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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

SUPPLEMENTAL BRIEF OF APPELLANT
KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 2,
D/B/A EVERGREENHEALTH MEDICAL CENTER

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I. INTRODUCTION

Nearly all nurses in the Emergency Department (“ED”) at King County Public Hospital District No. 2, d/b/a EvergreenHealth Medical Center work 12-hour shifts. Under the District’s Collective Bargaining Agreement (“CBA”) with the Washington State Nurses Association (“WSNA”), nurses in the ED receive one 30-minute meal break in a shift and three fifteen-minute rest breaks. No matter how a 12-hour shift is divided, a nurse will always work more than five hours **before or after** their 30-minute meal break, which would be prohibited under WAC 296-126-092(1) & (2).

The regulation requires a meal period within the first five hours of a shift and prohibits more than five hours work without a meal period. The CBA’s one 30-minute meal break distinctly varies from the regulation. Public employers, like the District, whose CBAs vary from the rule are exempted from this five-hour limitation.

Whether the CBA’s grant of a single meal break on a 12-hour shift varies from the regulation prohibiting more than five hours’ work before or after a meal break requires interpreting the CBA, including its long history. This Court’s decisions and broader labor law are clear. Interpreting a CBA that includes an arbitration clause is the exclusive province of the arbitrator.

The District did not waive its right to compel arbitration. As soon as Ms. Lee amended her complaint to add Ms. McFarland, who had standing to challenge the current rest and meal break practices under the CBA, the District moved to compel. The District had no grounds to move for arbitration before the complaint was amended to add Ms. McFarland as a class representative. The addition of Ms. McFarland created the grounds for moving for arbitration because it fundamentally changed the nature of the case from a statutory wage-and-hour claim to an arbitration claim interpreting the terms of the CBA.

II. DISCUSSION

A. **Plaintiffs seek to enjoin the District’s “current practice” in administering meal periods – directly raising the express terms of the nurses’ CBA.¹**

Public employers with collective bargaining agreements are different in kind from private employers. The Public Employees’ Collective Bargaining Act (“PECBA”), Chapter 41.56 RCW, provides “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. Unlike a private employment relationship,

¹ CP 269 (¶ 30). The parties’ longstanding practice is an express term of the CBA. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960).

public employers and employees “may enter into collective bargaining contracts, labor/management agreements, or other mutually agreed to employment agreements **that specifically vary from or supersede**, in part or in total, rules . . . regarding appropriate rest and meal periods.” RCW 49.12.187 (emphasis added).

Plaintiffs’ Second Amended Complaint directly challenged the lawfulness of the single meal break mandated under the District’s CBA. This requires that the CBA, including its long history, be construed. Construction of a CBA is a question for an arbitrator.

B. There is no better evidence of a variance from the regulation than impossibility of compliance.

The CBA’s authorization of a single meal period for nurses working a twelve-hour shift can never comply with WAC 296-126-092’s prohibition of more than five hours’ work before or after a meal. *See* Appendix. Plaintiffs argue that “[i]f Evergreen thinks that makes its compliance with the WAC impossible or its position untenable, its remedy is to negotiate with WSNA for a change.” Answer to Petition at 16. Plaintiffs miss the implication of the impossibility of compliance – a contract term that contradicts the regulation is necessarily a variance.²

² Plaintiffs rely on the CBA’s reference to the regulation: “Meal periods and rest periods shall be administered in accordance with state law (WAC 296-126-092).” CP 93. RCW 49.12.187 is part of state law. That language

WAC 296-126-092(1) requires a meal break by the fifth hour of work. The same regulation prohibits requiring an employee “to work more than five consecutive hours without a meal period.” WAC 296-126-092(2). To comply with the regulation, the nurses must have two meal breaks in their twelve-hour shifts. The CBA only allows one. The CBA varies from the regulation.

Plaintiffs repeatedly assert that the “timing” of the meal break was never negotiated or part of the CBA. Answer to Petition at 2, 3, 7, 16. This ignores that the testimony plaintiffs cite was in response to questions about whether the provisions in paragraph 7.7 of the CBA were specifically negotiated during the 2012 or 2015 bargaining sessions. CP 1243-47. The witness merely answered that the meal break provision was not negotiated in bargaining sessions she participated in. CP 1243-47. RCW 49.12.187 does not require the variance to be specifically raised at each negotiation – it only requires the CBA to vary from the regulation.

immediately precedes the single meal break provision. The Court must interpret the CBA to give effect to all its terms and harmonize terms that seem to conflict. *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 849, 158 P.3d 1265 (2007); *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 354-55, 103 P.3d 773 (2004). Plaintiffs’ reading of paragraph 7.7 gives no effect to the single meal break provision; that provision complies with state law, which allows public employers and employees to vary the meal break rules.

Further, paragraph 17.1 of the CBA specifically provides that each party in the negotiations “had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining.” CP 148 (2012-15 CBA), 191 (2015-18 CBA). There was no need to specifically negotiate the one meal break provision in 2012 or 2015 because it was a longstanding provision and established practice – from at least 2006, the meal break provision has not changed. CP 93 (2009-12 CBA); CP 691 (2006-09 CBA).

Plaintiffs’ argument essentially reads the single meal break out of the CBA and provides an example of their interference with collective bargaining – they seek to disregard the agreement between the nurses and their exclusive bargaining representative by declaring the CBA’s present practice unlawful.

C. Plaintiffs’ plea for forward-looking injunctive relief is a back-door attack on public collective bargaining and the CBA’s grievance and arbitration provisions.

The WSNA is the legal representative of the nurses, and the CBA’s grievance and arbitration provisions conserve public resources and protect the foundations of labor law. Plaintiffs’ attempted bypass of those provisions undercuts the union’s role as employee representative and forces the District to deal with alternate “representatives” outside the collective bargaining process.

Under paragraph 16.1 of the CBA, the grievance procedures are mandatory: “If a grievance arises, it **shall** be submitted to the following grievance procedure.” CP 147 (emphasis added). A grievance is “an alleged breach of the express terms and conditions” of the CBA. CP 147. Plaintiffs’ claim that the District is liable for meal breaks not provided within the first five hours of a twelve-hour shift is a direct challenge to the express terms of the CBA – the single meal break under paragraph 7.7 for all nurses. The “express terms” include historical practices under a CBA. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960).

As the “sole and exclusive bargaining representative” of the nurses, the WSNA decides whether a grievance should be arbitrated. CP 82 (2009-2012 CBA); CP 122 (2012-2015 CBA); CP 165 (2015-2018 CBA). This is consistent with its role as the representative of the nurses. *Id.* Plaintiffs remain free to litigate strictly statutory claims against their employer without the WSNA’s involvement – for example, a claim that “I never got a rest or meal break.”

Plaintiffs point out that WSNA informed the nurses that they were “free to participate” in this lawsuit. Answer to Petition at 8. Of course, that was before the Second Amended Complaint was filed, when the single named plaintiff, Ms. Lee, had no standing to seek prospective relief

affecting the terms of the CBA. CP 693.³ As a result, the claims were for “missed” rest or meal breaks, which were clearly statutory rather than contractual. That changed when plaintiffs filed the Second Amended Complaint – Ms. McFarland acknowledged that she received all of her meal breaks, but was seeking relief for “late” meal breaks received after the first five hours of her twelve-hour shift:

Q. Are there occasions where you miss your meal break?

A. I don’t think since my employment at Evergreen that I’ve missed a meal break.

* * *

Q. . . . When you get your meal break, is it always within the first five hours of your work?

A. No.

* * *

Q. Did you attempt to report a late rest break as missed?

A. . . . I asked Jennifer about the timetable for taking breaks that was in the union contract, and that if I didn’t get it within that time, was I allowed to clock out that I did not get it, and she said no.

Q. Do you think that Jennifer Celms is wrong?

A. I think if the union contract states that they’re required to give you a rest break within a certain period of

³ Plaintiffs cite to CP 693, which is a portion of their response to the District’s motion to compel arbitration. The response cites to an Exhibit 26, but there is no Exhibit 26 in the court record – counsel’s declaration only includes 23 exhibits. *Compare* CP 693 *with* CP 1237-39, 1478.

time, then if they do not give you that, they ought to pay you for it, yes.

CP 582-84, 589-90. It is here, with the addition of Ms. McFarland as a class representative, that plaintiffs' claims changed from strictly statutory to contractual, implicating the CBA – specifically, the CBA's provision of one 30-minute meal break in a 12-hour shift versus the regulation's two 30-minute meal breaks in a 12-hour shift.

D. There is no waiver of the right to arbitration where the plaintiffs did not have a class representative with standing to seek prospective relief until two weeks before the District moved to compel arbitration.

As soon as plaintiffs presented a justiciable challenge to the CBA's implementation – when the Second Amended Complaint was filed – the District moved to compel arbitration. There was no waiver. The District raised arbitration in its answer to the Complaint only to preserve this affirmative defense in the event the circumstances arose to support a motion to compel arbitration. As it is, that is exactly what happened – the circumstances changed and the District promptly moved to compel. The District should not be penalized for reserving an affirmative defense and then acting on it when facts supporting it were developed.

In her initial complaint, filed November 10, 2016, Jeoung Lee sought class certification under CR 23(b)(2). The District moved to dismiss because Ms. Lee, as a former employee, lacked standing to obtain

declaratory and injunctive relief. CP 1131-39. In January 2017, Ms. Lee responded by abandoning an injunctive relief class under CR 23(b)(2). She instead sought a damages class under CR 23(b)(3). CP 13-20. The District renewed its motion to dismiss, explaining again that Ms. Lee lacked standing to seek prospective relief that would affect the terms of the CBA. CP 1143-53. After the trial court allowed Ms. Lee to file the First Amended Complaint, the District again moved to dismiss, on jurisdictional grounds, the claims for declaratory and injunctive relief. CP 1158-67. The trial court never formally ruled on the District's motion.

The trial court declined to certify a class for late or interrupted meals – the meal break subclasses were limited to ED nurses who “missed meal breaks” – on Ms. Lee's First Amended Complaint. CP 255-56. The class certification order was limited to statutory claims; the CBA's implementation was not affected.

The District did not waive its right to compel arbitration by opposing Ms. Lee's motion to continue the trial date. At that time, the District was ready to try her statutory claims for missed rest and meal breaks because its electronic timekeeping system made it easy for nurses to report and be paid for missed rest and meal breaks. CP 21-23; 25-27; 212-14; 228-30.

The lawsuit changed radically with the Second Amended Complaint. CP 265-71. Plaintiffs alleged that Ms. McFarland is a current

employee, CP 266, and retained claims that the District's current practices violate the law. CP 269-71. Unlike the original Complaint or First Amended Complaint, the Second Amended Complaint included as plaintiff a current employee with standing to seek prospective relief. Such forward-looking declaratory and injunctive relief – seeking to invalidate the District's current practices – directly challenged the CBA and its historic implementation of the single 30-minute meal break on a 12-hour shift.

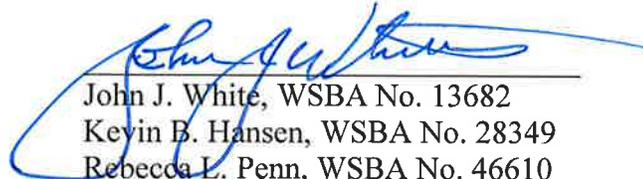
Plaintiffs may be “master of their complaint,” Answer to Petition at 14, but they cannot disregard what they actually pleaded. Ms. McFarland, a current employee, sought an injunction against the practices under the CBA in the Second Amended Complaint. Ms. McFarland never missed a meal break, CP 582, but nonetheless believed she is entitled to damages for meal breaks not received during the first five hours of her shifts. This was a game-changer, as it challenged the CBA's variance regarding meal breaks. The District filed its motion to compel arbitration two weeks later. CP 544.

III. CONCLUSION

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.⁴

Respectfully submitted this 6th day of December, 2019



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⁴ At present, only the named plaintiffs have claims for late meals – the meal break subclass was certified only for missed meals.

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on December 6, 2019, I caused service of the foregoing to the following counsel of record:

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Dated: December 6, 2019


Laura Faulstich, Legal Assistant

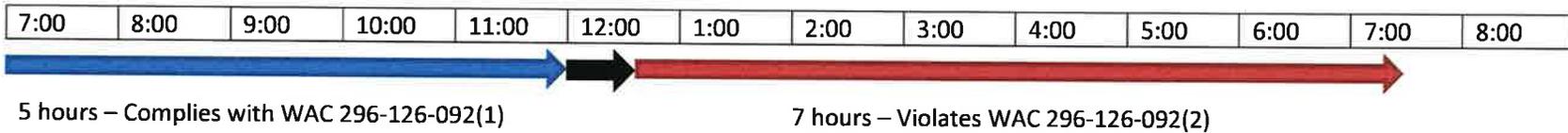
APPENDIX

Twelve Hour Shift – 7:00 am to 7:30 pm (including 30-minute unpaid meal break under CBA)

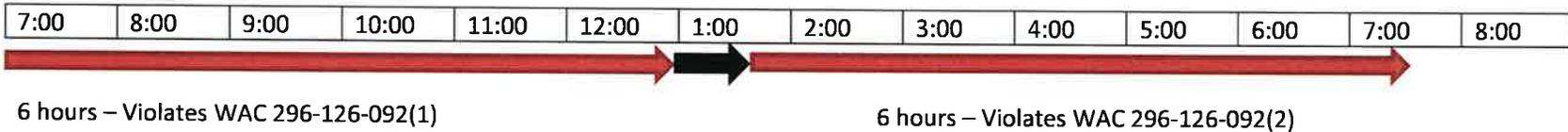
Example with single unpaid meal break at 9:30:



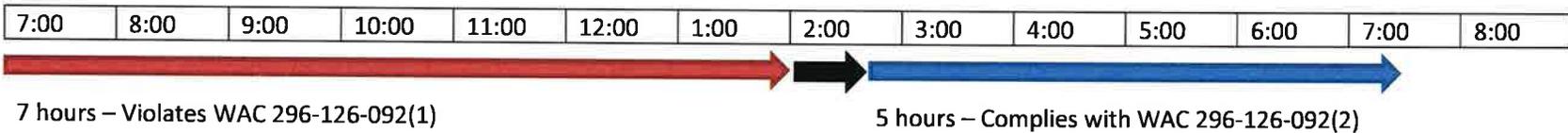
Example with single unpaid meal break at 12:00:



Example with single unpaid meal break at 1:00:



Example with single unpaid meal break at 2:00:



LIVENGOOD ALSKOG, PLLC

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