

No. 97201-0

SUPREME COURT  
OF THE STATE OF WASHINGTON

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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,

Petitioner.

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

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

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PETITION FOR REVIEW

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John J. White, Jr., WSBA No. 13682  
Kevin B. Hansen, WSBA No. 28349  
Rebecca L. Penn, WSBA No. 46610  
Livengood Alskog  
121 Third Avenue  
P.O. Box 908  
Kirkland, WA 98083-0908  
Ph: 425-822-9281  
Fax: 425-828-0908  
[white@livengoodlaw.com](mailto:white@livengoodlaw.com)  
[hansen@livengoodlaw.com](mailto:hansen@livengoodlaw.com)  
Attorneys for Petitioner

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## **I. IDENTITY OF PETITIONER**

King County Public Hospital District No. 2 d/b/a EvergreenHealth (“the District”) is the defendant below and petitioner.

## **II. DECISIONS BELOW**

The District asks the Court to grant discretionary review of the following court of appeals’ decisions: (1) Published Opinion – filed February 11, 2019,<sup>1</sup> and (2) Order Denying Appellant’s Motion for Reconsideration – filed April 12, 2019.<sup>2</sup>

## **III. ISSUES PRESENTED FOR REVIEW**

The issues presented are whether the court of appeals erred by:

(1) Ignoring the inherent variance between the District’s Collective Bargaining Agreement (“CBA”) provision of a single 30-minute meal period for 12-hour shifts and WAC 296-126-092, which prohibits more than five consecutive hours of work either *before or after a meal period*;

(2) Disregarding the implementation and history of long-standing CBA provisions governing meal periods – the common law of the CBA – and impermissibly construing the CBA, which is a matter governed by its arbitration provision; and

(3) Determining that the District waived its right to arbitrate even though plaintiffs’ newly-filed Second Amended Complaint added a

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<sup>1</sup> Appendix at App. 1-22.

<sup>2</sup> Appendix at App. 23-24.

current employee as a class representative, changing the nature of the lawsuit by putting forward-looking relief before the trial court.

#### **IV. STATEMENT OF THE CASE**

##### **A. Procedural background**

Plaintiff Jeoung Lee filed this lawsuit as a putative class action in November 2016, alleging that she and other registered nurses in the District's Emergency Department ("ED") were denied rest and meal breaks and not paid for missed breaks in violation of Washington wage statutes and regulations. CP 1-6, 13-20. Lee abandoned the initial complaint, which sought certification as an injunctive relief class under CR 23(b)(2).

The First Amended Complaint, filed January 17, 2017, sought CR 23(b)(3) certification. The trial court certified a class on March 8, 2017, CP 250-53, but closed the class period at the last day Lee was employed. CP 250-51. The court reconsidered its certification order, substantially modifying the class definitions on April 17, 2017. CP 254-56.

Four months later, Lee moved to amend her complaint to add Sherri McFarland as an additional class representative on the basis that McFarland was a current employee. CP 257-62. The trial court granted the motion to amend on August 15, 2017. CP 431-34. Plaintiffs' Second Amended Complaint was filed the next day. CP 435-42.

The District moved to compel arbitration on September 1, 2017, noting the hearing without oral argument for September 12. CP 544-56. On September 18, the trial court required the motion to be re-noted on the dispositive oral argument calendar. November 3 was the earliest date available. After forcing the District's counsel to identify the motion to compel arbitration as a motion under either CR 12 or CR 56, rather than CR 7, the court denied the motion under CR 12 based on the pleadings alone. VRP 8:14 – 10:3, 12:8 – 13:9, 14:6-21, 15:1 – 16:15; CP 745-48.

The District appealed. On February 11, 2019, the court of appeals' published opinion affirmed the trial court's denial of the motion to compel arbitration. The District filed a motion for reconsideration under RAP 12.4, which the court of appeals denied on April 12, 2019.

**B. Factual background.**

The District is a public hospital district organized under Chapter 70.44 RCW, serving northeast King and southeast Snohomish Counties. Lee worked as a registered nurse in the ED from February 2010 until August 2016, when she was fired for violating patient privacy rights. CP 32-33, 1087. McFarland worked as a registered nurse in the ED from July 2015 until August 2017. She quit promptly after the court appointed her a class representative. CP 880, 672.

**1. Collective bargaining agreements governed the terms and conditions of plaintiffs' employment.**

Collective bargaining agreements between the District and Washington State Nurses Association ("WSNA") have governed registered nurse employment for many years. CP 79-207. The CBAs govern "with respect to wages, hours of work and conditions of employment." Specific provisions address time reporting, rest breaks and meal periods. The CBAs have a long course of conduct under their terms.

WSNA is the "sole and exclusive bargaining representative for all regularly scheduled full-time, regularly scheduled part-time and per diem registered nurses engaged in patient care at the Hospital, excluding supervisors, nursing care coordinators, temporary nurses, students, and all other employees." CP 82, 122, 165 (¶1.1). The CBAs resulted from the parties' negotiations:

17.1 The parties acknowledge that during the negotiations which resulted in this Agreement all 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, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. . . .

CP 108, 148, 191. The rest break provisions of the CBA vary from and are more generous than the regulation. The meal period permitted under the CBA for RNs working 12-hour shifts is less favorable than the otherwise applicable regulation.

**a. CBA terms governing meal periods on 12-hour shifts varied from the generally applicable regulations.**

Rest and meal breaks in the ED are administered under the CBA's terms, not WAC 296-126-092, as McFarland and Lee both acknowledged. CP 569-70, 581. The CBAs have consistently authorized a single, 30-minute meal period for nurses working 12-hour shifts. CP 93, 133, 176. The question whether the single 30-minute meal period varies from the regulation, which prohibits more than five hours work before or after the meal, has been litigated by the District and class members previously – there, the trial court granted summary judgment to the District on the precise issue of variance from the regulation. CP 929-31. No change in the terms of the CBA was sought by WSNA in the most recently concluded CBA. CP 1243-44.

Both plaintiffs confirmed the CBA's application during their depositions:

Q. So on a 12-hour shift, what is your understanding of how many rest and meal breaks you're entitled to?

A. So one 30-minute break and then three 15-minute rest breaks.

\* \* \*

Q. . . . And would you agree that per this agreement, you did receive a 30-minute unpaid lunch period and three 15-minute breaks while you were working in the ED?

A. Yes.

CP 569-70, 578; *see also* CP 591. But for the CBA, employees would be required to have *two* 30-minute meal periods during a 12-hour shift to comply with the 5-hour work limit.

**b. CBA terms governing rest breaks also vary from and are more generous than the regulation.**

WAC 296-126-092(4) requires only a ten-minute paid rest break for every four hours worked. The CBA is more generous, providing a 15-minute rest break for every four hours worked: “All nurses shall be allowed a rest period of fifteen (15) minutes on the Employer’s time, for each four (4) hours of working time.” CP 93, 133, 176 (¶ 7.7).

Further, state law permits unscheduled intermittent rest totaling ten minutes as a “break.” WAC 296-126-092(5). In contrast, from June 1, 2011 to the present, nurses may claim and be paid for a “missed” rest break if they do not receive ten *consecutive* minutes of rest as part of each 15-minute break. CP 38.

Under the CBA, disputes concerning rest and meal breaks are subject to a mandatory, four-step grievance process initiated by the aggrieved WSNA member,<sup>3</sup> which includes, at the last step, arbitration:

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<sup>3</sup> CP 106-07, 147-48, 190 (“Step 1. Nurse and Manager. If any nurse has a grievance, the nurse and/or the Local Unit Chairperson, or designee, shall first present the grievance in writing . . . . Step 2. Nurse, Local Unit Chairperson and Director. If the matter is not resolved to the nurse’s satisfaction at Step 1, the nurse and/or the Local Unit Chairperson, or

. . . A grievance is defined as an alleged breach of the express terms and conditions of the Agreement. . . . If a grievance arises, it shall be submitted to the following grievance procedure.

\* \* \*

If the grievance is not settled on the basis of the foregoing procedures, the Association may submit the issue in writing to final and binding arbitration . . . . The arbitrator shall have no authority to add to, subtract from, or otherwise change or modify the provisions of this Agreement, but shall be authorized only to interpret existing provisions of this Agreement as they may apply to the specific facts of the issue in dispute.

CP 106-07, 147-48, 190-91 (¶ 16.1). The CBA also enables a group of employees to file a grievance. CP 108, 148, 191 (¶ 16.2). Neither McFarland nor Lee submitted the contract claims asserted in this lawsuit to the CBA's grievance and arbitration process. CP 576-77, 893. Lee did, however, submit other disputes, such as racial discrimination claims, to the CBA's grievance process, showing that she knew how to initiate a grievance under the CBA. CP 1203.

**2. District policies and procedures allow nurses to take meal and rest breaks and be paid for missed breaks.**

Consistent with the CBA's ratifications of the District's reserved management rights, CP 84, 124, 167-68 (¶ 3.1), the District adopted

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designee, shall present the grievance in writing . . . . Step 3. Nurse, Chief Nursing Officer and Association Representative. If the matter is not resolved to the nurse's satisfaction at Step 2, the nurse and/or Local Unit Chairperson, or designee, shall present the grievance in writing . . . . Step 4. Arbitration . . . .”).

policies governing rest and meal breaks for nurses. The Hours of Work/Overtime and Time & Attendance policies generally state that:

- Employees who are paged or telephoned during a meal break are responsible for communicating that they are on break;
- Scheduled rest periods are not required where the nature of the work allows employees to take intermittent rest equivalent to ten minutes (modified by CBA);
- Employees record their time in the Laborworkx system;
- Each employee is responsible for submitting accurate time, and the employee timecard is the legal record of time and attendance;
- Employees are required to record missed rest and meal breaks in the Laborworkx timekeeping system.

CP 337-360. ED departmental policies require that all missed breaks be recorded and paid. CP 361-365.

**3. When nurses comply with the requirement to record missed breaks, they are always paid.**

The District educates, trains and instructs its nurses to record all missed breaks in the Laborworkx electronic timekeeping system. Recording a missed meal or rest break is easy – employees need only push a button (Code “40”, “62”, “64”, or “66”) when clocking out at the end of their shift. CP 37, 64-71, 374-77, 388. When they do so, they are paid for

the missed break. CP 27, 210, 222, 226, 404, 892. McFarland testified that nurses, including herself, are trained and understand how to record a missed break in Laborworkx:

Q. Did you feel that the training that you received from Evergreen was adequate to allow you to understand how to record missed breaks in LaborWorkx?

A. Yes.

CP 891.<sup>4</sup> The time records can be corrected at any time. CP 956-57, 959, 989-91, 1085. Nurses experience no pressure from the District to underreport missed breaks. CP 22, 27, 210, 214, 217-18, 221-22, 230, 401.

The District relies on its nurses to record time worked, including missed meals and breaks. CP 32, 41-43. Accurate reporting is necessary to ensure adequate staffing. CP 32. McFarland understood that it was her responsibility to report missed breaks. CP 891.

Both named plaintiffs knew how to report missed breaks on Laborworkx and did so. During the class period, Lee used Laborworkx to report that she missed 2% of meal breaks and 17% of rest breaks she was

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<sup>4</sup> Other nurses' testimony corroborated McFarland's experience. *See also* CP 22 ("I've been told that we must record missed breaks. . . . I'm well aware of the ED's rest and meal break policies . . . . Whenever I miss a break, I always log out the missed break on the Laborworkx system."); CP 27, 47, 214, 217-218, 221, 225 ("The ED management is very clear that ED nurses must be given their breaks and direct the department's charge nurses to ensure all breaks are given. . . . If I am aware a nurse has missed a break, I tell him or her to record it on the Laborworkx timekeeping system."); CP 233 ("I have been trained to always use the no break code when I miss a break."); CP 237, 383.

entitled to. CP 1127, 1129-30. Likewise, McFarland reported on Laborworkx that she missed nearly 6% of her meal breaks and nearly 13% of her rest breaks. *Id.*

**4. Plaintiffs' claims require interpretation of the CBA.**

Plaintiffs' complaint alleges that

Defendant's practices under which Plaintiffs and the class did not receive meal and rest breaks violates RCW 49.12 and WAC 296-126-092.

CP 439. For public employers, a CBA can vary from otherwise applicable meal and rest break rules. RCW 49.12.187. The CBA contains terms regarding meal and rest breaks. Whether the CBA varies from state law will require interpreting the CBA.

The complaint omits any mention of the CBA, but Lee's and McFarland's testimony relates to relief based directly on contractual rights granted under the CBA – they explicitly referred to the contractual 15-minute rest breaks, not the regulation's ten-minute breaks:

Q. . . . [A]ll of the rest breaks you have in the ED are 15 minute breaks. . . .

A. Yes.

CP 565; *see also* CP 567-72, 574-75, 578, 581, 585-88, 591-92, 594-95.

McFarland expressly made a claim for missed breaks where she received the ten-minute break under state law:

Q. If you only received the first ten minutes of a 15-minute rest break –

A. Um-hmm.

Q. – did you consider that you missed the rest break?

A. Yes.

CP 881. A 10-consecutive-minute rest break is created by the CBA, not state law.

Although McFarland testified that she *never* missed meal breaks,<sup>5</sup> she reported a meal as missed when it was “late” and expected to be paid for it, based on her understanding of the union contract:

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. Again, as I had said, 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 time, then if they do not give you that, they ought to pay you for it, yes.

CP 583-84, 589-90 (emphasis added). The CBA must be interpreted to resolve McFarland’s claim.

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<sup>5</sup> CP 582:

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.

#### IV. ARGUMENT

##### A. Standard for discretionary review.

The Court should accept discretionary review of the court of appeals' decisions under RAP 13.4(b)(1) and (4) because the decisions conflict with this Court's decision in *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Emps. of Peninsula*, 130 Wn.2d 401, 924 P.2d 13 (1996) regarding the presumption of arbitration of employment disputes under the Public Employees' Collective Bargaining Act ("PECBA"), Chapter 41.56 RCW, and involve an issue of substantial public interest that has not been considered by this Court – the conditions under which a public employer may vary from the requirements of WAC 296-126-092.

##### B. **The court of appeals' ruling that an inherent inconsistency between the CBA and regulation is insufficient to constitute a variance undermines public employers' statutory authority to establish terms of employment – a matter of substantial public interest.**

As a public employer, the District has the right to collectively bargain for CBA terms which “specifically vary from or supersede, in part or in total, rules adopted under this chapter regarding appropriate rest and meal periods.” RCW 49.12.187. In *Wingert v. Yellow Freight Sys.*, 146 Wn.2d 841, 852, 50 P.3d 256 (2002), this Court held that a collective bargaining agreement for *private* employers can only “enhance or exceed” the standards in WAC 296-126-092. The Court has never, however, interpreted the *public* employer's expansive variance language in RCW

49.12.187. The court of appeals' ruling effectively reads the public employer variance out of existence. The District (and other public employers) should not be exposed to liability by requiring its nurses to comply with the CBA's meal period terms rather than the regulation's.

The court of appeals opined that CBA paragraph 7.7 governing rest breaks and meal periods "does not vary from or supersede WAC 296-126-092." Slip Op. at 5. This is incorrect – the CBA authorizes a *single*, 30-minute meal period for all District nurses, including during a 12-hour shift: "Nurses shall be allowed *an* unpaid meal period of one-half (1/2) hour." CP 93, 133, 176.<sup>6</sup> WAC 296-126-092(2) expressly prohibits more than five consecutive hours of work *before or after* a meal period. It also mandates a second meal period for a 12-hour shift. On a 12-hour shift, a single 30-minute meal period can never comply with this regulation's timing requirements. Paragraph 7.7 constitutes an inherent, bargained-for variance from the regulation. If it requires interpretation, it requires arbitration.

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<sup>6</sup> The addendum to the CBA provides further specificity, providing that each 12-hour shift "will include *one* (1) thirty (30) minute unpaid lunch period and three (3) fifteen (15) minute . . . paid rest breaks." CP 114, 155, 198 (emphasis added). The court of appeals stated that the addendum applied only to a "combined shift schedule," Slip Op. at 7, n.19, ignoring past practices of implementation. Even if correct, however, the nurses working the combined shift schedule are governed by the CBA, which varies from the regulation.

The court of appeals' conclusion that administering paragraph 7.7 "necessarily relies on compliance with the regulation rather than the CBA varying from or superseding the regulation," Slip Op. at 7, gives primacy to the general over the specific. This rewrites the CBA and determines the extent of the CBA's variance.

Whether meal period claims are barred because the nurses bargained for a variance from WAC 296-126-092(2) requires interpretation of the CBA by an arbitrator. The trial court would exceed its authority by interpreting the CBA's meal period provisions. *United Food & Commercial Workers Union, Local 770 v. Geldin Meat Co.*, 13 F.3d 1365, 1370 (9th Cir. 1994) (trial court exceeded its authority by interpreting substantive contract provisions).

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." PECBA 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 ED nurses, and the forward-looking claims in this lawsuit undercuts WSNA’s role as “the sole and exclusive bargaining representative.” The court of appeals’ decision also reverses the presumption in favor of arbitration as expressed by this Court in *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Emps. of Peninsula*, 130 Wn.2d 401, 413-14, 924 P.2d 13 (1996).

**C. The court of appeals’ opinion ignored the parties’ practice under the series of CBAs, which becomes part of the contract as the CBA’s common law. The CBA’s common law guides the interpretation of its provisions and is a matter for the arbitrator.**

The single meal period for 12-hour shifts has been part of the District’s CBA with nurses for many years. CP 900, 931, 1244. It was not even raised in the most recently-concluded CBA negotiations with WSNA. CP 1243-44. Its implementation is a long-standing practice, which is part of the CBA’s common law. *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). Respondents testified that they “frequently” or “usually” took their meal break after the fifth hour of a shift. CP 483, 759, 1415, 1421. The practice under the CBAs of providing the single meal period

after the fifth hour of 12-hour shifts has been found to be a variance from state law. CP 931. While the Court is not bound by the prior decision, the decision evidences the practice under the CBA, which is binding, and is a matter for resolution by an arbitrator in construing the CBA's terms.

**D. The District's time for initiating a motion to compel arbitration began to run when plaintiff filed her second amended complaint, and not before.**

Before the Second Amended Complaint, Lee's lawsuit against the District was only for backward-looking, monetary damages. Lee was not a District employee when she filed this lawsuit on November 10, 2016 seeking injunctive relief or when she filed her First Amended Complaint on January 17, 2017, abandoning the original complaint's request for CR 23(b)(2) class status.<sup>7</sup> At that time, there was no available equitable relief in the lawsuit which could impact the District's future actions regarding rest and meal periods. Likewise, neither the trial court's original nor reconsidered class orders included claims for injunctive or declaratory relief. CP 250-56.

On August 3, 2017, Lee moved to amend the complaint to add McFarland as a representative plaintiff for all class members. CP 257-72. Unlike Lee, McFarland was a then-current employee of the District. On

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<sup>7</sup> A former employee lacks standing to bring a class action for future injunctive relief. *Wash. Educ. Ass'n v. Shelton Sch. Dist.*, 93 Wn.2d 783, 790, 613 P.2d 769 (1980); NEWBERG ON CLASS ACTIONS, § 2.7 at 87.

August 15, 2017, the trial court granted Lee's motion to add McFarland as a representative plaintiff, CP 431-34, and Lee and McFarland filed the Second Amended Complaint on August 16, 2017. CP 435-42.

With the filing of the Second Amended Complaint, plaintiffs fundamentally changed the nature of the lawsuit. For the first time, they presented claims by a *current* employee for forward-looking relief against the District. CP 269-70. This substantially expanded and changed the lawsuit, causing the District to evaluate what defenses were appropriate to meet the new set of claims. The most appropriate defense was a motion to compel arbitration because McFarland's testimony and claims directly implicated the terms of the CBA. As of August 16, 2017, it was clear the case must be arbitrated consistent with the provisions of the CBA. The District filed its motion two weeks later. CP 544-56.

The court of appeals held that the District acted inconsistently with its right to arbitrate because it raised arbitration as an affirmative defense when answering the earlier versions of the complaint. The purpose of pleading arbitration as an affirmative defense is to preserve the defense if evidence produced in discovery indicates that arbitration is appropriate. Civil Rule 8(c) mandates that arbitration be pled as an affirmative defense to avoid waiver. The court of appeals' holding, if upheld, places the District and other employers in *zugzwang*: failing to plead arbitration as an

affirmative defense waives the defense, but pleading arbitration as an affirmative defense pending further development of the case and clarification of claims is “evidence” of actions inconsistent with the right to arbitrate, and also waives the defense.

As discovery proceeded in July 2017 and plaintiffs filed the Second Amended Complaint in August 2017, it became clear that the CBA’s provisions were directly implicated by McFarland’s participation as a representative plaintiff (*e.g.*, damages for meals after the fifth hour). Her forward-looking claims (CP 439 (¶ 30); CP 440 (¶ 34(f))) would affect the terms and conditions of the nurses’ employment with the District, requiring arbitration under the CBA.

The District’s opposition to Lee’s motion to continue the trial date was also not inconsistent with its right to arbitrate. Lee filed her motion to continue the trial date on July 31, 2017, which was *before* she filed her motion to file a Second Amended Complaint. *See* Respondent’s Resp. Br. at 17 (filed 4/20/18). The District’s response was due on August 4, 2017, the same day that Lee filed her motion to amend the complaint and *before* the Second Amended Complaint was filed. *Id.* The District opposed the motion to continue the trial date to compel Lee to present evidence and disclose witnesses on her claims and prevent further changes to the nature of her lawsuit, which was constantly evolving. There was no impetus

between July 31 and August 4 for the District to file a motion to compel arbitration because Lee had not yet moved to amend her complaint to add McFarland as a representative plaintiff. A refusal to consent to a continuance of trial on the First Amended Complaint is not inconsistent with arbitrating the claims asserted in the Second Amended Complaint.

#### **V. CONCLUSION**

The Court of Appeals decision undercuts the statutory right of public employers to negotiate rest and meal break provisions that are different from the general regulations. The court construed the CBA's meal period language wrongly, but should not have construed it at all.

The District did not waive its right to arbitrate by actively defending against this lawsuit before moving for arbitration two weeks after plaintiffs filed their Second Amended Complaint. The Second Amended Complaint fundamentally changed the nature of the lawsuit by adding a current employee with forward-looking relief, making it clear that arbitration was the only appropriate course. The District is entitled to arbitration as to the interpretation of its CBA meal period terms because those terms vary from the regulation's meal period terms. The District respectfully requests the Court accept review of the court of appeals' published opinion and order denying the District's motion for reconsideration.

DATED this 13<sup>th</sup> day of May, 2019

/s/ John J. White

John J. White, WSBA No. 13682

Kevin B. Hansen, WSBA No. 28349

Rebecca L. Penn, WSBA No. 46610

Livengood Alskog, PLLC

121 Third Avenue

P.O. Box 908

Kirkland, WA 98083-0908

Ph: 425-822-9281

Fax: 425-828-0908

E-mail: white@livengoodlaw.com

hansen@livengoodlaw.com

penn@livengoodlaw.com

Attorneys for Petitioner EvergreenHealth

**DECLARATION OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on May 13, 2019, I caused service of the foregoing to the following counsel of record:

<p><i>Attorneys for Plaintiffs:</i> David E. Breskin, WSBA #10607 Cynthia J. Heidelberg, WSBA #44121 Breskin Johnson &amp; Townsend PLLC 1000 Second Avenue, Suite 3670 Seattle, WA 98104 Ph: 206-652-8660 email: dbreskin@bjtlegal.com cheidelberg@bjtlegal.com jtelegin@bjtlegal.com shill@bjtlegal.com</p>	<p><input type="checkbox"/> via U.S. Mail <input type="checkbox"/> via Hand Delivery <input checked="" type="checkbox"/> Court E-Service <input type="checkbox"/> via Facsimile <input checked="" type="checkbox"/> via E-mail <input type="checkbox"/> via Overnight Mail</p>
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**Dated:** May 13, 2019

/s/ Holly McGinley \_\_\_\_\_  
Holly McGinley, Legal Assistant

# APPENDIX

2019 FEB 11 AM 11:00

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

JEOUNG LEE and SHERRI	)	No. 77694-1-I
MCFARLAND, on their own behalf	)	
and on behalf of all persons similarly	)	
situated,	)	
	)	
Respondents,	)	
	)	
v.	)	
	)	
EVERGREEN HOSPITAL MEDICAL	)	PUBLISHED OPINION
CENTER, a/k/a KING COUNTY	)	
PUBLIC HOSPITAL DISTRICT #2,	)	FILED: February 11, 2019
	)	
Appellant.	)	

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VERELLEN, J. — A union employee working for a public employer does not waive her ability to bring statutory wage and hour claims in a judicial forum unless her collective bargaining agreement (CBA) clearly and unmistakably does so. Because, on its face, the CBA between the Washington State Nurses' Association (WSNA) and Evergreen Hospital (Evergreen) does not waive union members' abilities to enforce their statutory rights in a judicial forum, the trial court correctly denied Evergreen's motion to compel arbitration.

Even if Evergreen had the right to compel arbitration under the CBA, it waived any right to do so by its conduct. A litigant waives its right to invoke arbitration where it knows of its right to arbitrate and engages in conduct

inconsistent with seeking arbitration, such as actively litigating and passing an obvious opportunity to assert that right. Evergreen noted its right to arbitrate in its answer to Jeoung Lee's initial complaint. Evergreen actively litigated the dispute for nine months and then opposed Lee's motion to continue the impending trial date, declaring it was ready to litigate as scheduled. Three weeks later, Evergreen filed its motion to compel arbitration. Because Evergreen knew of any right to compel arbitration, litigated vigorously, and passed an obvious opportunity to assert its right to compel arbitration, Evergreen waived its right.

Therefore, we affirm.

#### FACTS

Lee was an emergency room nurse at Evergreen from February 2010 until August 2016. The terms of her employment were governed by a CBA between Evergreen and WSNA. To resolve nurses' work-related grievances, the CBA provided a set of informal procedures culminating with the option of arbitration. The CBA also contained a provision about nurses' meal and rest breaks.

Lee filed a putative class action in November 2016 with herself as the sole representative plaintiff alleging that Evergreen denied emergency room nurses their statutorily guaranteed rest and meal breaks. Evergreen filed an answer in December denying that class certification was appropriate and raising an affirmative defense alleging that Lee "failed to exhaust the grievance and arbitration process under the applicable collective bargaining agreement."<sup>1</sup> On

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<sup>1</sup> Clerk's Papers (CP) at 10.

January 17, 2017, Lee filed a first amended complaint making identical rest and meal break allegations.<sup>2</sup>

Over the next six months, the parties engaged in discovery, conducted depositions, disagreed about trial dates, and disputed class certification. Lee also sent out class notices to over 500 nurses after the court certified the proposed class.

On July 26, Evergreen deposed class member Sherri McFarland. Soon after, Lee moved to continue the trial date from November of 2017 to March of 2018 and to amend her complaint by adding McFarland as a representative plaintiff. Evergreen opposed Lee's motion to continue and argued trial should go forward as scheduled. The court granted Lee's motion to continue.

On August 15, the court also granted Lee's motion to file her second amended complaint, which is the operative complaint. Two weeks later, Evergreen filed its motion to compel arbitration and alleged "Plaintiffs' second amended complaint, recent discovery requests, and deposition testimony of class representatives now make clear that the claims arise under the [CBA]."<sup>3</sup> The court denied Evergreen's motion to compel arbitration.

Evergreen appeals.

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<sup>2</sup> Lee originally filed to certify a class under CR 23(b)(2), and Evergreen moved to dismiss because she sought damages. The first amended complaint was essentially the same, except for seeking class certification pursuant to CR 23(b)(3).

<sup>3</sup> CP at 544.

## ANALYSIS

We review de novo denial of a motion to compel arbitration.<sup>4</sup> We also review de novo whether a party waived the right to compel arbitration.<sup>5</sup>

### Whether The CBA Requires Arbitration

Evergreen contends the CBA compels binding arbitration of all class claims because Lee's alleged violations arise from section 7.7 of the CBA, not from any statute or regulation.<sup>6</sup>

The Federal Arbitration Act (FAA)<sup>7</sup> generally applies to CBAs.<sup>8</sup> We apply federal substantive law to any arbitration agreement within the coverage of the FAA.<sup>9</sup> When reviewing a motion to compel arbitration, we consider “whether the arbitration agreement is valid” and “whether the agreement encompasses the

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<sup>4</sup> Cox v. Kroger Co., 2 Wn. App. 2d 395, 403, 409 P.3d 1191 (2018). The parties debate whether a motion to compel arbitration may be made as a general motion or whether it must be made pursuant to CR 12(c) or CR 56. But the issue is purely academic because Evergreen advised the trial court it was moving pursuant to CR 12, and both parties urge us to consider materials outside the pleadings. Thus, our review is de novo regardless of which civil rule governed Evergreen's motion to compel arbitration.

<sup>5</sup> Romney ex rel. Estate of Romney v. Franciscan Med. Grp., 199 Wn. App. 589, 602, 399 P.3d 1220, review denied, 189 Wn.2d 1026 (2017).

<sup>6</sup> Evergreen addresses Lee and McFarland's individual claims separately from class claims and contends both must be submitted to arbitration. Because Evergreen did not appeal class certification, and we do not consider the underlying issues—e.g., class certification—on appeal of a motion to compel arbitration, Peninsula Sch. Dist. No. 401 v. Public Sch. Emp. of Peninsula, 130 Wn.2d 401, 413, 924 P.2d 13 (1996), we treat all claims as class claims.

<sup>7</sup> 9 U.S.C. §§ 1-14.

<sup>8</sup> Cox, 2 Wn. App. 2d at 403.

<sup>9</sup> Id. at 403-04.

claims asserted.”<sup>10</sup> If both criteria are met, then Washington courts order arbitration in most instances.<sup>11</sup> The parties do not dispute the validity of the CBA. The critical question is whether Lee’s claims are statutory or contractual.<sup>12</sup>

Evergreen relies on RCW 49.12.187 to argue Lee’s claims are contractual because the statute gives public employers and public employee unions the ability to negotiate CBAs “that specifically vary from or supersede, in part or in total, rules adopted under this chapter regarding appropriate rest and meal periods.”<sup>13</sup> But section 7.7 does not vary from or supersede WAC 296-126-092. And this CBA’s grievance process does not encompass statutory claims.

Article 16 in the CBA provides a four-step grievance process.<sup>14</sup> The CBA defines a grievance as “an alleged breach of the *express* terms and conditions” of

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<sup>10</sup> *Id.* at 404 (quoting Wiese v. CACH, LLC, 189 Wn. App. 466, 474, 358 P.3d 1213 (2015)).

<sup>11</sup> Estate of Romney, 199 Wn. App. at 596-97.

<sup>12</sup> Evergreen argues this court lacks the authority to compare the CBA with meal and rest break regulations because issues of arbitrability must be resolved by an arbitrator. But threshold questions around arbitrability—questions about “whether the parties have submitted a particular dispute to arbitration”—should be resolved by courts unless the parties clearly and unmistakably provided otherwise in their CBA. Martin v. Yasuda, 829 F.3d 1118, 1123 (9th Cir. 2016) (quoting Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002)); accord FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 190 Wn.2d 281, 287, 413 P.3d 1 (2018). Because the CBA does not provide otherwise, we determine if Lee’s claims are arbitrable.

<sup>13</sup> RCW 49.12.187.

<sup>14</sup> First, a nurse must present her written grievance to her supervisor. Second, if unresolved, she must present her written grievance to the chief nurse executive. Third, if still unresolved, the nurse must present her grievance to an administrator. Fourth, “[i]f the grievance is not settled on the basis of the foregoing

the agreement.<sup>15</sup> The terms of this CBA do not allow an alleged statutory breach to be grieved under this narrow definition.

Chapter 49.12 RCW authorizes the creation of regulations about meal and rest periods for employees, which are defined in WAC 296-126-092:

(1) Employees shall be allowed a meal period of at least thirty minutes which commences no less than two hours nor more than five hours from the beginning of the shift. Meal periods shall be on the employer's time when the employee is required by the employer to remain on duty on the premises or at a prescribed work site in the interest of the employer.

(2) No employee shall be required to work more than five consecutive hours without a meal period.

(3) Employees working three or more hours longer than a normal work day shall be allowed at least one thirty-minute meal period prior to or during the overtime period.

(4) Employees shall be allowed a rest period of not less than ten minutes, on the employer's time, for each four hours of working time. Rest periods shall be scheduled as near as possible to the midpoint of the work period. No employee shall be required to work more than three hours without a rest period.

(5) Where the nature of the work allows employees to take intermittent rest periods equivalent to ten minutes for each 4 hours worked, scheduled rest periods are not required.

Section 7.7 of the CBA addresses meal and rest periods for nurses:

Meal periods and rest periods shall be administered in accordance with state law (WAC 296-126-092). Nurses shall be allowed an unpaid meal period of one-half (1/2) hour. Nurses required by the Employer to remain on duty during their meal period shall be compensated for such time at the appropriate rate of pay. All nurses

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procedures, [WSNA] may submit the issue in writing to final and binding arbitration." CP at 107.

<sup>15</sup> CP at 106 (emphasis added).

shall be allowed a rest compensated for such time at the appropriate rate of pay. All nurses shall be allowed a rest period of fifteen (15) minutes on the Employer's time, for each four (4) hours of working time.<sup>[16]</sup>

Contrary to Evergreen's contentions, section 7.7 in the CBA merely comports with WAC 296-126-092. Section 7.7 states meal and rest breaks "shall be administered in accordance with" WAC 296-126-092.<sup>17</sup> Notably, the regulation is more extensive than section 7.7 and addresses matters on which the CBA is silent.<sup>18</sup> For example, section 7.7 does not provide guidance on when nurses can take rest breaks. WAC 296-126-092(4) requires that rest periods be scheduled as near as possible to the midpoint of an employee's work period. Also, section 7.7 does not explain when employees can take meal breaks.<sup>19</sup> But WAC 296-126-092(2) requires that "[n]o employee shall be required to work more than five consecutive hours without a meal period." As section 7.7 states, administration of the CBA necessarily relies on compliance with the regulation rather than the CBA varying from or superseding the regulation.

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<sup>16</sup> CP at 93.

<sup>17</sup> CP at 93.

<sup>18</sup> Compare CP at 93 (section 7.7 of the CBA), with WAC 296-126-092.

<sup>19</sup> Throughout its briefing and at oral argument, Evergreen repeatedly claimed that the CBA provides only one meal break per 12-hour shift. But this is misleading. The section of the CBA Evergreen cites to for this fact is an addendum to the CBA applicable only to nurses working a "combined shift schedule" with both eight and 12-hour shifts. CP at 198. Generally, though, nurses working 12-hour shifts would work three 12-hour shifts within a seven day period. Because Lee and McFarland only worked 12-hour shifts, the combined shift schedule would not have applied to them. Instead, section 7.7, rather than the addendum, governed their meal and rest breaks.

Evergreen makes much of the fact that section 7.7 provides for a 15-minute rest period, whereas WAC 296-126-092(4) provides for a rest period of “no less than ten minutes.”<sup>20</sup> But 15 minutes is “no less than ten minutes.” The 15-minute rest period merely reflects compliance with rather than variance from the regulation. Also, Lee’s claim is for missed rest breaks. The potential duration of a rest break is irrelevant if the break never begins or was less than 10 minutes.

Evergreen also relies on deposition testimony from McFarland and other class members to argue Lee’s claims are contractual rather than statutory. But arguable differences between class claims pled in the complaint and snippets of plaintiffs’ testimony do not recast Lee’s claims as Evergreen wants them to be.<sup>21</sup> Specifically, Evergreen contends that McFarland’s testimony about missed breaks

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<sup>20</sup> See, e.g., Appellant’s Br. at 23-25 (“The CBA grants nurses 15-minute rest breaks, *not* the 10 minutes provided by WAC 296-126-092(4). . . . If nurses missed their 15-minute rest breaks and were not paid, that is a ‘breach of the express terms and conditions’ of the CBA and must be resolved through the CBA’s grievance process, culminating in arbitration.”).

<sup>21</sup> Evergreen points to CR 15(b) and related cases as authority for its contention. But neither CR 15 nor the cases Evergreen cites apply here. “CR 15(b) is applicable in general terms to those occasions when the course of the trial departs so materially from the image of the controversy pictured in the pleadings that it becomes necessary to adjust the pleadings to reflect the case as it was actually litigated in the courtroom.” Harding v. Will, 81 Wn.2d 132, 136, 500 P.2d 91 (1972). “Where evidence raising issues beyond the scope of the pleadings is admitted without objection, the pleadings will be deemed amended to conform to the proof.” Reichelt v. Johns-Manville Corp., 107 Wn.2d 761, 766-67, 733 P.2d 530 (1987). CR 15(b) is not an invitation to recast one party’s claims at the behest of the opposing party based on highly disputed characterizations of cherry-picked deposition testimony.

shows her claims arise under the CBA,<sup>22</sup> but the rest and meal breaks provided by the CBA accord with state law.<sup>23</sup> And Lee's complaint alleges Evergreen failed to provide any rest breaks regardless of each break's duration. Neither the CBA nor plaintiffs' testimony converts this statutory claim into a contractual one.

Evergreen contends that all disputes between parties to a CBA are presumptively subject to arbitration unless specifically excluded. This argument is not persuasive because it fails to recognize the source of the rights Lee asserts in her complaint.

The "Steelworkers Trilogy,"<sup>24</sup> which sets out the principles governing arbitration of public employee labor disputes governed by a CBA, strongly favors

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<sup>22</sup> E.g., Appellant's Br. at 14-16 ("I think if the union contract states that they're required to give you a rest break within a certain period of time, then if they do not give you that, they ought to pay you for it, yes.") (quoting CP at 589-90).

<sup>23</sup> Evergreen also relies on testimony from a single class member to argue Lee's claims rely on the "CBA's ten-minute continuous and 15-minute total standards" for rest breaks. Appellant's Br. at 24. But Lee's expectation of a continuous 10-minute break does not originate in the CBA. WAC 296-126-092(4) requires a rest break of at least 10 minutes, while WAC 296-126-092(5) merely allows for short, intermittent breaks over four hours to add up to a single 10-minute break. Whether some nurses take advantage of WAC 296-126-092(5) is a question germane to class certification and damages, neither of which are before us. Also, this argument admits that nurses can satisfy the break requirement in their CBA by totaling their short breaks over four hours even though this procedure is available only through WAC 296-126-092(5) and not section 7.7 of the CBA. It shows the CBA being administered by the regulation rather than superseding it.

<sup>24</sup> See United Steelworkers v. Am. Mfg. Co., 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960); United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960).

arbitration of contractual disputes within the scope of an arbitration provision.<sup>25</sup>

But a public or private employee's statutory rights are distinct from her contractual rights.<sup>26</sup> Even where a CBA contains a provision that is coextensive with a statutory right, the ultimate question is what the law requires; "and that is not a question which should be *presumed* to be included within the arbitration requirement."<sup>27</sup>

Moreover, arbitration clauses in CBAs differ from arbitration clauses in bilateral employment contracts, particularly when it comes to statutory rights.<sup>28</sup> Consequently, an employee retains the ability to enforce her statutory rights in court unless the employees clearly and expressly agreed in the CBA to arbitrate their statutory claims.<sup>29</sup> The CBA must "explicitly state[]" in "clear and

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<sup>25</sup> See RCW 41.56.122(2) ("A collective bargaining agreement may . . . . (2) Provide for binding arbitration of a labor dispute arising from the application or interpretation of *the matters contained in a [CBA].*") (emphasis added); Mount Adams Sch. Dist. v. Cook, 150 Wn.2d 716, 723, 81 P.3d 111 (2003) (quoting Peninsula Sch. Dist., 130 Wn.2d at 413-14) (summarizing principles derived from the Steelworker's Trilogy)).

<sup>26</sup> Vega v. New Forest Home Cemetery, LLC, 856 F.3d 1130, 1134 (7th Cir. 2017); Civil Serv. Comm' of City of Kelso v. City of Kelso, 137 Wn.2d 166, 175, 969 P.2d 474 (1999); see Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 78-80, 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998) (concluding that the presumption favoring arbitrability in the Steelworker's Trilogy was inapplicable to a statutory claim).

<sup>27</sup> Wright, 525 U.S. at 79.

<sup>28</sup> E.g., Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1473-79 (D.C. Cir. 1997) (discussing the historic background of the role of arbitration and distinguishing contractual and statutory claims).

<sup>29</sup> 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 258-59, 264, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009) (holding that employees subject to a CBA must arbitrate statutory claims where the CBA's "arbitration provision *expressly covers both*

unmistakable language” that employees waive their ability to enforce statutory rights in court.<sup>30</sup>

In Vega v. New Forest Home Cemetery, LLC, a union employee working under a CBA sued his former employer to collect unpaid wages.<sup>31</sup> The employee brought claims under the Fair Labor Standards Act (FLSA)<sup>32</sup> and Illinois state wage law.<sup>33</sup> The CBA addressed the employee’s wages, set out a mandatory four-step grievance process to resolve disputes, and explicitly defined grievances to include disputes over pay.<sup>34</sup> The court held the employee could sue in court to enforce his statutory wage rights under the FLSA because nothing in the CBA referenced the statute.<sup>35</sup> Because the CBA did not explicitly reference the FLSA, there was nothing clear and unmistakable in the CBA compelling the employee to assert his statutory rights through the grievance process.<sup>36</sup>

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statutory and contractual discrimination claims.”) (emphasis added); Wright, 525 U.S. at 79 (“[A]ny CBA requirement to arbitrate [a statutory claim] must be particularly clear.”).

<sup>30</sup> Vega, 856 F.3d at 1134 (citing 14 Penn Plaza, 556 U.S. at 258-59); Cox, 2 Wn. App. 2d at 404; cf. Kelso, 137 Wn.2d at 177 (“[W]here the two appeal processes are concerned with different substantive rights, this court will not impose an election of remedies clause [in a CBA] where none was bargained for by the parties.”).

<sup>31</sup> 856 F.3d 1130, 1131 (7th Cir. 2017).

<sup>32</sup> 29 U.S.C. § 206(b).

<sup>33</sup> Vega, 856 F.3d at 1132.

<sup>34</sup> Id. at 1133. Notably, the mandatory grievance process in Vega authorized arbitration on the demand of either the union or the employer. Id. at 1131 n.1.

<sup>35</sup> Id. at 1135.

<sup>36</sup> Id.

Similarly, this court recently held in Cox v. Kroger Co. that an arbitration provision in a union employee's CBA did not waive his ability to bring statutory wage and hour claims in court.<sup>37</sup> The employee brought a class action against his former employer to collect wages allegedly denied in violation of state wage laws.<sup>38</sup> Because neither the CBA's wage nor grievance provisions identified or even referenced any wage statutes covered by the agreement, the CBA did not "clearly and unmistakably" waive his ability to enforce his statutory rights in court.<sup>39</sup> The court affirmed the trial court's denial of the employer's motion to compel arbitration.<sup>40</sup>

By contrast, the Supreme Court held in 14 Penn Plaza LLC v. Pyett that a union employees' CBA waived their ability to enforce statutory rights in court.<sup>41</sup> The employees alleged discrimination in violation of the federal Age Discrimination in Employment Act of 1967 (ADEA).<sup>42</sup> But the employees' CBA explicitly provided that all employment discrimination claims, including those brought under the ADEA, would be subject to the contract's grievance provision requiring binding arbitration "as the sole and exclusive remedy for violations."<sup>43</sup> The court reasoned

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<sup>37</sup> 2 Wn. App. 2d 395, 405, 409 P.3d 1191 (2018).

<sup>38</sup> Id. at 399-400.

<sup>39</sup> Id. at at 404-05.

<sup>40</sup> Id. at 405

<sup>41</sup> 556 U.S. 247, 251-52, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009).

<sup>42</sup> 29 U.S.C. § 621.

<sup>43</sup> Id. at 251-52.

the CBA “clearly and unmistakably” required arbitration because the discrimination section explicitly stated ADEA claims were arbitrable.<sup>44</sup>

Here, as in Vega and Cox, article 16 makes no reference of any kind to any statute or to statutory rights. In addition, article 16 narrowly defines a grievance as an “alleged breach of the express terms and conditions of the [CBA],”<sup>45</sup> which WAC 296-126-092 is not. And unlike 14 Penn Plaza, no part of the CBA explicitly waives Lee’s ability to enforce her statutory rights in court. Lee’s complaint alleges that she and her fellow class members “did not receive meal and rest breaks violat[ing] RCW 49.12 and WAC 296-126-092.”<sup>46</sup> The complaint does not reference breach of any contractual term, and the face of the CBA shows it does not supersede or vary from WAC 296-126-092.<sup>47</sup>

Article 16 provides the option of submitting unresolved grievances to binding arbitration, rather than mandating arbitration in all instances.<sup>48</sup> And, as in

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<sup>44</sup> Id. at 260.

<sup>45</sup> CP at 106.

<sup>46</sup> CP at 439.

<sup>47</sup> We note that our Supreme Court has held that a CBA may not abrogate a worker’s right to periodic rest periods under chapter 49.12 RCW or WAC 296-196-092, and the statute must “operate as a base” from which parties may negotiate a CBA that “enhance[s] or exceed[s] those minimum standards.” Wingert v. Yellow Freight Sys., Inc., 146 Wn.2d 841, 852, 50 P.3d 256 (2002) (quoting Wingert v. Yellow Freight Sys., Inc., 104 Wn. App. 583, 596, 13 P.3d 677 (2000)). Thus, variances are still actionable as statutory claims to the extent the CBA abrogates an emergency room nurse’s ability to enjoy the minimum rest and meal breaks guaranteed by the statute.

<sup>48</sup> CP at 107 (“If the grievance is not settled on the basis of the foregoing procedures, [WSNA] may submit the issue in writing to final and binding arbitration.”) (emphasis added).

Cox, the CBA's grievance provisions make no mention of any statutory rights and apply only to a breach of the agreement's express terms. Lee's complaint does not implicate the CBA and, moreover, the CBA does not clearly and unmistakably waive Lee's ability to bring individual statutory claims in court.<sup>49</sup>

Evergreen contends, though, 14 Penn Plaza, Vega, and Cox are inapposite because those employees were privately employed whereas Lee was a public employee with a CBA subject to Washington's Public Employee Collective Bargaining Act (PECBA).<sup>50</sup> According to Evergreen, PECBA presumes that an employee's disputes with her public employer are subject to arbitration absent "a clear and unmistakable carve-out" because PECBA "provides an express waiver of a judicial forum for employee statutory claims on matters covered in the CBA."<sup>51</sup>

First, PECBA does not presume or mandate arbitration of employees' statutory claims. PECBA merely allows that a CBA "may . . . [p]rovide for binding arbitration of a labor dispute" arising from "matters contained in" the agreement.<sup>52</sup> The parties to a CBA are free to collectively bargain for particular dispute resolution procedures. PECBA mandates neither arbitration nor litigation. And, as discussed, Lee's statutory claims do not arise from "matters contained in" the CBA.

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<sup>49</sup> 14 Penn Plaza, 556 U.S. 258-59; Wright, 525 U.S. at 79; Cox, 2 Wn. App. 2d at 404.

<sup>50</sup> Ch. 41.56 RCW.

<sup>51</sup> Appellant's Supp. Br. at 5-6.

<sup>52</sup> RCW 41.56.122(2).

Second, our Supreme Court recognized in Peninsula School District No. 401 v. Public School Employees of Peninsula that PECBA is not implicated where only “statutorily created private rights” are allegedly harmed by an employer’s conduct.<sup>53</sup> In Peninsula, a school district declined to recognize a grievance filed jointly by a union and its member because the district argued the matter grieved fell outside the bounds of the CBA.<sup>54</sup> Thus, the court had to address whether the matter could be and was collectively bargained for.<sup>55</sup> The Peninsula court distinguished that case from Shoreline Community College District No. 7 v. Employment Security Department<sup>56</sup> because Peninsula did not involve a waiver of private statutory rights.<sup>57</sup>

In Shoreline, the community college argued that an English instructor was not entitled to unemployment benefits because his CBA calculated his work hours such that he could not meet the statutory minimum to receive benefits.<sup>58</sup> The community college further contended the CBA controlled over conflicting provisions of the Employment Security Act,<sup>59</sup> effectively waiving the instructor’s right to receive unemployment benefits.<sup>60</sup> The court disagreed and held that a

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<sup>53</sup> 130 Wn.2d 401, 412, 924 P.2d 13 (1996).

<sup>54</sup> Id. at 403-05.

<sup>55</sup> Id. at 409.

<sup>56</sup> 120 Wn.2d 394, 842 P.2d 938 (1992).

<sup>57</sup> 130 Wn.2d at 412.

<sup>58</sup> 120 Wn.2d at 401-02.

<sup>59</sup> Ch. 50.04 RCW.

<sup>60</sup> 120 Wn.2d at 401-02.

contractual waiver of the right to unemployment benefits was void as contrary to public policy because the right to benefits serves a public policy purpose; the court's analysis never considered PECBA.<sup>61</sup>

Because the CBA does not clearly and unmistakably waive Lee's ability to enforce her statutory rights in court and PECBA is not germane, the court did not err in denying Evergreen's motion to compel arbitration.<sup>62</sup>

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<sup>61</sup> Id. at 410. We also note that PECBA's stated purpose is to provide "a uniform basis for implementing the right of public employees to join . . . and to be represented by [labor] organizations in matters concerning their employment." Peninsula, 130 Wn.2d at 406-07 (quoting RCW 41.56.010). And cases cited by Evergreen implicating PECBA all involve infringements on a union's ability to represent its members. Peninsula, 130 Wn.2d at 403-04, 407 (school district refused to comply with CBA and enter arbitration after the union filed a grievance in conjunction with a terminated employee); Municipality of Metro. Seattle v. Pub. Emp't Relations Comm'n, 118 Wn.2d 621, 624, 631-34, 826 P.2d 158 (1992) (employer refused to comply with an order from the Public Employment Relations Commission mandating arbitration to advance the collective bargaining process between it and a union); Rose v. Erickson, 106 Wn.2d 420, 421-22, 721 P.2d 969 (1986) (employer refused to recognize a union employee's grievance filed pursuant to terms of the CBA); Nucleonics All., Local Union No. 1-369, Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Washington Pub. Power Supply Sys. (WPPSS), 101 Wn.2d 24, 25-27, 677 P.2d 108 (1984) (union sought to represent nonunion employees and employer opposed its efforts); SEIU 775 v. State Dep't of Soc. & Health Servs., 198 Wn. App. 745, 396 P.3d 369 (holding that PECBA does not prohibit a public employer's release of employees' names where the employees' union intervened to enjoin release of members' names under the Public Records Act), review denied, 189 Wn.2d 1011 (2017); The Council of County. & City Employees, AFSCME, AFL-CIO v. Spokane County, 32 Wn. App. 422, 647 P.2d 1058 (1982) (employer refused to recognize and arbitrate a grievance filed pursuant to CBA with the union). Here, by contrast, Evergreen's conduct implicates only private statutory rights and not collective bargaining rights. As in Shoreline Community College, PECBA does not appear to be germane to this litigation.

<sup>62</sup> Vega, 856 F.3d at 1134; Cox, 2 Wn. App. 2d at 404. Evergreen has moved to strike portions of Lee's supplemental briefing, which she and Evergreen both filed at our request. First, Evergreen's motion to strike relied exclusively on

Whether Evergreen Waived The Right To Compel Arbitration

Lee contends that even if the CBA required arbitration of her claims, Evergreen waived its right to compel arbitration.

We review de novo whether a party waived arbitration.<sup>63</sup>

“Washington courts have long held that the contractual right to arbitration may be waived if it is not timely invoked.”<sup>64</sup> Because Washington has a strong presumption in favor of arbitration, the party arguing against it bears a heavy burden of showing that waiver occurred.<sup>65</sup> “To establish waiver of the right to arbitration, the party opposing arbitration must demonstrate (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts.”<sup>66</sup> A party asserting its right to arbitration acts inconsistently with that right where it seeks a decision on the merits of issues in the litigation<sup>67</sup> and fails to

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materials outside the appellate record in violation of RAP 17.3(a). Second, Evergreen moved to strike only those portions of Lee’s supplemental brief arguing that her claims are based solely on statutes, but a motion to strike is not the appropriate vehicle for arguments on the merits of an appeal. We deny the motion.

<sup>63</sup> Estate of Romney, 199 Wn. App. at 602.

<sup>64</sup> Otis Hous. Ass’n, Inc. v. Ha, 165 Wn.2d 582, 587, 201 P.3d 309 (2009).

<sup>65</sup> Estate of Romney, 199 Wn. App. at 602.

<sup>66</sup> Id. at 601-02 (internal quotation marks omitted) (quoting Wiese, 189 Wn. App. at 480).

<sup>67</sup> Martin, 829 F.3d at 1125; Petroleum Pipe Ams. Corp. v. Jindal Saw, Ltd., 575 F.3d 476, 480 (5th Cir. 2009); see Otis Housing Ass’n, 165 Wn.2d at 588, (litigating a parallel action before invoking right to arbitrate in a separate action on same merits waives the right); Naches Valley Sch. Dist. No. JT3 v. Cruzen, 54 Wn.

assert its right at “obvious opportunities” to do so.<sup>68</sup> “Simply put, . . . a party waives a right to arbitrate if it elects to litigate instead of arbitrate.”<sup>69</sup>

Evergreen agrees it did not move to compel arbitration until the parties had been litigating for nine months.<sup>70</sup> But it contends it did not know the claims in the complaint arose under the CBA until after it deposed McFarland on July 26, 2017, and Lee added McFarland as a representative plaintiff a few weeks later.<sup>71</sup>

Lee’s meal and rest break claims against Evergreen in her second amended complaint are identical to those in her first amended complaint and her original complaint.<sup>72</sup> Also, Evergreen first raised arbitration as a defense in the

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App. 388, 395-96, 775 P.2d 960 (1989) (plaintiffs waived arbitration by filing for summary judgment on the merits of their claims).

<sup>68</sup> Hill v. Garda CL Nw. Inc., 169 Wn. App. 685, 692, 281 P.3d 334 (2012) (quoting Steele v. Lundgren, 85 Wn. App. 845, 853-55, 935 P.2d 671 (1997)), rev’d on other grounds, 179 Wn.2d 47, 308 P.3d 635 (2013).

<sup>69</sup> Otis Hous. Ass’n., 165 Wn.2d at 588.

<sup>70</sup> See Appellant’s Br. at 28-29 (Evergreen’s “motion to compel arbitration was filed 15 days after the [c]ourt granted the motion to amend and plaintiffs filed the [s]econd [a]mended [c]omplaint.”).

<sup>71</sup> See id. at 29-30 (“The combination of McFarland’s deposition testimony, which was given *before* plaintiffs sought to amend the complaint, and the [s]econd [a]mended [c]omplaint made clear that the claims in this lawsuit arise under the CBA and require an interpretation of the CBA’s express terms and past practices of the parties.”).

<sup>72</sup> Compare CP at 439 (section VI of second amended complaint stating claims against Evergreen: “Defendant’s practices under which Plaintiffs and the class did not receive meal and rest breaks violate RCW 49.12 and WAC 296-126-092.”), with CP at 5, 17 (section VI of complaint and first amended complaint stating claims against Evergreen: “Defendant’s practices under which Plaintiff and the class did not receive meal and rest breaks violate RCW 49.12 and WAC 296-126-092.”).

answer it filed December 22, 2016.<sup>73</sup> Evergreen cannot now contend it did not know these claims might be arbitrable where its answer raised arbitration as an affirmative defense.

Evergreen behaved inconsistently with a party seeking to arbitrate. Soon after McFarland's deposition, Lee moved to continue trial from November 2017 to March 2018. Lee also sent Evergreen a copy of her proposed second amended complaint adding McFarland as a representative plaintiff. Evergreen opposed the motion to continue, and stated it "is prepared to try this case on November 6, 2017."<sup>74</sup> Also, Evergreen was fully aware of McFarland's deposition testimony at the time it insisted on litigating. Evergreen specifically argued against granting Lee a continuance because McFarland had already been deposed and "[a] second class representative adds nothing to the present case."<sup>75</sup> Put simply, Evergreen elected to litigate and missed an obvious opportunity to assert its right to arbitrate.

Lee would be prejudiced by granting Evergreen's motion to compel. "When a party has expended considerable time and money due to the opposing party's failure to timely move for arbitration and is then deprived of the benefits for which it has paid by a belated motion to compel, the party is indeed prejudiced."<sup>76</sup> For example, there is prejudice when a party loses a motion on the merits and

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<sup>73</sup> CP at 10.

<sup>74</sup> CP at 1793.

<sup>75</sup> CP at 1798.

<sup>76</sup> Martin, 829 F.3d at 1127.

effectively attempts to relitigate it by invoking arbitration<sup>77</sup> or when a party “too long postpones” invocation of arbitration and causes the opposing party “to incur unnecessary delay or expense.”<sup>78</sup>

Here, Lee will be prejudiced if Evergreen is allowed to belatedly compel arbitration. Lee asserts she incurred over \$140,000 in fees and costs from formal discovery and pretrial litigation before Evergreen moved to compel arbitration. Granting Evergreen’s motion would also prejudice Lee by giving Evergreen a second chance on the critical substantive issues, such as class certification, that it litigated and lost.<sup>79</sup>

Evergreen analogizes to Hill v. Garda CL Northwest Inc. to argue it did not waive its right to compel arbitration.<sup>80</sup> In Hill, a group of employees filed a putative class action against an armored car company for alleged wage violations.<sup>81</sup> The

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<sup>77</sup> Steele, 85 Wn. App. at 859.

<sup>78</sup> Schuster v. Prestige Senior Mgmt., LLC, 193 Wn. App. 616, 643, 376 P.3d 412 (2016); Steele, 85 Wn. App. at 859. Evergreen argues that its motion to compel arbitration was not belated because it occurred only two weeks after the court approved Lee’s second amended complaint. But this ignores the preceding nine months of litigation during which Evergreen knew it could arbitrate, and it attempts to elevate chronology over conduct.

<sup>79</sup> Steele, 85 Wn. App. at 859; see Martin, 829 F.3d at 1128 (holding the defendant waived arbitration “because the plaintiffs would be prejudiced if the defendants got a mulligan on a legal issue it chose to litigate in court and lost”); Riverside Publ’g Co. v. Mercer Publ’g LLC, 829 F. Supp. 2d 1017, 1021-23 (W.D. Wash. 2011) (finding prejudice from the plaintiff’s “forum shopping” when it belatedly moved to compel arbitration only after losing substantive pretrial motions).

<sup>80</sup> 169 Wn. App. 685, 691-94, 281 P.3d 334 (2012).

<sup>81</sup> Id. at 688.

company asserted its right to compel arbitration in its answer and began to engage in discovery, but it did not move to compel arbitration for over one year.<sup>82</sup> But during that year, the parties agreed to delay litigation while awaiting the outcome in a very similar case<sup>83</sup> being litigated in this court.<sup>84</sup> After the similar case was decided, the parties filed a joint stipulation agreeing that the matter was arbitrable.<sup>85</sup> Also, both parties endeavored to resolve the dispute through mediation prior to committing to arbitration or litigation.<sup>86</sup> After the company finally moved to compel arbitration, this court held it had not waived the right to arbitrate “[b]ecause the delay in filing the motion to compel resulted in part from an effort to resolve this case without resorting to litigation and Garda asserted its arbitration rights in its answer.”<sup>87</sup>

Evergreen’s conduct in this case bears little similarity to that of the armored car company. Unlike the company in Hill, Evergreen demanded to litigate this case in court before seeking arbitration. Also, nothing in the appellate record shows an effort by either party to resolve this dispute out of court.

Evergreen’s knowledge of its ability to invoke arbitration, its litigation conduct, and the potential prejudice to Lee demonstrate waiver of the right to

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<sup>82</sup> Id. at 688-89, 691.

<sup>83</sup> Pellino v. Brink’s Inc., 164 Wn. App. 668, 267 P.3d 383 (2011).

<sup>84</sup> Hill, 169 Wn. App. at 691.

<sup>85</sup> Id.

<sup>86</sup> Id. at 692.

<sup>87</sup> Id.

arbitrate. Accordingly, we conclude Evergreen waived the right to arbitrate when it elected to litigate instead of arbitrate.<sup>88</sup>

For the foregoing reasons, we affirm.

WE CONCUR:

Andrus, J.

  
Mann, A.C.J.

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<sup>88</sup> Otis Hous. Ass'n, 165 Wn.2d at 588.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

JEOUNG LEE and SHERRI	)	No. 77694-1-I
MCFARLAND, on their own behalf	)	
and on behalf of all persons similarly	)	
situated,	)	
	)	
Respondents,	)	
	)	
v.	)	
	)	
EVERGREEN HOSPITAL MEDICAL	)	ORDER DENYING
CENTER, a/k/a KING COUNTY	)	APPELLANT'S MOTION
PUBLIC HOSPITAL DISTRICT #2,	)	FOR RECONSIDERATION
	)	
Appellant.	)	

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Appellant filed a motion for reconsideration of the opinion filed February 11, 2019. At the request of the court, respondents filed an answer. Respondents include a request for fees and costs incurred in preparing their answer, but provide no authority supporting the request. The panel has considered the motion and and respondents' answer and determined that the motion and respondents' request for fees and costs should be denied.

Now therefore, it is hereby

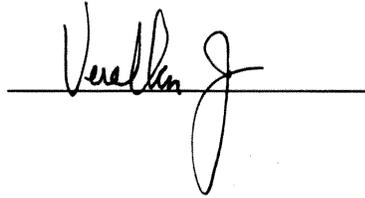
ORDERED that appellant's motion for reconsideration is denied.

No. 77694-1-I-2

It is further

ORDERED that respondents' request for fees and costs is denied.

FOR THE PANEL:

A handwritten signature in black ink, appearing to read "Verellen J.", is written over a horizontal line. The signature is cursive and stylized.

# LIVENGOOD ALSKOG, PLLC

May 13, 2019 - 2:50 PM

## Transmittal Information

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**Appellate Court Case Number:** 77694-1  
**Appellate Court Case Title:** King County Public Hospital, Appellant v. Jeoung Lee, Respondent  
**Superior Court Case Number:** 16-2-27488-9

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