeping members of the bargaining unit up to date on this issue.

Declaration of Linda Morrillsterritt - 2
Case No. 10-2-32896-3 SEA

LAW OFFICES OF
SCHWEIN CAMPBELL
BARBARA IGLITZON & LAVITT LLP
18 WEST MICHIGAN STREET SUITE 400
SEATTLE, WASHINGTON 98119-3971

1 I declare under penalty of perjury under the laws of the State of Washington that the
2 foregoing statements are true and correct.

3
4 SIGNED at Kirkland Washington, this 17th day of February, 2011.

5 
6 Linda Morrill Sterritt

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Declaration of Linda Morrillsterritt - 3
Case No. 10-2-32896-3 SEA

LAW OFFICES OF
SCHWEIN CAMPBELL
BARNARD IGLITZIN & LAVITT LLP
18 WEST MERCER STREET SUITE 400
SEATTLE, WASHINGTON 98119-3971

Honorable Carol A. Schapira
Hearing Date: February 13, 2015
Hearing Time: 10:00 a.m.
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

DEBRA PUGH, AARON BOWMAN, and
FLOANN BAUTISTA, on their own behalf and
on behalf of all persons similarly situated,
Plaintiffs,

v.

EVERGREEN HOSPITAL MEDICAL CENTER
a/k/a KING COUNTY PUBLIC HOSPITAL
DISTRICT #2,

Defendant,

WASHINGTON STATE NURSES
ASSOCIATION,

Intervenor.

NO. 10-2-33125-5 SEA

DEFENDANT'S REPLY IN
SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiffs' complaint alleged they did not receive adequate meal periods from the District. Plaintiffs' personal calendars, their deposition testimony, the District's time records, and other evidence confirm that when plaintiffs missed a meal period and reported it on the easy-to-use Laborworkx system, they were paid – as the law requires. Only four disputed instances for Ms. Pugh and one for Mr. Bowman remain. In response to the District's motion, plaintiffs submit testimony about "rest breaks," missing a meal period and what they don't remember, but show no issue of material fact. The District is entitled to partial summary judgment. Plaintiffs' response is replete with unsupported allegations and statements of fact that are simply not true. *See* Hansen Supp. Decl., Ex. H.

II. AUTHORITY

A. The District had no duty to pay for unreported, unknown missed meal periods

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Plaintiffs offer no evidence that the District "knew or had constructive knowledge about . . . unrecorded meal breaks." Pls.' Resp. at 17.¹ Plaintiffs' declarations omit any testimony that they reported a missed meal period to their managers and went unpaid.² *White v. Baptist Mem'l Health Care*, 699 F.3d 869, 875-76 (6th Cir. 2012) is directly on point, notwithstanding plaintiffs' effort to blunt its reasoning.

Neither *Anfinson v. FedEx Ground Package Sys.*, 159 Wn. App. 35 (2010) nor *Pellino v. Brink's, Inc.*, 164 Wn. App. 668 (2011) hold that Washington law prohibits using a reasonable

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¹ Ms. Pugh and Mr. Bowman identically assert that "I know Evergreen Hospital was aware we were not receiving adequate meal and rest breaks." Pugh Decl., ¶ 27; Bowman Decl., ¶ 20. Even if true, such awareness is irrelevant. *White v. Baptist Mem'l Health Care*, 699 F.3d 869, 875-76 (6th Cir. 2012) ("the relevant knowledge is not 'I know that the employee was working,' but 'I know the employee was working and not reporting his time.'").

² The only exceptions were the four times that Ms. Pugh's and one time Mr. Bowman's use of the "no lunch" code were denied by their managers. Scholl Decl., Ex. F. For those occasions, there is an issue of fact whether Ms. Pugh and/or Mr. Bowman falsely reported a missed meal period. *See* RCW 9A.76.175.

1 method to record employee time and missed meal periods.³ In *UFCW v. Mut. Benefit Life Ins.*
2 *Co.*, 84 Wn. App. 47, 54 (1996), the company “directed [employees] to perform off-the-clock
3 work” and the court held “[i]t would be contradictory to require an employee” to report such
4 work in order to be paid. In contrast, here plaintiffs provide “no evidence . . . to support the
5 conclusion that the [District] encouraged or forced [them] to submit incorrect time sheets.” *Id.* at
6 55 (citing *Newton v. City of Henderson*, 47 F.3d 746, 751 (5th Cir. 1995)).⁴

7 Despite counsel’s arguments about onerous and intimidating procedures to report missed
8 meal periods, Pls.’ Resp. at 18-19, no plaintiff testifies that *she or he* found the District’s
9 procedures an impediment to reporting and being paid for missed meals.⁵ While Ms. Pugh asserts
10 that she did not report all of her missed meal periods out of fear that she “was putting [her] job
11 on the line,” Pugh Decl., ¶ 10, the asserted fear is not objectively reasonable – it contradicts her
12 prior testimony and her contemporaneous personal calendar. Hansen Decl., Ex. B at 90:16–91:6,
13 94:7–95:12; Exs. D & E; *People v. Koverman*, 38 P.3d 85, 89 (Colo. 2002) (“[O]rdinary job
14 pressures, including the possibility of discipline or termination for insubordination, do not
15 support an objectively reasonable fear of dismissal.”). Ms. Pugh’s own records unambiguously
16 show she regularly reported missed meals. A party may not create an issue of fact through a
17 declaration that contradicts other unambiguous evidence. *Robinson v. Avis Rent-A-Car Sys.*, 106
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19 _____
20 ³ *Anfinson* addressed whether FedEx drivers were employees or independent contractors under Washington law.
Pellino dealt with class certification for employees who were uniformly required to perform work during rest breaks
and meal periods and the employer’s obligation to provide rest breaks and meal periods.

21 ⁴ Plaintiffs rely on a non-precedential, unpublished district court decision from California, *Lillehagen v. Alorica,*
Inc., No. SACV-13-0092-DOC, 2014 WL 6989230 (C.D. Cal. Dec. 10, 2014). While flawed, *Lillehagen* merely
22 holds that an “employee’s failure to use the employer’s time reporting procedures or otherwise notify the employer
is not dispositive” proof of lack of employer knowledge. *Id.* at *19. Here, plaintiffs provide no evidence that the
23 District had knowledge that *they* were not reporting missed meal periods. Instead, the evidence shows that plaintiffs
regularly reported missed meal periods and got paid. Scholl Decl., Ex. I.

24 ⁵ Indeed, both Ms. Pugh and Mr. Bowman were paid for missed meals using the “no lunch” code when reporting a
missed meal on the OT Approval List and receiving charge nurse approval, when reporting a missed meal and not
25 receiving charge nurse approval, and when not reporting a missed meal. Hansen Supp. Decl., ¶¶ 2-9 & Exs. A & B.

1 Wn. App. 104, 121 (2001).

2 **B. The District's CBA permits delaying meal periods beyond the fifth work hour.**

3 Plaintiffs Pugh and Bowman assert that the District is not entitled to summary judgment on
4 their meal period claim because they "rarely" or not "often" took their meal periods within the
5 first five hours of their 12-hour shifts. They are wrong for two reasons. First, the meal and rest
6 periods under WAC 296-126-092 do not apply to "[p]ublic employers that have entered into
7 collective bargaining agreements . . . that specifically vary from or supersede, *in part or in total*,
8 the rules regarding meal and rest periods." WAC 296-126-130(8)(b) (emphasis added).
9 Evergreen is a public employer, and its RN collective bargaining agreements (CBA) authorize
10 12-hour shifts and provide "one (1) thirty (30) minute unpaid lunch period and three (3) fifteen
11 (15) minute . . . paid rest breaks." Messitt Decl. [Dkt. 232], Exs. H at 10, 30 & I at 10, 33. This
12 varies from WAC 296-126-092, which otherwise requires two unpaid meal periods: "No
13 employee shall be required to work more than five consecutive hours without a meal period."
14 Both Ms. Pugh and Mr. Bowman worked 12-hour shifts and were entitled to one meal period,
15 but not necessarily within the first five hours of their shifts.⁶

16 Plaintiffs are also wrong because "there is no affirmative duty on the employer to schedule
17 meal periods for a specific time. The lack of any scheduled meal period is not a violation of
18 WAC 296-126-092(1)." *White v Salvation Army*, 118 Wn. App. 272, 279, 75 P.3d 990 (2003).
19 Meal periods are different from rest breaks. Unlike rest breaks, they are unpaid – if employees
20 work through their meal period, they must be paid, but if the meal period is merely delayed, the
21 employees still receive an unpaid break as provided by regulation and have provided no
22

23
24 ⁶ Ms. Pugh is well aware of this variance as she was on the negotiating team for and signed the CBA. Messitt Decl.
25 [Dkt. 232], Ex. I at 28.

1 “additional labor” to the District. *Cf. WSNA v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 826
2 (2012). No case has ever held an employer liable when there is a mere delay in providing a meal
3 period. To the extent that Ms. Pugh’s and Mr. Bowman’s meal period claims are based on not
4 receiving meal periods within the first five hours of their shifts, the Court should grant summary
5 judgment to the District.

6 **C. The District compensated plaintiffs for “interrupted” meal periods that they reported.**

7 WAC 296-126-092(1) does not require uninterrupted meal periods. As plaintiffs
8 acknowledge, if a meal period is interrupted, and then resumed so the employee gets a total of 30
9 minutes, the employer is not required to pay. Pls.’ Resp. at 21.⁷ Plaintiffs’ claim is not, therefore,
10 based on “interrupted” meal periods, but shortened meal periods. If they did not receive a full 30
11 minutes for their meal periods, both the CBAs and District policy make clear that they were to be
12 paid: “Nurses required . . . to remain on duty during their meal period shall be compensated for
13 such time at the appropriate rate of pay.” Messitt Decl. [Dkt. 232], Exs. H & I at 12 (¶ 7.7). [I]f
14 an employee is required . . . to work during the meal period, such time shall be considered as
15 time worked for pay purposes. Scholl Decl., Ex. B. “[I]f [the RNs] were not able to get 30
16 consecutive minutes for a meal break they are to clock out ‘no break,’ and not clock out and
17 continue working off the clock.” Fitzgerald Decl. [Dkt. 266], Ex. A. Mr. Bowman understood
18 this, as his calendar reflects a 20 minute meal period on September 8, 2010, a day on which he
19 used the “no lunch” code to be paid for a missed meal. Hansen Decl., Exs. F & G; Scholl Decl.,
20

21 _____
22 ⁷ This is consistent with the *de minimis* rule under the federal Fair Labor Standards Act:

23 When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working
24 hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of
25 working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is
required to give up a substantial measure of his time and effort that compensable working time is involved.

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 692, 66 S. Ct. 1187, 1195, 90 L. Ed. 1515 (1946).

1 Ex. I.

2 Plaintiffs must show that the District had actual or constructive knowledge of uncompensated
3 work. *UFCW*, 84 Wn. App. at 52. Other than vague assertions, however, plaintiffs provide no
4 testimony that they advised the District – or anyone else – that they were not paid for shortened
5 meal periods. Ms. Pugh’s speculation that if she had “entered ‘no lunch’ into Laborworkx for an
6 interrupted lunch, Mike Swenson would deny the payment,” Pugh Decl., ¶ 26, is not evidence
7 that can defeat summary judgment. The District’s managers denied payment to Ms. Pugh on four
8 occasions: December 7, 2008; March 19, 2009; August 14 and August 18, 2010 – and denied
9 payment to Mr. Bowman once, on August 2, 2010. Scholl Decl., Ex. F. The explanation provided
10 in Laborworkx for one of the denials was that Ms. Pugh “had ample opportunity to take break,”
11 which was consistent with Mr. Swenson’s declaration. Swenson Decl. [Dkt. 261], ¶¶ 11-13.

12 **III. CONCLUSION**

13 There are only five disputed meal periods for the three Plaintiffs.⁸ The District has paid for all
14 other missed meal periods Plaintiffs disclosed and is entitled to partial summary judgment.

15 Dated this 9th day of February, 2015

16 /s/Kevin B. Hansen

17 John J. White, Jr., WSBA #13682

18 Kevin B. Hansen, WSBA #28349

19 Livengood Alskog, PLLC

121 Third Avenue, P.O. Box 908

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21 E-mail: white@livengoodlaw.com; hansen@livengoodlaw.com

22 Attorneys for Defendant

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⁸ To rebut a properly supported summary judgment motion, the nonmoving party must present specific facts
24 showing a genuine issue for trial. *Adams v. Western Host, Inc.*, 55 Wn. App. 601, 607 (1989). The nonmoving
25 party's burden is not met by responding with conclusory allegations, speculative statements, or argumentative
assertions. *Ruffer v. St. Frances Cabrini Hosp.*, 56 Wn. App. 625, 628 (1990).

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury that on February 9, 2015, I caused service of the foregoing and the Supplemental Declaration of Kevin B. Hansen in Support of Motion for Partial Summary Judgment and Response to Cross Motion for Partial Summary Judgment to the following counsel of record:

<p><i>Attorneys for Plaintiffs:</i> David E. Breskin Cynthia Heidelberg Breskin Johnson & Townsend, PLLC 1000 Second Avenue, Suite 3670 Seattle, WA 98104 WSBA #10607 – Breskin WSBA #44121 - Heidelberg Ph: 206-652-8660 Fax: 206-652-8290 email: dbreskin@bjtlegal.com cheidelberg@bjtlegal.com admin@bjtlegal.com mvizzare@bjtlegal.com</p>	<p><input type="checkbox"/> via U.S. Mail <input type="checkbox"/> via Hand Delivery <input type="checkbox"/> E-Service <input type="checkbox"/> via Facsimile <input checked="" type="checkbox"/> via E-mail w/ hard copy to follow per agreement <input type="checkbox"/> via Overnight Mail</p>
<p><i>Attorneys for Intervenor WSNA:</i> David C. Campbell Carson Glickman-Flora Schwerin Campbell Barnard Iglitzin & Lavitt 18 West Mercer Street, Suite 400 Seattle, WA 98119 WSBA #13896 – Campbell WSBA #37608 – Glickman-Flora Ph: 206-285-2828 Fax: 206-378-4132 e-mail: campbell@workerlaw.com flora@workerlaw.com ohls@workerlaw.com</p>	<p><input type="checkbox"/> via U.S. Mail <input type="checkbox"/> via Hand Delivery <input type="checkbox"/> E-Service <input type="checkbox"/> via Facsimile <input checked="" type="checkbox"/> via E-mail w/ hard copy to follow per agreement <input type="checkbox"/> via Overnight Mail</p>

Dated: February 9, 2015

/s/ Lee Wilson

 Lee Wilson

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FILED
KING COUNTY, WASHINGTON
FEB 18 2015
SUPERIOR COURT CLERK
BY NICHOLAS REYNOLDS
DEPUTY

Honorable Carol A. Schapira

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

DEBRA PUGH, AARON BOWMAN, and
FLOANN BAUTISTA on their own behalf
and on behalf of all persons similarly situated,

No. 10-2-33125-5 SEA

Plaintiffs,

ORDER GRANTING DEFENDANT'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT

v.

EVERGREEN HOSPITAL MEDICAL
CENTER a/k/a KING COUNTY PUBLIC
HOSPITAL DISTRICT #2,

Defendant,

WASHINGTON STATE NURSES
ASSOCIATION,

Intervenor.

This matter came on for hearing before the above-titled Court with oral argument on
December 19, 2014 on Defendant's Motion for Partial Summary Judgment (the "Motion").

The Court has reviewed and considered the following:

1. The Motion;
2. Declaration of Laurie Byrnes, dated October 28, 2014;
3. Declaration of Lisa Dilorenzo, dated November 18, 2014;
4. Declaration of Candis Gillum, dated October 30, 2014;

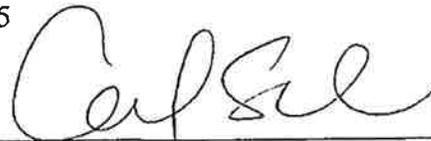
- 1 5. Declaration of Cherie Green, dated October 30, 2014;
- 2 6. Declaration of Jeruschia Horton, dated October 28, 2014;
- 3 7. Declaration of Karla Kloes, dated November 4, 2014;
- 4 8. Declaration of Vera Livshits, dated November 4, 2014;
- 5 9. Declaration of Laura Kay Main, dated October 30, 2014;
- 6 10. Declaration of Jamie McDonald, dated October 27, 2014;
- 7 11. Declaration of Mary Mellis, dated November 7, 2014;
- 8 12. Declaration of Madonna Ojoylan, dated November 4, 2014;
- 9 13. Declaration of Melissa Pederson, dated October 27, 2014;
- 10 14. Declaration of Sandra Simon, dated October 30, 2014;
- 11 15. Declaration of Kim Weber, dated October 31, 2014;
- 12 16. Declaration of Jan Williamson, dated October 30, 2014;
- 13 17. Declaration of Kristine Scholl, dated November 20, 2014;
- 14 18. Declaration of Kevin B. Hansen, dated November 21, 2014;
- 15 19. Declaration of Cheryl E. Nail, dated August 26, 2011 (Dkt. 98);
- 16 20. Declaration of Annette M. Messitt, dated August 8, 2011 (Dkt. 232);
- 17 21. Declaration of Dmitri Iglitzen, dated January 19, 2012 (Dkt. 250);
- 18 22. Declaration of Jeff Roberts, dated January 16, 2012 (Dkt. 254);
- 19 23. Declaration of Marta Grapensteter, dated January 18, 2012 (Dkt. 255);
- 20 24. Declaration of Cindy Hopson, dated January 17, 2012 (Dkt. 256);
- 21 25. Declaration of Lisa Nesbitt, dated January 19, 2012 (Dkt. 259);
- 22 26. Declaration of Michael Swenson, dated January 19, 2012 (Dkt. 261);
- 23 27. Declaration of Lenore Apigo, dated January 19, 2012 (Dkt. 264);

24

- 1 28. Declaration of Janelle Collins, dated January 20, 2012 (Dkt. 265);
2 29. Declaration of James Fitzgerald, dated January 19, 2012 (Dkt. 266);
3 30. Declaration of Dianna Davis, dated January 23, 2012 (Dkt. 267);
4 31. Response by Intervenor Washington State Nurses Association, if any;
5 32. Plaintiffs' response to motion;
6 33. Declaration of Debra Pugh, R.N., dated January 25, 2015;
7 34. Declaration of Aaron Bowman, R.N., dated January 26, 2015;
8 35. Declaration of Floann Bautista, R.N., dated January 24, 2015;
9 36. Declaration of David E. Breskin, dated January 26, 2015;
10 37. Defendant's reply in support of motion;
11 38. Supplemental Declaration of Kevin B. Hansen, dated February 9, 2015; and
12 39. The files and records herein.

13 NOW, THEREFORE, it is hereby ORDERED that defendant's motion for partial
14 summary judgment is GRANTED as follows: (1) plaintiffs' claim that meal periods outside the
15 fifth hour for nurses working twelve hour shifts violate the law is dismissed; and (2) that the
16 Laborworkx system is a reasonable system for recording reported missed meal periods and
17 claims that it did not accurately record missed meal periods are dismissed.

18 DATED this 17th day of February, 2015



19
20 JUDGE CAROL A. SCHAPIRA
21 King County Superior Court Judge
22
23
24

1 Presented by:

2 LIVENGOOD ALSKOG, PLLC

3

/s/ Kevin B. Hansen

4 John J. White, Jr., WSBA No. 13682

Kevin B. Hansen, WSBA No. 28349

5 Attorneys for Defendant King County Public Hospital District No. 2

d/b/a EvergreenHealth

6

7 Approved as to form;

Notice of presentation waived by:

8

SCHWERIN CAMPBELL BARNARD IGLITZEN & LAVITT LLP

9

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Dmitri L. Iglitzen, WSBA No. 17673

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Carson Glickman-Flora, WSBA No. 37608

Attorneys for Intervenor Washington State Nurses Association

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BRESKIN JOHNSON TOWNSEND, PLLC

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David D. Breskin, WSBA No. 10607

Attorneys for Plaintiffs Debra Pugh, Aaron Bowman, and Floann Bautista

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PETERSON RUSSELL KELLY LIVENGOOD PLLC

January 31, 2020 - 3:17 PM

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Appellate Court Case Title: Jeoung Lee, et al. v. Evergreen Hospital Medical Center

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