No. 99829-9
Court of Appeals Cause No. 80211-9-I

SUPREME COURT OF
THE STATE OF WASHINGTON

TIMOTHY LUNDQUIST, and a certified class of similarly situated individuals,

Plaintiffs/Petitioners,

v.

SEATTLE SCHOOL DISTRICT NO. 1,

Defendant/Respondent.

PLAINTIFFS' PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

The petitioner is Timothy Lundquist, a permanently disabled former school teacher, who represents a class of disabled school employees who did not receive long-term disability benefits equal to 60% of pre-disability earnings, as the District's disability benefit plan provides. The District reduced the benefits well below 60% by failing to include and report regular earnings in the form of locally funded (TRI) pay, deferred compensation, and employer-paid health insurance premiums.

II. COURT OF APPEALS DECISION

The Court of Appeals ruled on March 1, 2021 that the plaintiff class cannot sue the District for long-term disability benefits offered as employee benefits and a part of their deferred compensation. A motion to reconsider was denied on April 27, 2021. Copies are attached.

III. ISSUES PRESENTED FOR REVIEW

1. Should this Court review Court of Appeals' unique decision, contrary to decisions of this Court, that long-term disability benefits are not "deferred compensation" and that the employer district is not liable to provide the benefits it expressly promised, where the district intentionally contributed to the reducing of benefits by failing to include and report all of employees' pre-disability earnings for the 60% calculation?

2. Should this Court review the Court of Appeals' decision that permanently disabled former employees who have no expectation of future

employment are members of an employee bargaining unit and thus can only use nonexistent CBA remedies to seek disability benefits (a) where permanently disabled individuals are not "employees" for purposes of collective bargaining representation, (b) where a permanently disabled individual has no community of interest with current employees, and (c) where the CBA does not mention or pertain at all to those disability benefits?

IV. STATEMENT OF THE CASE

School districts are authorized by statute to provide long-term disability benefits and other insured benefits to their employees. RCW 28A.400.350. They may provide the benefits "by contracts or agreements with private carriers, with the state health care authority, or through self-insurance or self-funding… or in any other manner authorized by law." *Id*. The District long ago chose to offer disability benefits to their employees by contracting with Standard Insurance (starting in 1983). CP 636. As the District noted, the policy is a "group disability insurance" policy which is "issued to an employer [covering its] employees…" CP 809, quoting RCW 48.21.010(1). The statutes refer to disability insurance as an "employee benefit" and "compensation." RCW 48.21.075 (referring to "compensation [that] includes group disability" insurance); RCW 41.05.740 (disability insurance is part of "school employees' benefits").

Timothy Lundquist was employed by the Seattle School District as a

teacher at Salmon Bay School from 1999 to 2017. CP 132-33. Mr. Lundquist has Parkinson's disease and became totally and permanently disabled and unable to teach. CP 133, 782-83, 1127. Mr. Lundquist receives disability pay and will continue to receive disability pay until he is 66 years old. CP 50. Disability pay is 60% of an employee's pre-disability earnings to provide for the essential needs of a disabled worker, but Mr. Lundquist's benefits are substantially less than 60%.

The District excluded much of Mr. Lundquist's (and everyone else's) pre-disability earnings in its monthly payroll reports to Standard Insurance. First, Mr. Lundquist received TRI pay, which is regular salary funded by local levies, CP 132-33, because the State did not adequately fund regular pay, as the school districts established in *McCleary v. State*, 173 Wn.2d 477, 536-37, 269 P.3d 227 (2012). Nevertheless, the District did not report TRI pay as part of the annual earnings on which his 60% disability pay is based. Moreover, the District did not include the employer cost of health insurance or deferred compensation, both of which are a routine part of annual earnings under the terms of the disability plan.[1] CP 133.

[1] *Adams v. Reliance Stand. Life Ins. Co.*, 225 F.3d 1179, 1185-86 (10th Cir. 2000) (employer cost of health insurance is considered a part of a teacher's earnings for purposes of disability pay calculation); *Cockle v. DLI*, 142 Wn.2d 801, 818-21, 823, 16 P.3d 583 (2001) (employer cost of health insurance is part of employee's earnings in calculating time-loss benefits of injured employee); CP 104 (the term "earnings" is expressly defined in the disability plan to include "deferred compensation"). And deferred compensation is a regular part of teachers' earnings. *Adams*, 225 F.3d at 1185.

The District does not dispute the terms of the disability policy. Instead, it contended that Mr. Lundquist's claim was barred by failing to exhaust collective bargaining agreement (CBA) remedies, even though the CBA is completely irrelevant to disability pay. King County Superior Court Judge Annette Messitt rejected this affirmative defense on summary judgment, ruling the disability claim does not arise out of a CBA because it is an employee benefit that arises from the long-term disability policy, not the CBA. She said this "is supported, in part, by the fact that all district employees receive long-term disability coverage…regardless of whether or not they are subject to a CBA." CP 1166. And she thus ruled that Mr. Lundquist "was not required to grieve this issue under the CBA because he is not claiming the Seattle School District violated any term of the CBA." *Id.* Judge Messitt further ruled that Mr. "Lundquist was not an 'employee' of Seattle School District for purposes of union representation…because he was within the category of persons who had 'cease[d] worked without expectation of further employment'" and thus was not subject to the CBA grievance procedure. *Id.* Accordingly, Judge Messitt rejected the District's exhaustion defense for those two independent reasons. CP 1167.

The Court of Appeals granted discretionary review. Meanwhile, the court permitted the plaintiffs to add Standard Insurance as an additional defendant. October 16, 2020 order. And Standard Insurance filed a claim

against the District. *Standard v. S.S.D.*, W.D. WA No. 2:20-cv-01097-MJP, Dkt. 11. Standard says the District must "provide Standard with 'all information reasonably necessary to the administration of the Group Policy.' " *Id*. at 5. Moreover, Standard alleges that "[i]n reliance on information submitted by the District, [it] calculated LTD Benefits without including TRI Pay…." *Id*. at 7-8. Standard's claim is basically the same as plaintiffs' complaint, CP 1-12, *i.e.*, that the District breached its duties by its failure to calculate and report disability pay as required by the plan. *Standard Insurance v. Seattle School Dist.*, 2020 WL 8513589 (W.D. Wash. 2020).

The Court of Appeals ruled, without any motion on the matter below, that the District has no duty to provide disability pay in accord with the terms of its own employee benefit plan. Op. at 10, 22.

V. ARGUMENT

A. Standard for Accepting Review.

Under RAP 13.4(b), this Court will review decisions that involve "an issue of substantial public interest that should be determined by the Supreme Court," involve a "significant question" of Washington law, or are "in conflict with a decision of the Supreme Court." The Court of Appeals decision should be reviewed because it involves issues of substantial public interest regarding employee benefits and the ability of employees to seek compensation for the denial of benefits, and it conflicts with multiple controlling decisions of this Court. Here, the District agrees that the Court of

Appeals "decision…is of general public interest and importance." Mot. to Publish at 2, 5.[2]

The Legislature has emphasized the importance of disability benefits by enacting statutes governing school districts' insured employee benefits including disability plans. See RCW 28A.400.350; RCW 28A.400.275; RCW 41.05.740 (enacted while this case has been pending). These statutes were not addressed by the Court of Appeals.

B. The Court of Appeals Erred on an Issue of Public Importance by Ruling Long-Term Disability Benefits Are Not Compensation, Contrary to This Court's Decisions.

The Court of Appeals rejected two controlling decision of this Court in holding that long-term disability benefits are not employee compensation. The District proudly promoted this point (Mot. to Publish at 3-4):

> The decision is one of the first appellate decisions to interpret the scope of two prior Washington cases, *Jacoby v. Grays Harbor Chair & Manufacturing Co.*, 77 Wn.2d 911, 468 P.2d 666 (1970), and *Navlet v. Port of Seattle*, 164 Wn.2d 818, 194 P.3d 221 (2008) … In so holding, the decision clarified…[that] not every employee benefit constitutes deferred compensation.

The decision is not a "clarification," it is the first and only case in Washington to hold that long-term disability pay (or any employee benefit) is not employee compensation. And as the District says, the decision is "significant

[2] Although the Court denied the District's motion to publish, it will be considered persuasive in Superior Court because there are few cases applying this Court's precedent. Mot. to Publish at 3-4. Unfortunately, it actually rejects Supreme Court precedent in connection with both insured employee benefits and labor law.

because it is one of the few…address[ing] group disability insurance," and thus will influence future disability benefit cases. Mot. at 4, n. 3.

This decision conflicts with this Court's controlling precedents holding that *all* employee benefits are compensation (wages) and that an employee may sue an employer for breach of contract for an employee benefit. *Jacoby*, 77 Wn.2d at 916; *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1014-1015 (9th Cir 1997) (en banc), *cert. denied*, 522 US 1098 (1998) (applying Washington law); *Navlet*, 164 Wn.2d at 838-39 (adopting holding of *Vizcaino*).

In *Jacoby*, retirees seeking a pension from their employer under its contract with an insurance company brought suit "*against their former employer*…on a pension plan contract between their employer and [the insurance company]." 77 Wn.2d at 912 (emphasis added). Insured benefits are "a basic part of an employee's remuneration even as his wages are a part thereof." *Id.* Thus, the pension contract was "not only between the employer and the [insurance] company, but [also] an implied contract between employer and employee." *Id*.

In *Vizcaino*, 120 F.3d 1006, the Court ruled that an employer's public promulgation of an employee benefit is an offer that employees accept by continued work. *Id.* at 1014. Consequently, it ruled that treating employee benefits as compensation should "appl[y] to all employee benefits." *Id*.

This Court expressly adopted the holding that "all employee benefits," including insured benefits, are "compensation" that employers are contractually obligated to provide in *Navlet* (164 Wn.2d at 839):

> [W]elfare benefits make up part of the core compensatory benefits package offered in exchange for continued service. *See, e.g., Cockle v. Dep't of Labor & Indus.,* 142 Wash.2d 801, 823, 16 P.3d 583 (2001) (recognizing employer-provided health care benefits as "core, nonfringe benefits" provided in consideration for services rendered… .

Thus, this Court held that "the same form of reasoning [that pension benefits are deferred compensation] *applies to all employee benefits*." *Navlet*, 164 Wn.2d at 838, quoting *Vizcaino*, 120 F.3d at 1014 (this Court's bracketed insert and italics). Accordingly, an employee may sue the employer to obtain the benefit. *Navlet*, 164 Wn.2d at 847 n. 17; *Jacoby*, 77 Wn.2d at 916. And, consistent with *Navlet*, Division II held that disability benefits are employee "compensation." *Merino v. State*, 179 Wn. App. 889, 906, 220 P.3d 153 (2014).

The trial court thus correctly ruled that the long-term disability policy is a unilateral contract between the District and its employees under *Navlet* and *Jacoby*. CP 1116. The Court of Appeals, however, rejected the holdings of *Navlet* and *Jacoby* and found that the long-term disability benefit offered by the District to its employees is not compensation, unlike all other employee benefits. It tried to distinguish *Jacoby* on the facts by saying the employer there "promised to finance 100 percent of the pension plan." Op. at

25. And it said that the employer in *Navlet* had a "clear, written contractual obligation to pay welfare benefits." *Id*. at 25, n. 8.

The alleged distinction between this case and *Jacoby* and *Navlet* is baseless. The policy explicitly says that the "POLICYHOLDER [the District] will pay the *entire cost* of your INSURANCE." CP 97 (emphasis added). And the record shows that the plan functions as a pass-through, where the District pays the entire cost of the benefits through premiums, plus a small charge for administration and profit. CP 1082-86, 1125, 1130-39. If the claims exceed premiums in a given year, the deficiency is taken from the District's deposit account or future premiums are adjusted to account for the shortfall. CP 1125 ("Standard has the right to use the [deposit] to cover losses in any given year when their costs exceed the premium"), CP 1137-38 (calling the District's deposit account a "claim fluctuation reserve" and adjusting premiums based on an increase in paid claims).

Moreover, the specific terms of the policy state a plain contractual obligation to cover 60% of an employee's "annual rate of earnings." But the District informed employees that it would only report and pay premiums to cover "basic annual earnings," CP 676, where "basic" is contrary to the policy's definition of "annual rate of earnings. CP 104. And Standard Insurance receives and relies on the District's person-by-person report of payroll to calculate employees' pre-disability earnings. CP 1137-38. Thus,

the District's intentional underreporting of the insured earnings included in the calculation resulted in Mr. Lundquist receiving much less than 60% of his pre-disability "annual rate of earnings." Accordingly, the Court of Appeal' statement that the District is not involved in the calculation of disability pay (Op. at 23-24) is contrary to the undisputed record.

Because there was never any motion for summary judgment or decision in the trial court on the District's contract duty or breach—only on its CBA defense—the Court of Appeals misunderstood and misstated the facts.[3] First, the long-term disability benefit is totally employer-funded (see p. 9 *supra*). Second, it is mandatory for *all* school employees. CP 637. It is offered to every employee, regardless of union representation. CP 736-37. The benefit is described in documents provided to the employees, including the employee benefit handbook, each year. CP 637, 676; see also the District disability plan summary (attached).[4] And the Court of Appeals misstated the

[3] The Court of Appeals also failed to apply the summary judgment standard. It said that "by filing cross motions for summary judgment, the parties concede there are no material issues of fact." Op. at 10. That is not the standard. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 597 260 P.3d 857 (2011) ("As this case is here on cross-motions for summary judgment, we take the facts in the light most favorable to the nonmoving party with respect to the particular claim."). Here, by arguing that the long-term disability policy was an independent contract claim (not part of the CBA) under *Jacoby* and *Navlet* in a motion for partial summary judgment on the CBA exhaustion defense, the plaintiffs did not concede that the District made no promises in its employee handbook and other benefit documents. If the Court of Appeals thought the record was not sufficient to establish there was a unilateral contract (Op. at 10, 22), it should have remanded for further proceeding, not assume facts not in the record and rule on factual issues never considered below.

[4] This Court should take judicial notice of the LTD plan summary contained in *(continued)*

source of the calculation error in disability pay (Op. at 23-24). Additionally, the District's annual benefit worksheets show that the District was incorrectly reporting to Standard only "basic" earnings instead of the "annual rate of earnings" defined as "insured earnings" in the plan. CP 676.

Plaintiffs never received the opportunity to move for summary judgment as to whether the District had a contractual duty to provide disability benefits or had breached its duty because the Court of Appeals granted discretionary review of the trial court's early rejection of the exhaustion defense.[5] Despite the absence of any discovery, motion, or decision on duty or breach below, the Court of Appeals ruled that the District had no duty to provide disability benefits it offers and did not breach any duty by its failures. The Court of Appeals concluded that it was error to "find[] the existence of a unilateral contract requiring the District to pay *any disability compensation* to Lundquist." Op. at 27 (emphasis added).

Under this decision, the long-term disability benefit promised to all employees and paid for entirely by the District is *not* deferred compensation and employees may not sue their employer for failing to provide this

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the new employee benefit guidebook, Appendix 3, because it was cited by web address in documents submitted by the District, CP 677, but is no longer at that address, particularly because plaintiffs were never provided an opportunity to litigate the District's breach at any level. *McAfee v. Select Portfolio Servicing, Inc.*, 193 Wn. App. 220, 226, 370 P.3d 25 (2016). The plan description correctly notes that "plan contract prevails." Appendix 3.

[5] The Court of Appeals *sua sponte* issued a stay pending the interlocutory review, July 8, 2020, preventing plaintiffs from obtaining discovery on the District's failure to provide disability compensation.

compensation. *Id*. The decision is directly contrary to *Navlet*, where this Court *rejected* the employer's argument that the benefit provider "is the proper defendant in a suit for retirement welfare benefits, not the employer" because the "conferral of retirement benefits creates an implied contract directly between the employee and *employer*." 164 Wn.2d at 847 n.17 (this Court's emphasis); *accord*, *Jacoby*, discussed on p. 7 *supra*.

Employee compensation is an important issue in Washington. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157, 961 P.2d 371 (1998) (there is a "strong legislative intent to assure payment to employees of wages they have earned"); *Vizcaino*, 120 F.3d at 1014 (Washington has "adopted a protective view towards employee rights"). This strong legislative protection applies "to any type of compensation due by reason of employment." *Bates v. City of Richland*, 112 Wn. App. 919, 940, 51 P.3d 816 (2002). And "disability payments are '*compensation due by reason of employment*.' " *Merino*, 179 Wn. App. at 906. The decision here conflicts with all these decision and undermines the strong protection granted to employee rights by the Legislature.

Under the Court of Appeals decision, employees have no right to sue when their employer fails to provide a promised (and employer-funded)

benefit, at least when the employee benefit is administered by an insurer.[6] This decision affects any employee covered by a long-term disability employee benefit (or indeed any insured benefit) because any employer could misreport earnings (or other necessary information) leading to the denial of the benefit in whole or in part by the insurer. It also could affect all Washington employees as nearly all employers offer insured benefits.

The Court should review and decide that long-term disability benefits are the deferred compensation they are intended to be and, thus, whether employees may sue when an employer offered the benefit but misreports the compensation to the insurer or otherwise fails to provide a promised employee benefit.

The trial court decided the disability claim was independent of the CBA. CP 1116. Thus, the CBA discussion in argument C below is unnecessary if the Court agrees that the claim arises out of the policy. *Ervin v. Columbia Distrib., Inc.*, 84 Wn. App. 882, 889-90, 930 P.2d 947 (1997). The facts showing that the claim is independent of the CBA are discussed *infra* at pp. 18-19.

[6] The Court of Appeals mistakenly analogizes the case to where an insurer simply fails to pay benefits covered by the plan, such as refusing to pay for supposedly experimental treatment. Op. at 27. Here, it is undisputed in the record that *the District* reported to Standard that Mr. Lundquist is totally and permanently disabled, CP 133, 782-83, 1127, and that the District failed to report all pre-disability earnings and thus undisputedly contributed to the disability pay of substantially less than 60% of annual earnings.

C. The Court of Appeals Erred on an Issue of Public Importance by Ruling That Permanently Disabled Former Employees Are Bargaining Unit Members Subject to CBA Remedies.

Timothy Lundquist is a permanently disabled former employee. Although the District determined that Mr. Lundquist is permanently disabled with Parkinson's disease and cannot ever teach again, CP 1127, the District argued that he had to use the CBA grievance procedure to obtain the 60% of insured earnings he is owed under the District's disability policy. CP 739-816.

Under labor law, retired or permanently disabled former employees are not part of the bargaining unit because they do not share a community of interest with current employees. This principle was established by the U.S. Supreme Court in *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 164 (1971):

> [T]he obligation of the employer to bargain collectively, 'with respect to wages, hours, and other terms and conditions of employment,' with 'the representatives of his employees…[']extends only to the 'terms and conditions of employment' of the employer's 'employees' in the 'unit appropriate for such purposes' that the union represents.

Allied Chemical rejected the same argument made by the District here and accepted by the Court of Appeals (*id.* at 168, 171-72):

> No decision…is cited, and none to our knowledge exists, in which an individual who has ceased work without expectation of further employment has been held to be an 'employee.'
> …

> [Retirees] obviously were not employees 'working' or 'who work' on hourly rates of pay. Although those terms may include persons on temporary or limited absence from work…it would utterly destroy the function of language to read them as embracing those whose work has ceased with no expectation of return.

Accordingly, former employees who have ceased work without expectation of return are neither part of the bargaining unit nor subject to a CBA because "they plainly do not share a community of interest" with current employees. *Id.*

Under *Allied Chemical*, former employees who have retired or become permanently disabled without expectation of further employment are not subject to a CBA and may pursue remedies in court without resorting to CBA remedies even when the right to be enforced arises expressly from the CBA itself. *Rossetto v. Pabst Brewing Co., Inc.*, 128 F.3d 538, 539-40 (7th Cir. 1997); *Anderson v. Alpha Industries*, 752 F.2d 1293, 1298-1300 (8th Cir. 1985); *Local 134 UAW v. Yard-Man*, 716 F.2d 1476, 1484-85 (6th Cir. 1983); *Meza v. General Battery Corp.*, 908 F.2d 1262, 1270 (5th Cir. 1990); *Garcia v. City of Hartford*, 972 A.2d 706, 713 n. 5, 292 Conn. 334 (2009).

Washington labor law follows the federal precedents. RCW 41.59.110(2). And *Navlet*, 164 Wn.2d at 839-40, expressly adopted the *Allied Chemical* rule:

> [A] union's duty of fair representation for each employee terminates once the employee retires. *See Allied Chem. Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass*

> *Co*., 404 U.S. 157, 172, 92 S. Ct. 383, 30 L. Ed. 2d 341 (1971) ("retirees could not properly be joined with the active employees in the unit that the Union represents").
>
> [Footnote] [A] union would likely breach its duty to fairly represent its current members if it attempted to secure benefits for retirees out of the employer's resources that otherwise would be spent on compensation for the current employees. *See Pittsburgh Plate Glass Co*., 404 U.S. at 173 ("[T]he risk cannot be overlooked that union representatives on occasion might see fit to bargain for improved wages or other conditions favoring active employees at the expense of retirees' benefits.").

Under general labor law, "a totally disabled person…fall[s] squarely in the category of persons who have ceased work without expectation of further employment" and therefore are not covered by the CBA. *Meza*, 908 F.2d at 1269. The Washington Public Employment Relations Commission (PERC) follows federal labor law, holding that disabled former employees are not in the bargaining unit and not subject to a CBA. See *e.g.*, *Aldridge v. Washington State Troopers Association*, 2019 WL 1549471 (PERC). The hearing examiner explained (*id.* *7):

> Individuals receiving disability payments … are equivalent to retirees. They no longer perform work for the employer and do not have a reasonable expectation of return.

The decision was affirmed by PERC (2019 WL 3781675 at *7):

> Employees receiving disability retirement compensation do not share a community of interest with bargaining unit employees. *See Allied Chemical & Alkali Workers of America, Local Union No. I v. Pittsburgh Plate Glass Co.*, 404 U.S. at 175.

Indeed, the District conceded that Mr. Lundquist did not share a "community of interest" with the bargaining unit because he did not intend to ever return to work (CP 627):

> Mr. Lundquist's interest conflicts with those of potential class members because, unlike other potential class members, *he does not intend to return to work*. As a former employee, he has an incentive to maximize monetary damages… [T]he former/current employee dichotomy is exacerbated… [b]ecause increased long-term disability coverage will increase current employees' out-of-pocket premium costs… once they return to work, such employees have financial interest directly at odds with Mr. Lundquist's. [Citations omitted; emphasis added.]

Margaret White, the District's benefits administrator, confirmed that Mr. Lundquist was permanently disabled with Parkinson's as of March 21, 2017 and would not be returning to work (CP 1127):

> SPS employee Tim Lundquist will not be eligible for [benefits] on April 1, 2017 because *he is disabled as of last week and will not be returning to work* (Parkinson's)… [P]lease remove Tim from your list of eligible employees for your [insurance] report. [Emphasis added.]

Thus, the District's own determination shows that it knew when Mr. Lundquist left that he was permanently leaving work because he had Parkinson's disease and therefore could no longer work as a teacher.[7]

Instead of following the well-established general rule from *Allied Chemical*, and adopted in *Navlet* and *Aldridge*, the Court of Appeals said that,

[7] He was *not* leaving temporarily, as the Court of Appeals suggests, analogizing him to a pregnant employee on leave. Op. at 15, n. 6.

because the District treated Mr. Lundquist as an employee for limited payroll purposes (donated sick leave and unpaid medical leave), as required by the disability policy (CP 105, 1034), that made him an employee covered by the CBA.[8] The decision is contrary to *Aldridge* where the PERC held that a disabled former employee was not part of the bargaining unit and not covered by the CBA even though the employer kept him on the payroll as an employee for administrative reasons.[9] 2019 WL 1549471 at *3.

Not only is the Court of Appeals decision contrary to the *Navlet*, *Aldridge*, and the *Allied Chemical* rule, but its decision to allow only CBA remedies is perverse because there is no remedy under the CBA for Mr. Lundquist. *Smoke v. City of Seattle*, 132 Wn.2d 214, 225, 937 P.2d 186 (1997) ("[w]here there is no possible remedy at all there can scarcely be a failure to exhaust remedies"). The disability policy is not part of the CBA. It is not even mentioned in the CBA (CP 782) and it predates the CBA by 32 years (CP 736-37). It is independent and not part of the CBA because it applies to all employees, not just those covered by a CBA, as Judge Messitt

[8] The Court of Appeals attached great weight to the date of Mr. Lundquist's resignation from the payroll on March 30, 2018. The District sent Mr. Lundquist a resignation form. CP 783. To confirm that he was filling out the District's form in the way the District wanted, Mr. Lundquist asked a District HR representative about what date he should put as his resignation date: "is the last date of employment today (the date I sign the paper)? [O]r my last day I worked (3-21-17)?" *Id*. *The District* told him that he could use any date after he ceased working, so using the date that he filled out the form (March 30, 2018) was fine. CP 783-84.

[9] PERC is statutorily charged with determining bargaining unit membership. RCW 41.59.020(3).

held. CP 1166. The decision removes even the illusory remedy by dismissing the claims against the District of class members who are not subject to the teachers' CBA or *any* CBA. *Id.*

To be insured under the Standard Insurance plan, employees must "*not* [be] covered by another Employer paid [long-term disability] insurance program by reason of a union contract." CP 98 (emphasis added). The disability plan arises from state law, not from any CBA. RCW 28A.400.350. The CBA reinforces the point that disability benefits are independent by stating that "this Agreement shall not be interpreted and/or applied so as to eliminate, reduce or otherwise detract from individual salaries or employee benefits." CP 832. And the District explicitly "reserve[d] the right to make, adopt and implement policies, rules, regulations and procedures not in conflict with the CBA," *e.g.*, the disability plan. CP 832. The CBA states that "this Agreement is complete in and of itself and sets forth all terms and conditions of all the agreements between the SPS and the SEA pursuant to Chapter 41.59 RCW." *Id.* And it provides that if the union pursues arbitration "[t]he arbitrator shall have no power to alter, add to, subtract from, or modify the terms of this Agreement…" CP 936.

And yet the Court of Appeals holds Mr. Lundquist had to pursue a nonexistent remedy under the CBA for a disability benefit that is not part of the CBA and imposes a duty of fair representation on the union, even though

this Court's decision in *Navlet* finds that a union would violate its duty of fair representation if it also represented and former employees.

The decision is also perverse in that it equates a claim about the denial of disability pay for permanent disability (Parkinson's), where the former employee can no longer work, as a condition about "working conditions" covered by the CBA. As the Court of Appeals put it: "Lundquist's allegations clearly related to his working conditions." Op. at 17.

Because of Washington's protective view of employee rights, this Court reviews cases regarding whether employees may sue in court or are limited to arbitration. See, *e.g.*, *Burnett v. Pagliacci Pizza, Inc.*, 196 Wn.2d 38, 470 P.3d 486 (2020); *Jeoung Lee v. Evergreen Hosp. Med. Ctr.*, 195 Wn.2d 699, 464 P.2d 209 (2020). The Court should grant review.

VI. CONCLUSION

As the District argued, the Court of Appeals' decision implicates two issues of public importance, in which the decision is contrary to controlling Supreme Court decisions: (1) whether long-term disability pay is employee compensation and (2) whether permanently disabled former employees are "employees" for purposes of union representation and thus limited to only CBA remedies against the District (if there are such remedies). The Court should therefore grant review. Alternatively, the Court should grant review, summarily reverse the Court of Appeals, and remand to the Superior Court.

DATED this 27th day of May, 2021.

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APPENDIX 1

FILED
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Court of Appeals
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State of Washington

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

TIMOTHY LUNDQUIST, and a class of similarly situated individuals, Respondents, v. SEATTLE SCHOOL DISTRICT NO. 1, Appellant.	No. 80211-9-I DIVISION ONE UNPUBLISHED OPINION

ANDRUS, A.C.J. — Timothy Lundquist, a former teacher with the Seattle School District No. 1 (the District), alleges the District owes him compensation under the terms of a long-term disability insurance policy provided to school employees by Standard Insurance Company. The District moved to dismiss his claim because Lundquist did not exhaust the grievance procedures of his Collective Bargaining Agreement (CBA). The trial court denied the motion, finding Lundquist's claim to be outside the scope, and independent, of the CBA. We reverse and remand for the trial court to dismiss Lundquist's claim without prejudice.

FACTS

Timothy Lundquist taught middle school language arts and physical education at the Salmon Bay K-8 School within the District from January 1999 to May 2017. He was diagnosed with Parkinson's disease in July 2015. Because of his condition, Lundquist took a paid leave of absence beginning in March 2017. Shortly thereafter, he applied for long term disability compensation through Standard Insurance Company (Standard) and began receiving those benefits in May 2017.

As a teacher in the Seattle School District, Lundquist was a member of the Seattle Education Association (SEA), which represents "certificated non-supervisory educational employees" of the District, including teachers.

The SEA and the District negotiated the terms of the 2015-2018 CBA, which governs many aspects of the employee-employer relationship and includes provisions for compensation, work hours, procedures for taking a leave of absence, and employee benefits. Under the CBA, the District (identified as "SPS" in the CBA) was required to enter into a written individual contract with each employee "in conformity with the provisions of this Agreement and the laws of the State." The CBA provided that District policies, rules, regulations, procedures, and practices relating to wages, hours, and other terms and conditions of employment not in conflict with the CBA remained in effect unless modified by agreement with the union.

The CBA detailed how teachers, including Lundquist, were to be paid. Each teacher received compensation under an "Individual Employee Contract" (IEC) and a "Supplemental Contract." The IEC provided a salary pursuant to a schedule negotiated with the SEA. Teachers also received "Time, Responsibility and Incentive" compensation, or TRI pay. The TRI pay was set out in each teacher's separate Supplemental Contract, referred to in the CBA as the TRI Contract, the terms of which were included as Appendix C to the CBA. The CBA detailed the types of duties considered part of the annual base salary covered by the IEC, and those duties considered part of the TRI pay.

Lundquist received both an annual base salary under his IEC, and TRI pay under a TRI Contract. Both of his contracts directly referenced and incorporated the terms of, and duties set out in, the CBA.

The District also provided employees with certain insurance benefits. Margaret White, the District's insurance broker, testified that all of the District's insurance benefits are funded by contributions from the State of Washington and supplemented by local funding. Washington school districts are allowed to use state benefits to provide employees up to five basic insurance benefits: medical, dental, vision, life and long-term disability. The District provides all five benefits to all of its employees.

But the amount the District contributes toward these benefits for teachers is governed by the CBA. Under a CBA provision entitled "Group Insurance Provisions," the District agreed to contribute premiums toward approved "Group Insurance Programs" through a "Group Insurance Pool." The District agreed to

contribute the same amount as the State in a monthly allocation for insurance benefits. A separate CBA provision entitled "Pooling" provides:

> It is the intent of SPS as per agreement with the SEA to provide the SPS's contribution to the Group Insurance Fund for certificated employees of SPS to the fullest extent allowed by the Group Insurance Fund Pool. The SPS recognizes that the total amount contributed to the pool for any individual may not be fully utilized due to some employees selecting less coverage than would be paid by the SPS. Therefore, the SPS will identify any unutilized portion of the contributed amount for group insurance and distribute such amount, if any, to enrollees whose coverage exceeds the full share rate.
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> a. Beginning with the 10/01 pay warrants, the SPS's maximum contribution rate to the pool shall be the State monthly allocation figure for insurance benefits.
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> . . . .
>
> c. Figures used by the SPS to compute the cost of projected premium increases and projected changes in employee participation in insurance programs shall be developed by the SPS in consultation with the SEA.

White described how the District's "pooling" of insurance benefits, as described in the CBA, worked: "All benefits funds that are not used because an employee waives coverage or chooses a less expensive benefit plan are redistributed to employees with out-of-paycheck costs. This is called 'pooling.'" To the extent this funding did not fully cover any employee's premiums, employees paid out-of-pocket for the remainder.[1]

According to White, all insurance benefits the District provides are selected and approved by the "Joint Insurance Committee," or JIC, which is a group of

[1] When hired, all employees covered by the CBA receive copies of their individual contract, the salary schedule, the CBA, and the District's "Group Insurance Program Booklet," insurance enrollment forms, and "an explanation of the SPS's contributions to the premiums." This booklet is not in the record before us.

union-appointed employee representatives and District staff. This group includes representatives from the SEA. The JIC meets regularly to decide whether to renew an insurance policy, to change a carrier, or to change or amend the terms of these policies. Because any increase in premiums would come directly from an employee's out-of-pocket premium costs and affect the benefits pool, JIC has extensive discussions about the value of any benefits and the relative cost of increasing premiums. White testified the JIC approved the long-term disability insurance policy and benefits provided by Standard.

In addition to provisions relating to compensation and group benefits, the CBA also set out teachers' rights to take both short and long term leaves of absence. Any employee unable to perform his duties due to a medical disability is eligible for long term disability leave up to one year. If a second year of leave is necessary, the employee may apply for an additional year upon written request to the District's Human Resources Department. Any employee granted leave for two years or less "will be returned to service" by applying for a vacancy through the hiring process set out in the CBA. Any employee who has been on leave for more than one year is deemed a "displaced" staff member under the agreement. That displaced employee's right to return to a teaching position is set out in detail in the CBA's staffing and hiring provisions.

In the 2016-2017 academic year, Lundquist took paid leave from March 22, 2017 through June 26, 2017. On June 19, 2017, the District notified Lundquist that as an employee on a leave of absence, he was still considered a District employee and required to sign a teaching contract for the upcoming academic year. Corinne

Ross, a member of the District's Human Resource Department, sent Lundquist an email on June 21, 2017, asking Lundquist if he intended to extend his disability leave through the new school year. In response, Lundquist asked Ross if extending his leave would affect his right to return as an employee in the future. Ross informed Lundquist that he could come back to the District after a second year of leave in a "displaced" status, information consistent with the CBA's leave provisions. Lundquist then notified Ross he intended to continue his leave, and he executed the new contracts for the 2017-2018 academic year on June 24, 2017.

Lundquist was again on paid leave during the 2017-2018 academic year from September 6, 2017 through November 13, 2017. At that point, he took unpaid leave from November 14, 2017 through March 30, 2018. On March 30, 2018, Lundquist resigned from the District by executing a "Notice of Separation." He indicated on this form that he was resigning for medical reasons. Lundquist testified that he identified his last date of employment as March 30, 2018 at the District's direction.

In the spring of 2017, while on medical leave, Lundquist applied for and began receiving long term disability benefits from Standard. Under Standard's long term disability policy, eligible employees receive benefits based on 60 percent of the employee's pre-disability "insured earnings," reduced by "income from other sources." The policy defines "insured earnings" as the employee's monthly earnings from the District "including deferred compensation, but excluding bonuses, overtime pay, and any other extra compensation." The policy's rules for computation specify that "[i]f you are paid on an annual basis, your annual rate of

earnings is your annual contract salary." It further specifies that "[i]f you are paid on any other basis, your annual rate of earnings is your earnings for the period you are regularly scheduled to work each year."

When Standard initially began paying disability compensation to Lundquist in May 2017, its payments were based on a combination of his pre-disability base salary under his IEC and the locally-funded TRI pay he received under his TRI Contract. Two months later, Standard sent Lundquist a letter, indicating it had overpaid him because it viewed compensation under the TRI Contract to be excluded "extra compensation." Lundquist requested an internal review of this decision by Standard. In December 2017, Standard completed its review and concluded that Lundquist's annual earnings did not include compensation under the TRI Contract.

In 2019, Lundquist filed this lawsuit against the District, claiming the District was contractually liable under Standard's insurance policy for his disability compensation and he was entitled to have that compensation calculated based on the combination of his pre-disability base salary under the IEC, his additional TRI pay, the amount the District contributed toward the cost of health insurance, and Lundquist's deferred compensation.

The District asserted, as an affirmative defense, that Lundquist had failed to exhaust his contractual remedies under the CBA's grievance procedures. Article X of the CBA, entitled "Grievance Provisions," provided that if a "grievance" arose between any employee covered by the CBA, known as a "grievant," and the

District, the CBA required the employee to resolve the grievance through a four-step procedure. A "grievance" was defined under the CBA as:

> [A] claim based upon an event or condition which affects the conditions or circumstances under which an employee works, allegedly caused by the misinterpretation or inequitable application of written SPS regulations, rules, procedures, or SPS practices and/or the provisions of this Agreement.[2]

Each of the four steps in the grievance process is mandatory and failure to follow the procedures will result in "the grievance being dropped." If, at the conclusion of the first three steps of the process, the grievant remains unsatisfied, the SEA may "submit the grievance to final and binding arbitration." Under article X, section D(4), the only party entitled to demand binding arbitration on a grievance is the union. If the SEA files a notice of its intention to arbitrate with the Department of Labor Relations, an arbitration is conducted pursuant to the rules of the American Arbitration Association or the Federal Mediation Conciliatory Service. If the union does not notify the District of a demand for arbitration within the 60 days allowed under the CBA, that grievance is "deemed withdrawn." The arbitrator's decision "shall be final and binding on the employee involved and the SPS."

It is undisputed that Lundquist did not follow the grievance procedures before initiating this lawsuit against the District.

The parties filed cross motions for summary judgment on the sole issue of the applicability of the CBA to Lundquist's claims. The District asked the trial court to dismiss Lundquist's claims based on his failure to exhaust the grievance and

[2] Excluded from the scope of the grievance procedures are "matters for which law mandates another method of review." Lundquist does not contend this exclusion applies here.

arbitration process required by the CBA. Lundquist asked the court to rule that the District's CBA-based affirmative defense did not cover Lundquist's contract claim.

The trial court granted Lundquist's motion and denied the District's. In doing so, the court made the following findings of fact and conclusions of law:

> The Court concludes that the collective bargaining agreement (CBA) between the Seattle School District and the Seattle Education Association does not govern this dispute and judgment as a matter of law is appropriate as to that issue. The Court's findings are as follows:
>
> The Court finds that Lundquist was not an "employee" of Seattle School District for purposes of union representation when he began receiving long-term disability benefits because he was within the category of persons who had "ceased work without expectation of further employment": his physician had deemed him unable to work in any profession, he had ceased working, and there was no expectation of future employment.
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> The Court further finds that Lundquist was not required to grieve this issue under the CBA because he is not claiming that Seattle School District violated any term of the CBA and no terms of the CBA require interpretation to resolve his claims.
>
> The Court finds that Lundquist's claims are independent of the CBA because they arise from a unilateral contract between Seattle School District and its employees. This finding is supported, in part, by the fact that all district employees receive long-term disability coverage administered through Standard regardless of whether or not they are subject to a CBA.

The District appeals.[3]

ANALYSIS

The District contends the trial court erred in concluding Lundquist's claims are not subject to the grievance procedures of the CBA. We agree. First, the

[3] Lundquist argues the trial court's summary judgment orders are not appealable as a matter of right. We need not resolve that issue because we conclude discretionary review under RAP 2.3 is appropriate. We therefore deny Lundquist's motion to modify the commissioner's ruling accepting review.

record does not support the trial court's finding that Lundquist was not a District "employee" when his contract claim arose. Second, any contention that Lundquist's annual earnings should include TRI pay require an interpretation of the CBA's provisions relating to the duties covered by a teacher's annual base salary and those duties covered by TRI pay. Finally, the record does not support the trial court's alternative finding that an independent, unilateral contract existed under which the District agreed to pay disability compensation to Lundquist. We therefore reverse.

We review summary judgment orders de novo, performing the same inquiry as the trial court. Wilkinson v. Chiwawa Cmtys. Ass'n, 180 Wn.2d 241, 249, 327 P.3d 614 (2014). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). A material fact is one that affects the outcome of the litigation. Janaszak v. Dep't of Soc. & Health Servs., 173 Wn. App. 703, 711, 297 P.3d 723 (2013). "By filing cross motions for summary judgment, the parties concede there were no material issues of fact." Pleasant v. Regence BlueShield, 181 Wn. App. 252, 261, 325 P.3d 237 (2014).

Lundquist first contends he was not required to grieve his disability compensation claim because he was not a "grievant" under the CBA when that claim accrued. Neither the plain language of the CBA nor the undisputed evidence supports this argument.

We apply contract law to the interpretation and construction of collective bargaining agreements. Navlet v. Port of Seattle, 164 Wn.2d 818, 842, 194 P.3d 221 (2008). We search for intent of the parties through the objective manifest language of the contract itself. Id. The interpretation of an unambiguous contract is a question of law reviewed de novo. Paradise Orchards Gen. P'ship v. Fearing, 122 Wn. App. 507, 517, 94 P.3d 372 (2004).

The CBA defines a "grievant" as "an employee . . . of the [District] covered by this Agreement having a grievance." The CBA defines an "employee" as "a certificated non-supervisory educational employee represented by the SEA." The undisputed evidence demonstrates that Lundquist was an employee represented by the union when his contract claim arose, making him a "grievant" under the CBA.

The trial court found that Lundquist was not an employee "for purposes of union representation" when he began receiving his disability benefits in May 2017 because "he was within the category of persons who had 'ceased work without expectation of further employment': his physician had deemed him unable to work in any profession, he had ceased working, and there was no expectation of future employment." But this finding is inconsistent with the unambiguous language of the CBA and the evidence of Lundquist's entitlement to union representation while employed but on a disability leave.

Lundquist first contends that under federal labor law, he was no longer an "employee represented by the SEA" as soon as he took disability leave and had no reasonable likelihood of returning to work, citing to Allied Chemical & Alkali

Workers of America v. Pittsburg Plate Glass Co., 404 U.S. 157, 168, 92 S. Ct. 383, 30 L. Ed. 2d 341 (1971). But that case is inapplicable to the facts of this case. There, the Supreme Court held that employers were not obligated to bargain with unions over benefits for retired workers because retired workers were not "employees" as that term was used in the National Labor Relations Act (NLRA)[4] because they had "ceased work without expectation of future employment." Id. at 168, 172. It further held that retirees could not properly be joined with active employees in the same bargaining unit under the NLRA because the two groups did not share a community of interests broad enough to justify including retirees. "Pensioners' interests extend only to retirement benefits, to the exclusion of wage rates, hours, working conditions, and all other terms of active employment." Id. at 173.

Allied Chemical does not control because at the time Lundquist's contract claim accrued in July 2017,[5] he had neither resigned his employment with the District nor retired. He was on a paid leave of absence with the District until November 13, 2017, and then on an unpaid medical leave until he resigned in March 2018. Lundquist had contractual rights guaranteed by the CBA while on disability leave, even if he believed it unlikely he would ever return to work. While on leave, Lundquist had the right to return to his pre-disability position during the first year of his leave and, if the leave extended into a second year, he had the

[4] 29 U.S.C. §158(a) *et seq.*

[5] Lundquist's contract claim accrued when Standard denied him pay to which he claims he was contractually entitled. See Schwindt v. Commonwealth Ins. Co., 140 Wn.2d 348, 353, 997 P.2d 353 (2000) (a contract claim accrues when the insurance company breaches the contract by wrongfully denying coverage). Lundquist testified that he began receiving disability payments in May 2017, and Standard notified him of its miscalculation in July 2017. Lundquist's contract claim would have accrued no later than July 2017.

right to seek a different position as an employee in "displaced" status. There is no evidence to suggest that Lundquist lost his status as an employee and his right to union representation under the CBA simply by taking a medical leave.

The record further demonstrates that Lundquist was contemplating a return to work even though he sought disability compensation from Standard. Standard began paying him in May 2017. The next month, the District sent Lundquist new employment contracts for the 2017-2018 school year and asked him if he intended to extend his leave. Lundquist specifically asked the District if he could extend his leave and retain the right to return to work. When the District confirmed he could return in a "displaced" status, Lundquist informed the District he wanted to continue his leave and executed the new employment contracts. Lundquist testified he applied for disability insurance benefits through Standard because he could no longer work, and the District was aware of this fact because the District assisted him in applying for disability pay. But he applied for disability with Standard before signing new employment contracts and asking the District to extend his medical leave of absence. It was at Lundquist's request that he remained an employee of the District while receiving long term disability compensation from Standard.

Had the District denied Lundquist's request to extend his leave or denied him the opportunity to return to work, the CBA provided Lundquist with the right to union representation to grieve the denial of those rights under the CBA. It is thus impossible to harmonize the CBA leave provisions with the trial court's finding that Lundquist was no longer an "employee" of the District for purposes of union representation when his contract claim accrued.

Lundquist seeks to extend the holding of Allied Chemical to employees who have become disabled and are physically unable to return to work. But the case law on which Lundquist relies does not support his contention that he was no longer entitled to union representation while on a medical leave of absence.

Lundquist points to Meza v. General Battery Corp., 908 F.2d 1262 (5th Cir. 1990) for the proposition that disabled employees, although still on an employer's payroll, have no right to union representation. But the facts of the Meza case demonstrate that the employee was in fact not on his employer's payroll at the relevant time. In that case, Meza suffered brain damage in December 1982 and was officially terminated as an employee in May 1983 at which time his union membership ended. Id. at 1264. He sued his employer and its insurance carrier seeking to recover worker's compensation benefits, occupational disability benefits, and a lump sum pension payment under a collective bargaining agreement's pension plan. Id.

The district court dismissed his worker's compensation and pension claims for failure to exhaust administrative remedies in the CBA and the pension plan. Id. at 1264-65. It dismissed his claim for occupational disability compensation because his former union had filed a lawsuit seeking the same benefits for three different employees and the court concluded Meza was bound by an adverse decision in that prior lawsuit. Id. at 1265.

The Fifth Circuit affirmed the dismissal of the pension plan claim, concluding Meza failed to exhaust mandatory administrative procedures. Id. at 1278. It reversed the dismissal of the occupational disability claim, concluding the doctrine

of res judicata did not apply to Meza: he was not a party to the union's lawsuit, the union had not certified a class to include him, Meza was not a union member at the time the union initiated its separate lawsuit, and the union had not sought reinstatement for Meza. Id. at 1269. The court suggested the union probably could not have represented Meza:

> The Union did not seek Meza's reinstatement, nor could it have done so; as a totally disabled person, Meza seems to fall squarely in the category of persons who have "ceased work without expectation of further employment."

Id. (quoting Allied Chemical, 404 U.S. at 168). But the court's reference to Allied Chemical must be read in context. It was undisputed that the union did not represent Meza when the union initiated a lawsuit seeking compensation for three different employees because Meza had already been terminated from his employment.

There is nothing in Meza to support the conclusion that Meza lost his entitlement to union representation before his termination occurred. Indeed, Meza did not appeal the dismissal of his CBA-related claim for failure to exhaust CBA grievance procedures, a fact that directly undercuts Lundquist's contention that CBA grievance procedures can never apply to a disabled employee.[6]

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[6] Lundquist's reliance on Meza also assumes that a "totally disabled" person who has ceased working will never return to work. This assumption is not supported by the language of the Standard disability insurance policy or by the record here. Under the insurance policy, "total disability" includes pregnant women. A pregnant woman may be totally disabled for some period of time during her pregnancy, but it does not logically follow that when she takes a medical leave, she has no expectation of ever returning to work. Indeed, the Standard policy provides District employees with a "return to work" incentive. Even an employee who qualifies for long term disability benefits because of a disability is eligible for certain benefits as a way to encourage that person to return to work. Id.

The inquiry is not whether Lundquist had an expectation of returning to work at the end of his leave of absence but whether Lundquist's claim arose while he was employed by the District and entitled to union representation. See Sheet Metal Workers Local No. 2 v. Silgan Containers Mfg. Corp., 690 F.3d 963, 967 (8th Cir. 2012) (Allied Chemical did not apply to claims arising during the course of employment even though employee died before grievance could be resolved). It is undisputed that the District considers employees on disability leave to be employees. In June 2017, the District sent Lundquist employment contracts to sign for the 2017-2018 school year and told him that "[a]ll employees that are on a leave of absence are still considered district employees." Lundquist signed contracts for the 2017-2018 school year and continued to be a dues-paying member of the union until November 30, 2017. He presented no evidence that the union ever declined to represent him while on medical leave.

We conclude that Lundquist was an employee represented by the SEA at the time his breach of contract claim accrued and was thus a "grievant" under the CBA.

The District next argues Lundquist's claim falls within the definition of a "grievance" under the CBA. The trial court found that "Lundquist was not required to grieve this issue under the CBA because he is not claiming that Seattle School District violated any term of the CBA and no terms of the CBA require interpretation to resolve his claims." It alternatively found that Lundquist's claims are "independent of the CBA because they arise from a unilateral contract between

[the District] and its employees." Neither finding is supported by the language of the CBA or the record below.

First, the CBA broadly defines a "grievance" as a "claim based upon an event or condition which affects the conditions or circumstances under which an employee works, allegedly caused by misinterpretation or inequitable application of written [District] regulations, rules, procedures, or [District] practices and/or the provisions of this Agreement." The definition of "grievance" covers more than claims the District breached the CBA. That Lundquist does not allege the District violated the CBA is immaterial.

Second, Lundquist's allegations clearly relate to his working conditions. Lundquist alleges Standard's insurance policy imposes a direct obligation on the District to provide benefits Standard refused to pay. He alleges the District failed to pay sufficient premiums and to report all regular earnings to Standard, and that it has erroneously interpreted the policy by excluding TRI pay from the computation of disability pay. He is directly challenging the District's procurement of disability insurance, its interpretation of the scope of the policy, and the nonpayment of direct benefits under that policy—all of which fall within the definition of District "procedures or practices."

Third, Lundquist's claim is not "independent of the CBA." The Standard policy defines an employee's monthly "insured earnings" as "one-twelfth (1/12th) of your annual rate of earnings from your employer, including deferred compensation, but excluding bonuses, overtime pay, and any other extra compensation." Determining whether Lundquist's compensation under his TRI

Contract is interpreted as his "annual rate of earnings" or excluded as "extra compensation" turns on what he did to become entitled to his base pay and TRI pay. Resolving this issue depends on the duties he was expected to perform, as detailed in the CBA.

For example, a teacher's base employment contract provides compensation for 14 different enumerated tasks all listed in the CBA—from planning daily lessons, providing instruction, and administering assessments, to communicating with parents or guardians and participating in staff meetings. The CBA provides that compensation paid under TRI Contracts covers activities "beyond the basic contract, normal workday hours and school year," and includes such tasks as preparing for school opening; preparing the classroom before, after, and during the school year; providing individual help to students; researching educational materials and supplies; and attending school-connected meetings. Lundquist's TRI Contract required him to perform all of the TRI responsibilities as laid out in the CBA.

Resolving Lundquist's claim that CBA-enumerated TRI tasks fall within his "annual rate of earnings" as that term is used in Standard's insurance policy, will require reference to and an interpretation of the CBA. His claim falls squarely within the definition of a "grievance" under the CBA.

Lundquist argues his contract claim can be litigated in court without having to follow CBA grievance procedures because the District's obligation to pay disability compensation does not arise from the CBA. He relies on International Ass'n of Firefighters, Local 1789 v. Spokane Airports, 146 Wn.2d 207, 45 P.3d 186

(2002) to support this argument. But International Ass'n of Firefighters is distinguishable. In that case, the Spokane Airport contracted with the federal government to extend social security coverage to its fire department employees. Id. at 211. Under the agreement, union members paid 6.2 percent of their wages into a social security account and 1.4 percent of their wages into a Medicare account. The Airport matched these contributions. Id. In 1999, the employees opted out of the social security plan. The Airport received a refund from the federal government for all amounts paid into both accounts during a three year period. Id.

When the Airport refused to turn the funds over to the union, it sued for conversion on behalf of its members. Id. Ultimately, the Airport reimbursed the employees for the taxes withheld from the employees' paychecks but it refused to pay the union the matching sums it paid on its employees' behalf. Id. at 212. The Supreme Court held the claims being prosecuted on behalf of the union members fell outside the scope of the bargaining agreement's grievance procedures. Id. at 217. The CBA at issue there mandated arbitration of "disputes . . . involving interpretation or application of [the CBA]." Id. at 217. The Supreme Court concluded that the obligation to pay social security and Medicare taxes was not an obligation that arose from the CBA and thus was not a dispute involving the interpretation or application of the CBA. Id. at 217.

But Lundquist is not seeking to recoup improperly withheld social security or Medicare taxes. Nor does he claim conversion, as the union did in International Ass'n of Firefighters. And the grievance provision at issue here is broader than

the one at issue in International Ass'n of Firefighters. Reliance on that case is misplaced.

Finally, Lundquist asks us to affirm the trial court's finding that his claim is based on a unilateral contract, the terms of which fall outside the scope of the CBA grievance procedure. The trial court found:

> Lundquist's claims are independent of the CBA because they arise from a unilateral contract between Seattle School District and its employees. This finding is supported, in part, by the fact that all district employees receive long-term disability coverage administered through Standard regardless of whether or not they are subject to a CBA.

As with the trial court's other "findings" on summary judgment, the record simply does not support these findings.

Lundquist's sole claim against the District is a claim for breach of contract. In paragraph 12 of the First Amended Complaint, Lundquist alleges "[t]he Disability Plan itself is a unilateral contract offer by the District to its employees." He alleges that by offering this plan to its employees, the District "assumes contractual obligations to its employees under the Plan." In paragraph 32, he alleges "[t]he District failed its duty under the plan to ensure that employees receive long-term disability benefits based on their 'annual rate of earnings, including deferred compensation.'"

In any breach of contract action, a court must determine whether an enforceable contract has been created. Storti v. Univ. of Wash., 181 Wn.2d 28, 35, 330 P.3d 159 (2014). A unilateral contract is created when one party makes a promise that a second party accepts only through performance of their end of the bargain. Id. at 35-36. Unilateral contracts are defined by traditional contract

concepts of offer, acceptance, and consideration. Id. at 36. In Storti, professors at University of Washington contended that by enacting a policy of providing a regular two percent merit salary increase to faculty and incorporating the policy into its employee handbook, the university made a contractual offer of merit pay that professors accepted by agreeing to serve in the academic year. Id. at 34. The professors argued the university breached this unilateral promise by rescinding the pay raise mid-academic year. Id.

The Supreme Court recognized an employee handbook provision may form the basis of a unilateral contract between an employer and employees. Storti, 181 Wn.2d at 36, citing Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 228-29, 685 P.2d 1081 (1984). The evidence presented by the faculty established an offer, acceptance and consideration. Id. at 38. But the university reserved the right to reevaluate the policy based on funding and the university followed its written procedures in reevaluating the policy. As a result, the court held suspension of merit raises did not constitute a breach of the unilateral contract. Id. at 39.

Thompson, the case on which Storti relies for the existence of an implied unilateral contract, requires proof of a promise of specific treatment in specific situations set out in an employee policy manual or other policy document. 102 Wn.2d at 229. Generally, whether a statement made by an employer amounts to a promise of specific treatment in a specific situation is a question of fact. Id. at 233 (reversing summary judgment); Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas County, 189 Wn.2d 516, 540, 404 P.3d 464 (2017) (whether employee has reasonable expectation that employer will follow procedure in workplace and a

promise of specific treatment in specific situations is question of fact). The party asserting the existence of a unilateral contract has the burden of proving each essential element of such contract. Multicare Med. Ctr. v. Dep't of Soc. & Health Servs., 114 Wn.2d 572, 584 n.19, 790 P.2d 124 (1990), overruled in part on other grounds Neah Bay Chamber of Commerce v. Dep't of Fisheries, 119 Wn.2d 464, 832 P.2d 1310 (1992). Summary judgment is only proper if reasonable minds could not differ in resolving this question. Mikkelsen, 189 Wn.2d at 540.

We cannot determine the factual basis on which the trial court found the existence of a unilateral contract in which the District promised to provide disability compensation to Lundquist. The record demonstrates that in August 2014, the JIC issued a memo to District employees announcing open enrollment for insurance coverage. This memo provided:

> The District provides a monthly benefit contribution that will pay all or part of the cost of your basic benefits. . . . Enrollment on the dental, vision and life/long term disability plans is mandatory and automatic. . . . Enrollment in the medical coverage and other voluntary programs is optional.

The "Monthly Cost Worksheet" each employee completed contained the following note:

> Life and LTD Insurance—Your monthly cost for Life and LTD is based on your basic annual earnings (NOTE: Your basic annual earnings do not include other income, such as TRI). See the Life/LTD monthly premium sheet on page 9.

The JIC memo contained a chart indicating the monthly premiums an employee would pay for Standard's long term disability insurance, depending on that employee's "basic annual earnings."

While this evidence supports a finding that the District offered to contribute funds toward the cost of group insurance benefits, including long term disability insurance, we can find no evidence the District ever promised to pay disability compensation directly to an employee if Standard denied coverage. And the obligation to contribute toward these benefits originates in the CBA. Lundquist provided no proof of any separate policy or employee handbook in which additional promises were made to any District employees.

In this case, the CBA explicitly provides that "the SPS shall make funds available to contribute toward premiums of SPS-approved group insurance programs." It also provides for a method of pooling state and District contributions in a manner developed by the District in consultation with the union. The JIC explicitly discussed whether the Standard long term disability insurance policy should cover TRI pay and the enrollment documentation discloses to employees that TRI pay is not included in the "basic annual earnings" benefit of the disability insurance.[7]

The District does not determine whether any employee is eligible for disability benefits under Standard's policy. Standard alone makes that determination. The District similarly plays no role in calculating the benefits an

[7] According to White, in 2016, the JIC considered whether to ask Standard to include TRI pay in the long-term disability earnings calculation under the benefits it provides. The JIC wanted to assess whether including TRI pay in the definition of insured earnings would increase premium costs for the employees. This assessment was challenging because of the individualized nature of TRI pay. To White's knowledge, whether to include TRI pay in Standard's long-term disability benefits was unresolved and Standard based its employee premiums only on the base salaries of each teacher, excluding TRI pay. White testified that if Standard were to include TRI pay in calculating long term disability benefits, it would increase premiums and result in less money available in the Group Insurance Pool and increase employees' out of pocket costs for insurance.

employee is entitled to receive under Standard's policy; Standard alone makes that calculation as well. And Standard pays benefits directly to its insureds, like Lundquist. There are no District enrollment forms or any written policy in which the District guarantees any level of disability insurance benefits to its employees or in which the District has represented that other benefits, such as deferred compensation or health care benefits, would be included in Standard's calculation of long-term disability benefits.

Lundquist contends that the insurance policy itself creates the contractual duty of the District to pay the benefits described in the policy. But the policy clearly identifies Standard as the insurer, the District as the policyholder, and the employees as the insureds. The insuring clause of the long term disability policy indicates that "[s]ubject to all the terms of the GROUP POLICY, STANDARD will pay the LTD BENEFIT . . . upon receipt of satisfactory written proof that you have become TOTALLY DISABLED while insured under the GROUP POLICY." (Emphasis added). There is no provision in the insurance policy imposing this duty to pay on the District. It is clear from this language that Standard is the only party obligated to pay benefits under the policy.

Based on this record, the trial court erred in concluding as a matter of law that a unilateral contract exists under the terms of which the District is responsible to pay disability compensation to Lundquist or to any other employee.

Lundquist relies on Jacoby v. Grays Harbor Chair & Mfg. Co., 77 Wn.2d 911, 468 P.2d 666 (1970) and Vizcaino v. Microsoft Corp., 120 F.3d 1006 (9th Cir. 1997) (Vizcaino II) for the proposition that when an employer establishes a benefit

plan, the employer can be held contractually liable to its employees for non-compliance with the plan's terms, even when the plan is being administered by a third party.[8] These cases are distinguishable.

In Jacoby, former employees sued their employer and its insurer for violation of a pension plan contract. 77 Wn.2d at 912. The employer wrote a letter to each salaried employee announcing the establishment of the pension plan for those who worked until age 65. Each employee was furnished with a booklet explaining this plan and the conditions under which a terminated employee would be entitled to a deferred pension. Id. at 918. The employer then made regular deposits into the plan based on the number of its employees, their ages, length of service, annual salary, and life expectancy. Id. at 912-13.

The Supreme Court held that this employer-financed pension plan was contractual in nature. Id. at 915. Once an employee who accepted employment under that plan, complied with all conditions entitling him to participate in the plan, his rights become "vested," and the employer could not divest the employee of those rights. Id. at 916.

Jacoby is clearly distinguishable. In that case, the employer not only promised to finance 100 percent of the pension plan for its employees but it also actually did so. We have no such evidence here. The only evidence is the District's promise to contribute a certain dollar amount per employee, to match what the State paid, into a pool that would cover employee group benefits, which

[8] Lundquist also relies on Navlet v. Port of Seattle, 164 Wn.2d 818, 194 P.3d 221 (2008). However, that case is inapplicable because it involved a clear, written contractual obligation to pay welfare benefits, which were directly tied to the language of the CBA at issue in that case.

included long-term disability insurance purchased from Standard. The State and District contributions might cover the entire cost of an employee's premiums but they might not, depending on the "[f]igures used by the SPS to compute the cost of projected premium increases and projected changes in employee participation in insurance programs" developed "in consultation with the SEA."

Vizcaino is similarly unhelpful to Lundquist's case. In that case, Microsoft hired a group of independent contractors that the IRS later determined were actually common law employees. 120 F.3d at 1008-09. The workers sued Microsoft seeking benefits under Microsoft's Employee Stock Purchase Plan, which permitted employees to "purchase company stock at eighty-five percent of the lower of the fair market value on the first or on the last day of each six-month offering period through payroll deductions of from two to ten percent." Vizcaino v. Microsoft Corp., 97 F.3d 1187, 1191 (9th Cir. 1996) (Vizcaino I), on reh'g en banc, 120 F.3d 1006 (9th Cir. 1997).

The Ninth Circuit determined that, pursuant to Washington law, the stock purchase plan was a unilateral contract between Microsoft and the employees because the plan was "offered to all employees, the [w]orkers knew of it . . . and their labor gave them a right to participate in it." Vizcaino II, 120 F.3d at 1014. Analogizing the plan to a pension plan, the court reasoned that "consideration rendered for the promise in the pension contract of the employer to pay a pension is established when the employee is shown to have knowledge of the pension plan and continues his employment." Id. (quoting Dorward v. ILWU-PMA Pension Plan, 75 Wn.2d 478, 483, 452 P.2d 258 (1969)). The court ruled that, like a pension

plan, the stock option plan was deferred compensation for services rendered. Vizcaino II, 120 F.3d at 1014.

Vizcaino is also distinguishable because the benefit plan was not a promise to provide access to insurance but was instead a promise of compensation offered and funded entirely by the employer. In that case, there was no insurance company evaluating benefits eligibility, handling benefits calculations, or paying benefits, as exists here. Indeed, were Lundquist's claim viable, any employer who purchased employee health insurance from a third-party insurer would somehow become directly liable to its employees for the payment of health care expenses if the insurer refused to cover those expenses. We know of no case extending Vizcaino in that manner.

The record before us contains no evidence that the District ever offered to do anything other than contribute toward the purchase of insurance. Pursuant to the CBA provisions, the District and the union created the JIC to decide the type of insurance to offer to teachers:

> The District's Joint Insurance Committee (the JIC) is a long-standing committee served by members of the administration and major represented groups. The JIC meets regularly to discuss and review SPS employee benefits matters, including the plans that are offered, costs, service, and certain other fringe benefit matters that affect the employees of Seattle Public Schools.

From this, it was the JIC, and not the District, that chose to purchase the particular Standard insurance policy at issue here.

Based on this record, the trial court erred in finding the existence of a unilateral contract requiring the District to pay any disability compensation to Lundquist.

Lundquist's contract claim is a grievance subject to the CBA grievance procedures because he was an employee when his claim arose. His claim is not independent of the CBA and to resolve it requires an interpretation of the CBA's provisions regarding duties associated with annual base pay and TRI pay. We find no basis in the record for the finding that there is a "unilateral contract" to pay disability compensation to Lundquist. Accordingly, we reverse and remand this case to the trial court to dismiss Lundquist's claims against the District without prejudice.

Andrus, A.C.J.

WE CONCUR:

Brennan, J.

Smith, J.

APPENDIX 2

FILED
4/27/2021
Court of Appeals
Division I
State of Washington

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

TIMOTHY LUNDQUIST, and a class of similarly situated individuals, Respondents, v. SEATTLE SCHOOL DISTRICT NO. 1, Appellant.	No. 80211-9-I ORDER DENYING MOTION FOR RECONSIDERATION

Respondent, Timothy Lundquist, filed a motion for reconsideration of the opinion that was filed on March 1. 2021. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Andrus, A.C.J.

Acting Chief Judge

APPENDIX 3

SEATTLE PUBLIC SCHOOLS

Seattle Public Schools
Employee Benefits Guidebook
For New Employees

For the Benefits Plan Year of
October 1, 2012 to September 30, 2013
Updated as of March 1, 2013

What Benefit Plans are Available?

Eligible employees at Seattle Public Schools ("SPS") have access to a wide selection of excellent employee benefits. Enrollment in some plans is mandatory, while enrollment in other plans is optional.

Mandatory employee benefit plans include:
- Dental Insurance
- Vision Insurance
- Group Life Insurance
- Long Term Disability Insurance

Optional or voluntary plans include:
- The Medical plan of your choice
- Health Care Flexible Spending Account
- Dependent Care Flexible Spending Account
- Voluntary Term Life Insurance
- Voluntary Short Term Disability Insurance
- 403(b) Tax Sheltered Annuity (TSA)

Detailed descriptions of these plans can be found by visiting the SPS employee benefits website, found at www.ourpasswordpage.com (password: sps), or by calling the Benefits Helpline at (206) 957-7066.

Eligibility for Benefits

For represented employees, participation in the SPS group benefits program is based upon the eligibility criteria contained in the prevailing collective bargaining agreement. In the case of non-represented employees, participation is based upon the eligibility criteria contained in the Salary & Benefits Package for Non-Represented Employees as most recently approved by the Seattle Public Schools Board of Directors.

It is the employee's responsibility to submit application forms in a timely manner. All applications must be submitted to Human Resources within 30 calendar days of the initial employment or eligibility date. Employees who do not properly submit applications will be deemed to have waived coverage. (See also *When Coverage Begins*)

Generally, to be eligible for SPS contributions you must be working in a regular, budgeted position of 0.5 FTE status or more and not be covered under another SPS benefits program through a union contract.

If you cease to become eligible for benefits, your coverage may usually be continued for a period of time on a self-pay basis. (See *Continuing of Health Benefits*)

Costs and SPS Contributions

Most employees who are eligible for benefits are also eligible to receive a monthly SPS contribution toward the cost of benefits. This contribution will pay all or part of the cost of the plans selected.

SPS contributions may be applied to:
- All mandatory benefits (i.e., vision, dental, group life and long term disability)
- The medical plan of your choice

Many employees have no payroll deductions because the plan elections of their choosing cost less than their SPS contribution. However, if the combined cost of your benefits is not fully covered by the SPS benefit contribution, the excess amount will be your responsibility and will be deducted from your pay warrant each month.

Employees whose total monthly cost exceeds the SPS contribution allowance will be automatically enrolled in the SPS premium conversion plan. This means that premiums will be withheld on a pre-tax basis, unless you are covering a domestic partner who is not your income tax dependent or if you request in writing to pay tax on these expenses. Contact the Benefits Helpline at (206) 957-7066 for more information.

SPS contributions may not be applied to:
- Flexible Spending Account participation
- Voluntary Life Insurance
- Voluntary Short Term Disability Insurance
- Voluntary 403(b) Retirement Plan
- State Pension Plans (DRS)

Some part-time employees receive a prorated or reduced benefit contribution, based on their part-time status. Specifically, prorated contributions apply to part-time non-represented SPS staff, part-time machinists and warehouse teamsters, and all part-time employees covered by Seattle Education Association bargaining agreements. Prorated contributions do not apply to employees represented by Local 609.

If you hold a prorated part-time position, then the amount of SPS money available to you will be proportionate to your FTE status. For example, if you work half-time (.50 FTE), then you will receive half of the full SPS contribution.

Employees who receive a prorated contribution still have access to the same benefits - they just have less SPS money to cover the premium costs.

Enrollment Procedures

All enrollment procedures are handled through SPS Human Resources and the Employee Benefits Administrators, Sprague Israel Giles, Inc. Plan elections and changes can only be made during one of three periods:

1. The employee's initial eligibility period (See *Eligibility for Benefits)*
2. The annual Open Enrollment period for the specific plan (See *Three Annual Open Enrollment Periods*)
3. Within 30 or 60 calendar days of a "Qualifying Event" (See *Changing Your Coverage*)

SEATTLE PUBLIC SCHOOLS

Long Term Disability Plan

The Standard Insurance Company

Plan Type	Long Term Disability (LTD) Insurance
Plan Number	353414

Percentage Paid	60% of covered monthly earnings; reduced by certain other sources of income including Social Security, other disability income, and income from part-time employment.
Monthly Benefit Maximum	$10,000
Benefits Waiting Period	45 calendar days
Benefit Duration	The maximum benefit period is determined by your age at the start of disability as follows:

Age Disabled	Benefits Payable Until/for...
Prior to Age 62	-To 65, or Social Security Normal Retirement Age, or 42 months, whichever is longer
Age 62	-To Social Security Normal Retirement Age, or 42 mos., whichever is longer
Age 63	-To Social Security Normal Retirement Age or 36 months if greater
Age 64	-30 months
Age 65	-24 months
Age 66	-21 months
Age 67	-18 months
Age 68	-15 months
Age 69 and over	-12 months

Own Occupation Period	2 years
Pre-Existing Conditions	There is no limitation of coverage for pre-existing conditions
Total Disability Required?	No, partial disability can be paid (call Helpline for details)
Waiver of Premium	Yes
Survivor Benefit	3 x monthly LTD benefit
Assisted Living Benefit	Yes
Chemical Dependency	24 month lifetime limitation
Mental & Nervous Disability	24 month limitation per period of disability unless confined
More Information	Visit the Benefits Website at www.ourpasswordpage.com (password is "sps") or call the Benefits Helpline at (206) 957-7066 or toll free at (800) 946-7066.

This is only a summary of your benefits, the plan contract will prevail if there are any discrepancies. Please consult your benefits booklet for a detailed description.

DECLARATION OF SERVICE

I, Anders Forsgaard, declare that I effected service of the following documents on the parties listed below through the Court's e-filing system and by email.

Document(s):
Plaintiffs' Petition for Review

Parties:
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Timothy G. Leyh, WSBA #14853
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I declare under penalty of perjury in accordance with the laws of the State of Washington that the foregoing is true and correct.

DATED this 27th day of May, 2021.

/s/ Anders Forsgaard
Anders Forsgaard

BENDICH STOBAUGH & STRONG

May 27, 2021 - 3:39 PM

Transmittal Information

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Appellate Court Case Number:	80211-9
Appellate Court Case Title:	Timothy Lundquist, Respondent v. Seattle School District No. 1, Appellant

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