

No. 86563-9

SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON STATE NURSES ASSOCIATION, on behalf of certain
employees it represents, and VIVIAN MAE HILL, individually and on
behalf of others similarly situated,

Petitioners,

v.

SACRED HEART MEDICAL CENTER,

Respondent.

AMICUS CURIAE BRIEF BY
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	3
REST BREAKS ARE CRITICAL TO EMPLOYEE HEALTH AND SAFETY; IF <i>SACRED HEART</i> IS NOT REVERSED, WORKERS ACROSS WASHINGTON STATE WILL SUFFER INCREASED ACCIDENTS, INJURIES, AND ILLNESS.....	3
A. <i>Sacred Heart</i> Wrongly Financially Rewards Employers For Violating Their Mandatory Duty to Provide Rest Breaks.....	3
1. <i>Washington Law Mandates That Employers “Shall” Provide Rest Breaks to Protect the Health of Employees.</i>	3
2. <i>Sacred Heart Financially Rewards Employers for Denying Employees Rest Breaks</i> .	4
B. Rest Breaks Prevent Employee Accidents, Injuries, and Illness. Washington Law Mandates Rest Breaks to Protect the Health and Safety of Hundreds of Thousands of Employees Throughout the State.	6
1. <i>The Court’s Decision Here Will Affect Hundreds of Thousands of Employees Throughout Washington State Who Work in a Variety of Jobs.</i>	6
2. <i>Rest Breaks Protect the Health of Employees by Reducing Accidents and Musculoskeletal Disorders.</i>	8

3.	<i>Rest Breaks Protect the Health of Employees by Reducing Work-Related Stress.</i>	13
4.	<i>Rest Breaks Protect the Health of Employees by Reducing Bladder Problems.</i>	15
5.	<i>Rest Breaks Protect the Health of Employees by Reducing Illnesses Related to High Temperatures.</i>	15
CONCLUSION.....		17

TABLE OF AUTHORITIES

	<i>Page</i>
 Cases	
<i>Murphy v. Kenneth Cole Prod.</i> , 155 P.3d 284, 40 Cal.4th 1094 (Cal. 2007)	7, 12, 13
<i>Pellino v. Brink's Inc.</i> , 164 Wn. App. 668, 267 P.3d 383 (2011)	4
<i>Roberts v. King County</i> , 107 Wn. App. 806, 27 P.3d 1267 (2001), <i>review denied</i> , 145 Wn.2d 1024 (2002).....	4
<i>Scannell v. City of Seattle</i> , 97 Wn.2d 701, 656 P.2d 1083 (1982).....	4
<i>Washington State Nurses Ass'n. v. Sacred Heart Medical Center</i> , 163 Wn. App. 272 (2011)	<i>passim</i>
 Codes and Statutes	
RCW 43.22.270	3
RCW 49.12.010	2, 3, 17
WAC 296-126-092.....	2-4, 13, 17
 Other Authorities	
Bendsten et al., <i>Infrequent Voiders Syndrome (Nurses Bladder): Prevalence Among Nurses and Assistant Nurses in a Surgical Ward</i> , 25 Scan. J. Urol. Nephrol. 201 (1991)	15
Bureau of Labor and Statistics, <i>Dangerous Jobs, Compensation and Working Conditions</i> (1997), http://www.bls.gov/iif/oshwc/cfar0020.pdf ...	9
Bureau of Labor and Statistics, <i>Injuries, Illnesses, and Fatalities: Frequently Asked Questions</i> , www.bls.gov/iif/oshfaq1.htm	9

Dababneh et al., <i>Impact of Added Rest Breaks on the Productivity and Well Being of Workers</i> , 2 Ergonomics 164-74 (2001)	7
Foley and Silverstein, <i>The Economic Burden of Carpal Tunnel Syndrome: Long-Run Earnings of CTS Claimants in Washington State, 1993-94</i> , Wash. Dep't of Labor & Indus. Technical Report No. 40-1-2005 (May 2005), http://www.lni.wa.gov/Safety/Research/Files/EconomicBurdenCarpalTunnel.pdf	10
Kenner, <i>Working Time, Jaeger and the Seven-Year Itch</i> , 11 Colum. J. Eur. L. 53, 55 (2004/05)	7
Leigh JP, <i>Economic Burden of Occupational Injury and Illness in the United States</i> (2011), www.ncbi.nlm.nih.gov/pubmed/22188353	10
Marc Linder & Ingrid Nygaard, <i>Void Where Prohibited: Rest Breaks and the Right to Urinate on Company Time</i> (Cornell Univ. Press 1998).....	6, 12, 15
Milford, T., <i>Managing Health: Putting Your Employees in the Best Position to Keep Workers Comp Cost Down</i> , EHS Today, The Magazine for Environment, Health and Safety Leaders, (Mar. 5, 2012), http://ehstoday.com/health/managing-health-keep-workers-comp-costs-down-0302/index1.html	11-12
Miliken et al., <i>The Impact of Stress Management on Nurse Productivity and Retention</i> , Nursing Economics (July/August 2007) http://findarticles.com/p/articles/mi_m0FSW/is_4_25/ai_n27345354/	14
National Institute for Occupational Safety and Health, <i>STRESS . . . at Work</i> , Pub. No. 99-1011 http://www.cdc.gov/niosh/docs/99-101/	14
<i>NINDS Carpal Tunnel Syndrome Information Page</i> , http://www.ninds.nih.gov/disorders/carpal_tunnel/carpal_tunnel.htm	12
OSHA Technical Manual, Sec. 3, Ch. 4 (“Heat Stress”), www.osha.gov/dts/osta/otm_iii/otm_iii4.html	15
OSHA Worker Safety Series: Warehousing, www.osha.gov/Publications/warehousing.html	10, 11, 13

SHARP Investigates Heat-Related Illness in Washington State’s Workers, <http://www.lni.wa.gov/Safety/Research/OccHealth/Reports/HeatStress/Default.asp>16

Tucker et al., *Rest Breaks and Accident Risk*,
361 *The Lancet*, Issue 9358, p. 680 (Feb. 22, 2003).....7, 12, 13

Wash. State Dep’t of Labor & Industries, *Office Ergonomics: Practical Solutions for a Safer Workplace* (2002),
<http://www.lni.wa.gov/IPUB/417-133-000.pdf>9, 11

Washington State Employment Security Department’s Quarterly Consensus of Employment and Wages, October 2011,
<https://fortress.wa.gov/esd/employmentdata/docs/industry-reports/qcew-2011-q2.pdf>.....8

INTEREST OF AMICUS CURIAE

The Washington Employment Lawyers Association (WELA) is an organization of Washington lawyers who are devoted to protecting employee rights. See WELA Amicus Motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the majority opinion in *Washington State Nurses Ass'n. v. Sacred Heart Medical Center*, 163 Wn. App. 272 (2011) (“*Sacred Heart*”), when performing the same 40 or more hours of physical work, employees who are forced to work through their rest breaks will receive less in wages than employees who receive their rest breaks. This backwards result stems from the fact that under *Sacred Heart*, rest breaks provided to nurses during the work day are counted as “hours worked” for calculating overtime, but when employers force employees to work through their rest breaks (and the time for rest is essentially provided after the work has ended), the rest breaks are not counted as “hours worked” for calculating overtime. *Id.* at 281-82.

Sacred Heart thus fails to protect Washington workers because it treats employees who are forced to work through their rest breaks worse than employees who receive rest breaks. The decision also *financially rewards employers for violating the law* because under the decision employers will save money by paying less in wages when they force

employees to work through their rest breaks.

The Legislature and the Department of Labor & Industries did not intend to financially reward employers for denying employees rest breaks. Instead, the law mandates that employers “shall” provide rest breaks. WAC 296-126-092(4). And the law’s intent is to ensure employees are “protected from conditions of labor which have a pernicious effect on their health.” RCW 49.12.010.

Rest breaks protect the health of employees throughout Washington State by: (1) preventing muscular injuries due to repetitive motions or awkward positions, (2) reducing accidents by lowering the accumulation of risk that accrues as the length of a shift increases without a break, (3) lowering health risks from general fatigue and stress, (4) preventing bladder problems by providing the opportunity for employees to use the bathroom, and (5) lessening the risk of illnesses related to high temperatures. See *infra* pp. 6-16.

The Court’s decision here will thus not only affect the nurses in the case, but it will also affect the hundreds of thousands of Washington State employees who work on construction sites, in factories, in machine shops, in warehouses, and in offices. These employees often receive low wages and are not represented by unions. And if employers have the financial incentive to deny employees rest breaks, it is these employees who will

suffer the increased accidents, injuries, and illnesses because they are forced to work through their rest breaks.

Accordingly, the Court's decision here will affect the health of employees throughout Washington State. The Court should reverse the Court of Appeals to effectuate not only the law mandating rest breaks (WAC 296-126-092(4)), but also the law's express intent to protect employees from "conditions of labor which have a pernicious effect on their health." RCW 49.12.010.

ARGUMENT

REST BREAKS ARE CRITICAL TO EMPLOYEE HEALTH AND SAFETY; IF *SACRED HEART* IS NOT REVERSED, WORKERS ACROSS WASHINGTON STATE WILL SUFFER INCREASED ACCIDENTS, INJURIES, AND ILLNESS.

A. *Sacred Heart* Wrongly Financially Rewards Employers for Violating Their Mandatory Duty to Provide Rest Breaks.

1. *Washington Law Mandates That Employers "Shall" Provide Rest Breaks to Protect the Health of Employees.*

Under the Industrial Welfare Act (IWA), all employees shall be "protected from conditions of labor which have a pernicious effect on their health." RCW 49.12.010. The director of the Department of Labor and Industries (DL&I) is responsible for administering and enforcing "all laws respecting the employment and relating to the health, sanitary conditions, surroundings, hours of labor, and wages of employees employed in business and industry." RCW 43.22.270(4).

Under WAC 296-126-092(4) “[e]mployees **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.” [Emphasis added.] “The plain language” of this regulation “imposes a mandatory obligation on the employer” to provide rest breaks. *Pellino v. Brink’s Inc.*, 164 Wn. App. 668, 688, 267 P.3d 383 (2011); *see also Scannell v. City of Seattle*, 97 Wn.2d 701, 704-05, 656 P.2d 1083 (1982) (clause with term “shall” imposes mandatory duty on employer to provide employees vacation pay); *Roberts v. King County*, 107 Wn. App. 806, 815, 27 P.3d 1267 (2001) (county policy with term “shall” imposes mandatory obligation on employer to provide equal pay for equal work), *review denied*, 145 Wn.2d 1024 (2002).

2. ***Sacred Heart Financially Rewards Employers for Denying Employees Rest Breaks.***

Sacred Heart says there is no “financial incentive for violating the IWA” by not providing rest breaks. Sacred Heart Answer to Amicus Curia Br. of Wash. State Labor Council, p. 5. But this statement is plainly wrong because the Court of Appeals decision holds that when employees are forced to work through their rest breaks (and the time for rest is essentially provided after the work is completed), the rest breaks are not

counted as “hours worked” for calculating overtime. In contrast, when employees receive rest breaks during the work day in accordance with the law, those breaks are counted as “hours worked” for calculating overtime. *Id.*, p. 7 (employee who receives rest breaks “gets paid for eight hours”).

Accordingly, under *Sacred Heart*, if an employer requires an employee to physically work 40 hours per week with no rest breaks, the employer only needs to pay the employee straight time for 41 hours and 40 minutes (40 hours of physical work plus one hour and 40 minutes for the rest breaks the employee was denied during the work day). If the employee is earning \$18 per hour, the employer would pay the employee \$750 for the week. On the other hand, if an employer requires an employee to physically work 40 hours per week and provides the employee with the mandated rest breaks, the employer has to pay the employee straight time for 40 hours (38 hours and 20 minutes of physical work + 1 hour and 40 minutes of rest breaks) and overtime for the additional one hour and 40 minutes of physical work. In this situation, the employer would pay the employee \$765 for the week. The employee receiving rest breaks thus receives an additional \$15 per week in pay compared to the employee not receiving rest breaks. Although this might not appear significant for a single worker, in a factory with 100 workers an employer would save \$1,500 per week by not providing rest breaks. And

over 52 weeks the employer would save \$78,000 by not providing rest breaks.¹

Accordingly, *Sacred Heart* creates a perverse financial incentive for employers to force employees to work through their rest breaks. Rather than protecting the health of employees in Washington State, the decision encourages employers to deny employee rest breaks.

B. Rest Breaks Prevent Employee Accidents, Injuries, and Illness. Washington Law Mandates Rest Breaks to Protect the Health and Safety of Hundreds of Thousands of Employees Throughout the State.

1. The Court's Decision Here Will Affect Hundreds of Thousands of Employees Throughout Washington State Who Work in a Variety of Jobs.

Good employers will continue to provide employees rest breaks not only because breaks reduce employee accidents and injuries, but also because breaks increase employee productivity.² Unfortunately, many other employers are only motivated by the bottom line and see low-wage

¹ Sacred Heart says that by forcing its nurses to work through rest breaks, it supposedly “doesn’t extend the actual work day or workweek.” Supp. Br. of Sacred Heart, p. 5. Sacred Heart’s argument is contrary to logic because the nurses’ work day is obviously extended when they do not take rest breaks because they have to work an additional 20 minutes that should otherwise be time off.

² The impetus for modern day rest breaks began not to directly benefit the worker, but to instead increase the worker’s output for the benefit of the employer. See, e.g., Marc Linder & Ingrid Nygaard, *Void Where Prohibited: Rest Breaks and the Right to Urinate on Company Time*, pp. 26-38 and notes (Cornell Univ. Press 1998) (referencing the numerous studies by governments and industrial scientists linking rest breaks with increased productivity).

workers as a fungible commodity: when one worker wears out, that worker is simply replaced by another worker. And as the Supreme Court of California has noted, some of the employees most affected by employers denying rest breaks are “low-wage workers who often perform manual labor.” *Murphy v. Kenneth Cole Prod.*, 155 P.3d 284, 296, 40 Cal.4th 1094 (Cal. 2007) (the “additional hour of pay” an employer must provide under a statute if an employee misses a rest break is considered “wages” rather than a “penalty” under the statute of limitations).³

The Washington workers who most desperately need the rest breaks at issue here thus include not only the nurses, but also those who work as construction laborers, factory workers, warehouse workers, landscapers, retail workers, and restaurant employees. Other Washington workers who also desperately need rest breaks are those office workers who perform repetitive tasks all day, such as data entry. See *infra* pp. 9-12 (discussing musculoskeletal disorders, including carpal tunnel syndrome, in office workers).⁴ The number of Washington employees

³ *Murphy, supra*, 155 P.3d at 296, *citing* (Tucker et al., *Rest Breaks and Accident Risk*, 361 *The Lancet*, Issue 9358, p. 680 (Feb. 22, 2003); Dababneh et al., *Impact of Added Rest Breaks on the Productivity and Well Being of Workers*, 2 *Ergonomics*, 164-74 (2001); Kenner, *Working Time, Jaeger and the Seven-Year Itch*, 11 *Colum. J. Eur. L.* 53, 55 (2004/05)).

⁴ It is important that the Court analyze the rest-break issue here not from the perspective of those professionals who have the luxury of working for employers who allow them to come in late or leave early for a child’s soccer
(continued)

working in these industries is extensive: 256,464 Washington employees in manufacturing, 117,519 Washington employees in wholesale trade, 77,553 Washington employees in transportation and warehousing, 118,765 Washington employees in construction, and 212,352 Washington employees in accommodation and food services. See <https://fortress.wa.gov/esd/employmentdata/docs/industry-reports/qcew-2011-q2.pdf>, accessed March 25, 2012. These employees often work rigidly scheduled shifts with no flexibility, work in cramped quarters, perform repetitive movements, and work in the hot sun. Some of these employees also perform dangerous work involving heavy machinery on construction sites, in factories, and in machine shops that can lead to both minor and catastrophic accidents. These employees need the protections provided to workers under Washington law. And it is these employees who will suffer the most if *Sacred Heart* is not reversed and employers thereby retain the financial incentive to deny employees rest breaks.

2. *Rest Breaks Protect the Health of Employees by Reducing Accidents and Musculoskeletal Disorders.*

Forcing the nurses to work through their rest breaks not only

game or those employees who work in modern, climate-controlled, indoor work environments, where they never have to work with dangerous machinery or do any heavy lifting or repetitive movements. While such good working conditions might prevail in the offices in which judges, attorneys, and corporate executives are customarily employed, the reality for thousands of Washington workers is different.

threatens patient safety due to increased nursing errors (see Amicus Br. of the American Nurses Association, pp. 5-6), but it also threatens the health of the nurses themselves and employees in other jobs. Nurses are often injured due to a “[s]prain, strain, or tear” that occurs when handling a patient. Bureau of Labor and Statistics, *Injuries, Illnesses, and Fatalities: Frequently Asked Questions*, www.bls.gov/iif/oshfaq1.htm, accessed on March 30, 2012.⁵ Due to the high number of workplace injuries, nursing aides and orderlies have a more dangerous job for nonfatal injuries than janitors, construction laborers, and carpenters. Bureau of Labor and Statistics, *Dangerous Jobs, Compensation and Working Conditions*, p. 58 (1997), <http://www.bls.gov/iif/oshwc/cfar0020.pdf> accessed March 28, 2012.

The injuries from work-related musculoskeletal disorders not only affect those in the health care industry, but they are also the “single largest class of injury claims” in offices across Washington State. Wash. State Dep’t of Labor & Industries, *Office Ergonomics: Practical Solutions for a Safer Workplace*, p. 2 (2002), <http://www.lni.wa.gov/IPUB/417-133-000.pdf>, accessed March 25, 2012. “The injuries result in medical and

⁵ “In 2009, there were 37,410 occupational musculoskeletal disorder (MSD) cases in private industry where the source of injury or illness was a health care patient or resident of a health care facility.” Bureau of Labor and Statistics, *Injuries, Illnesses, and Fatalities: Frequently Asked Questions*, *supra*.

time loss costs of over \$12 million per year” and “over 70,000 lost work days per year.” *Id.* According to a Department of Labor & Industries study in 2005 that examined the long-term loss of earnings of a cohort of claimants from 1993-94, “the cumulative excess loss of earnings of the 4,443 CTS [carpal tunnel syndrome] claimants” was “between \$203 million and \$309 million over the six years following their claim, a per claimant loss of between \$46,000 and \$70,000.” Foley and Silverstein, *The Economic Burden of Carpal Tunnel Syndrome: Long-Run Earnings of CTS Claimants in Washington State, 1993-94*, Wash. Dep’t of Labor & Indus. Technical Report No. 40-1-2005 (May 2005), <http://www.lni.wa.gov/Safety/Research/Files/EconomicBurdenCarpalTunnel.pdf>, accessed March 20, 2012. The study thus “show[s] the devastating economic impact which carpal tunnel syndrome can impose on workers and their households” and “underscores the importance of prevention.” *Id.*⁶

The risk factors for work-related musculoskeletal disorders, such

⁶ Worker accidents and injuries exact a huge toll on employees and society in general. In 2007, the direct and indirect cost of work place injuries and illness reached an estimated \$250 billion per year. Leigh JP, *Economic Burden of Occupational Injury and Illness in the United States* (2011), www.ncbi.nlm.nih.gov/pubmed/22188353, accessed March 29, 2012. According to the Occupational Safety and Health Administration (OSHA), “[a]bout 100 employees are killed and 95,000 injured every year while operating forklifts in all industries.” OSHA Worker Safety Series: Warehousing, www.osha.gov/Publications/warehousing.html, *infra*.

as carpal tunnel syndrome, include “[p]erforming the same or similar motions repeatedly” because this “can result in trauma to the joints and surrounding tissues” and “[w]ithout time for rest and recovery, repetition can lead to injury.” Wash. State Dep’t of Labor & Industries, *Office Ergonomics: Practical Solutions for a Safer Workplace*, *supra*, p. 6. Rest breaks are thus one of the important solutions to reducing work-related musculoskeletal injury because breaks allow “employees time to recover from the demands, both mental and physical, of their jobs . . . and give their hands and eyes a rest.” *Id.*, p. 28.

The Occupational Safety and Health Administration (OSHA), the main federal agency charged with enforcing employee safety and health legislation, also recognizes that employees develop “musculoskeletal disorders associated with awkward postures and repetitive motions.” OSHA Worker Safety Series: Warehousing, www.osha.gov/Publications/warehousing.html, accessed March 16, 2012. And under the “2-Hour Rule” there are inherent health risks in continually repeating a motion for two hours, lifting a specific weight for two hours, being in an awkward position for two hours, or being subject to vibration for two hours (let alone for four hours without a break). Milford, T., *Managing Health: Putting Your Employees in the Best Position to Keep Workers Comp Cost Down*, EHS Today, The Magazine for Environment, Health and Safety

Leaders, (Mar. 5, 2012), <http://ehstoday.com/health/managing-health-keep-workers-comp-costs-down-0302/index1.html>, accessed March 22, 2012.

“The vast increase in repetitive motion injuries” over the past four decades has thus “prompted ergonomists to warn that periodic rests during the workday are necessary to counteract the onset of carpal tunnel syndrome and other trauma from repetitive cycles.” Linder, *Void Where Prohibited: Rest Breaks and the Right to Urinate on Company Time*, *supra*, p. 7. The National Institute of Neurological Disorders and Stroke [NINDS], part of the National Institutes of Health, thus recommends that “[t]o prevent workplace-related carpal tunnel syndrome, workers [should] take frequent rest breaks[.]” *NINDS Carpal Tunnel Syndrome Info. Page*, http://www.ninds.nih.gov/disorders/carpal_tunnel/carpal_tunnel.htm, accessed March 26, 2012.

In addition to reducing musculoskeletal injuries, requiring that the rest break be scheduled as near as possible to the midpoint of the work period “successfully counteract[s] the accumulation of risk noted over [two hours] of continuous, repetitive, and largely machine-paced work.” Tucker et al., *supra*, *Rest Breaks and Accident Risk*, p. 680 (cited by *Murphy*,

supra, 155 P.3d at 296).⁷ OSHA similarly advises that “[e]mployees performing physical work [should] have adequate periodic rest breaks to avoid fatigue levels that could result in greater risk of accidents and reduced quality of work.” OSHA Worker Safety Series: Warehousing, *supra*, www.osha.gov/Publications/warehousing.html.

Accordingly, Washington law mandates that an employer “shall” provide a rest break, the break “shall be scheduled as near as possible to the midpoint of the work period[,]” and “[n]o employee shall be required to work more than three hours without a rest [break].” WAC 296-126-092(4). And the Washington law mandating a rest break at the midpoint of the work period both reduces employee accidents by counteracting the accumulation of risk that occurs as a shift lengthens without a break and also prevents employees from incurring injuries by providing a musculoskeletal break for employees. See *supra* pp. 8-12.

3. Rest Breaks Protect the Health of Employees by Reducing Work-Related Stress.

A rest break also provides employees a break from fatigue, stress, and monotony. Employees denied rest breaks “face greater risk of work-related . . . stress.” *Murphy, supra*, 155 P.3d at 296.

⁷ In this study of a car assembly plant, accidents occurred on the last half-hour of a two-hour shift preceding a rest break at almost double the rate of the first half-hour of the two-hour shift (and also higher than the second and third half-hours of the shift) Tucker, *supra*, *Rest Breaks and Accident Risk*, p. 680.

There are “many causes of stress for nurses, including the critical nature of the work with its potential for serious injury to others if careless for even a moment; staffing shortages . . . ; inadequate rest . . . ; [and] watching people suffer and coping with family grief in the front lines of human need[.]” Miliken *et al.*, *The Impact of Stress Management on Nurse Productivity and Retention*, *Nursing Economics* (July/August 2007) http://findarticles.com/p/articles/mi_m0FSW/is_4_25/ai_n27345354/ accessed March 30, 2012. This “[e]mployee stress and burnout commonly lead to myriad health-related problems[.]” *Id.* “Stress-related physical illnesses include heart disease, migraines, hypertension, irritable bowel syndrome, muscle, back and joint pain, duodenal ulcers, and mental health problems such as anxiety, depression, insomnia, and feelings of inadequacy.” *Id.*

“Evidence is rapidly accumulating to suggest that stress plays an important role in several types of chronic health problems - especially cardiovascular disease, musculoskeletal disorders, and psychological disorders.” National Institute for Occupational Safety and Health, *STRESS . . . at Work*, Pub. No. 99-1011, p. 6 <http://www.cdc.gov/niosh/docs/99-101/> accessed March 26, 2012. And one of the job conditions that may lead to worker stress is “infrequent rest breaks.” *Id.*, p. 5. Rest breaks thus reduce employee stress and health problems related

to stress.

4. Rest Breaks Protect the Health of Employees by Reducing Bladder Problems.

Rest breaks also provide employees the opportunity to relieve themselves. Linder, *supra*, *Void Where Prohibited: Rest Breaks and the Right to Urinate on Company Time*, pp. 7. Although it is hard to imagine employment with no opportunity to use the bathroom when the need arises, employees are routinely denied rest breaks in numerous jobs and, as a result, suffer from bladder problems. *Id.*, pp. 46-66. In addition to teachers, hairdressers, and line workers, nurses also incur bladder problems: “A.L. Bendsten coined the term ‘nurse’s bladder’ when he found 70 percent of nurses in a Danish study suppressed the desire to void during working hours.” *Id.* at 45 (citing Bendsten et al., *Infrequent Voiders Syndrome (Nurses Bladder): Prevalence Among Nurses and Assistant Nurses in a Surgical Ward*, 25 Scan. J. Urol. Nephrol. 201 (1991)). Rest breaks thus reduce bladder problems in employees.

5. Rest Breaks Protect the Health of Employees by Reducing Illnesses Related to High Temperatures.

Many employees also work in operations involving hot temperatures with a “high potential for inducing heat stress in employees engaged in such operations.” OSHA Technical Manual, Sec. 3, Ch. 4 (“Heat Stress”), www.osha.gov/dts/osta/otm_iii/otm_iii4.html, accessed

March 16, 2012. These workplaces include iron and steel foundries, electrical utilities (particularly boiler rooms), bakeries, confectionaries, commercial kitchens, laundries, and food canneries. *Id.* “Outdoor operations conducted in hot weather, such as construction, refining, asbestos removal, and hazardous waste site removal, especially those that require workers to wear semipermeable or impermeable protective clothing, are also likely to cause heat stress among exposed workers.” *Id.* The adverse heat disorders and heat effects workers can suffer include heat stroke, heat exhaustion, heat cramps, heat collapse, heat rashes, and heat fatigue. *Id.*, p. 2. OSHA advises that one way to prevent heat stress in workers is “frequent rest breaks in cooler environment” (*id.*, p. 5) and “intermittent rest periods with water breaks.” *Id.*, p. 6. The Department of Labor & Industries also recommends “regular breaks” to prevent heat-related illness in workers. *SHARP Investigates Heat-Related Illness in Washington State’s Workers*, <http://www.lni.wa.gov/Safety/Research/OccHealth/Reports/HeatStress/Default.asp>, accessed on March 26, 2012.

Accordingly, the Washington law mandating rest breaks protects the health of nurses and other employees throughout Washington State because the law: (1) reduces accidents by lowering the accumulation of risk that accrues as the time in a shift lengthens without a break, (2) prevents muscular injuries due to repetitive motions or awkward

positions, (3) provides a break from general fatigue and stress, (4) prevents bladder problems by providing employees the opportunity to use the bathroom, and (5) lessens the risk of illnesses related to high temperatures.

CONCLUSION

Rest breaks prevent employee accidents, injuries, and illness. Washington law expressly mandates rest breaks to ensure employees are “protected from conditions of labor which have a pernicious effect on their health.” RCW 49.12.010; WAC 296-126-092(4) (employer “shall” provide rest breaks).

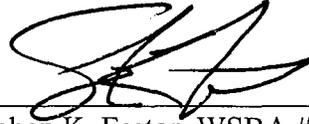
Under *Sacred Heart*, when two employees perform the same 40 or more hours of physical work, employers who force their employees to work through their rest breaks will save money by paying less in wages compared to employers who provide rest breaks. *Sacred Heart* thus financially rewards employers for violating the law. Surely the Legislature and the Department of Labor & Industries did not intend to financially reward employers for violating the law by forcing their employees to work through their rest breaks.

Under *Sacred Heath* both nurses and employees throughout Washington State in a variety of industries are at greater risk of accidents, injuries, and illness due to employers requiring them to work through their

rest breaks. This Court should thus reverse the Court of Appeals to effectuate the mandatory requirement that employers provide rest breaks and thereby fulfill the law's intent to protect employee health and safety.

Respectfully submitted this 6th day of April, 2012.

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION



Stephen K. Festor, WSBA #23147
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PROOF OF SERVICE

I, Monica I. Dragoiu, the undersigned, hereby certify and declare under penalty that the following statements are true and correct:

1. I am over the age of 18 years, not a party to the within cause and employed by the law firm of Bendich, Stobaugh & Strong, P.C., My business and mailing address is 701 Fifth Avenue, Suite 6550, Seattle, WA 98104.

2. On the 6th day of April, 2012, I caused to be sent for filing an original of the **Motion for Leave to Appear as Amicus Curiae by the Washington Employment Lawyers Association and Amicus Curiae Brief by Washington Employment Lawyers Association and Motion for Leave to Appear as Amicus Curiae by the Washington Employment Lawyers Association (WELA)** via email to:

Clerk of the Court: Ronald R. Carpenter
Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929
Email: Supreme@courts.wa.gov

3. On the 6th day of April, 2012, I caused to be served a copy of the **Amicus Curiae Brief by Washington Employment Lawyers Association and Motion for Leave to Appear as Amicus Curiae by the Washington Employment Lawyers Association (WELA)** via U.S. Mail to:

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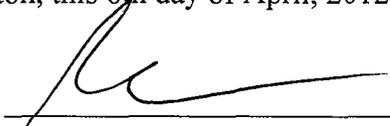
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Executed at Seattle, Washington, this 6th day of April, 2012.



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