

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

DANA RUSH and a class of similarly
situated individuals,

Plaintiffs,

v.

STATE OF WASHINGTON,

Defendant.

Case No. 20-2-03771-1 SEA

**ORDER GRANTING PLAINTIFFS'
MOTION TO DETERMINE FORMULA
TO CALCULATE LOSSES AND
DETERMINE LIABILITY FOR
EXEMPLARY DAMAGES**

THIS MATTER comes before the Court for hearing on plaintiffs' motion for partial summary judgment to determine the formula for calculating class losses and for determining liability for exemplary damages. This Court has considered the pleadings and records on file, the arguments of counsel, and the briefing and evidence filed by the parties in connection with the motion, including:

1. Plaintiffs' Motion to Determine Formula to Calculate Losses and Determine Liability for Exemplary Damages;
2. Declaration of Erika Haack;
3. Declaration of Stephen Strong (Dkt. 22);
4. Declarations of Dana Rush (Dkts. 21, 28, and 34);
5. Order Certifying Class (Dkt. 29)
6. Order Granting Plaintiffs' Motion for Partial Summary Judgment (Dkt. 49);
7. Order Determining Statute of Limitations (Dkt. 96);

1 8. Defendant's Response to Plaintiffs' Motion to Determine Formula;

2 9. Declaration of John Boesenberg;

3 10. Declaration of Eric Mentzer;

4 11. Declaration of Shirely Bean (Dkt. 37);

5 12. Plaintiffs' Reply in Support of Motion to Determine Formula;

6 13. Declaration of Dana Rush dated June 17, 2024;

7 14. Declaration of Alexander Strong dated June 17, 2024;

8 15. *Competing Proposed Orders on Summary Judgment Partially*
The Court, being fully informed, hereby enters the following Order:

9 IT IS HEREBY ORDERED that plaintiffs' Motion for Partial Summary Judgment is

10 **GRANTED.**

11 **MATERIAL FACTS NOT IN DISPUTE**

12 This Court previously certified a class of all part-time faculty who did not accrue sick
13 leave in proportion to their full-time equivalency. Dkt. 29. As class representative, Dana Rush
14 is suing on behalf of all part-time academic employees. Summary judgment is appropriate where
15 there is no genuine issue of material fact and the moving party is entitled to judgment as a matter
16 of law. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249 (1993). The following material
17 facts are without substantial controversy:

18 1. The State employs all the faculty at Washington State community and technical
19 colleges and the colleges are state agencies.

20 2. The State has not provided sick leave to part-time faculty that is proportionate to
21 the sick leave received by full-time faculty.

22 3. The State has imposed sick leave accumulation limits on part-time faculty.

23 ///

24 ///

25 ///

26 ///

27

1 Rush's employer, Green River College, from 2001 until June 2018, limited Mr. Rush (and
2 hundreds of other part-time faculty at that college) to sick leave accruals that were much less
3 than proportionate to their FTE%. See Dkt. 34, Rush Dec., ¶¶4-13, 20-23.

4 The State did not dispute that part-time faculty are entitled to receive sick leave
5 proportionate to that received by full-time faculty under RCW 28B.50.4893. The State said that
6 the part-time faculty had to use the grievance procedure in the colleges' CBAs to obtain a
7 remedy for the colleges' violation of the statute set forth in those very same CBAs. Dkt. 36, 3-
8 11; Dkt. 44, 7-9. The Court rejected this argument because the right to sick leave is independent
9 of the CBAs and nonnegotiable (Dkt. 49, p. 3):

10 RCW 28B.52.220 governs the ability of local colleges to bargain over how part-
11 time faculty accrue sick leave. Part-time faculty have an independent non-
negotiable right to proportionate sick leave.

12 Additionally, because the right to proportionate sick leave does not arise solely
13 out of any collective bargaining agreement (CBA), it is not mandatory to use
14 CBA grievance procedures. Accordingly, the certified class of part-time faculty
may recover sick leave they were unlawfully denied in this action without
pursuing any CBA grievance remedies.

15 The Court also entered summary judgment on the State's liability for proportionate sick
16 leave and determined how the lost sick leave will be calculated (*id.*, pp. 2-3):

17 Part-time faculty have a right to sick leave in proportion to their full-time
18 equivalency (FTE%) as compared to the sick leave accrued by full-time faculty
19 during a year. The calculation of FTE% may only be based on comparing a part-
time faculty member's in-class hours to the in-class hours of a full-time faculty
20 member at the same college and in the same discipline as required under RCW
28B.50.489(1); out-of-class hours may not be used in this calculation. The
21 requirement of RCW 28B.50.489(1) that the calculation of sick leave is based on
a comparison of the in-class hours of part-timer faculty to only the in-class hours
22 of full-time faculty also means that a part-time faculty member cannot be required
to work during the summer to receive sick leave if a full-time faculty member
23 receives sick leave in the summer without working. The amount of loss to any
24 faculty member can be calculated by subtracting the amount that the faculty
member received from the proportionate amount the part-time faculty member
25 should have received.

26 This Court next issued a partial summary judgment ruling on the statute of limitations.
27 Dkt. 96. This Court thereafter ruled—(1) the class period includes part-time faculty who worked

1 within six years of the filing date (February 11, 2020) (the class period), and (2) class members
2 could accumulate sick leave earned before that date, back to June 7, 2006, or whenever they
3 began teaching if after 2006 (the accumulation period). *Id.*, p. 6.

4 **ORDER**

5 There are two issues before this Court on the instant partial summary judgment motion on
6 the measure of damages: (1) determination on a formula for calculating class member losses and
7 (2) determination on the defendant's liability for exemplary damages.

8 Here, the plaintiffs have asked the Court to determine as a matter of law the appropriate
9 measure of damages to compensate the class members for the State's withholding of sick leave
10 wages they were due under their employment contracts and state law. See Dkt. 49 (Order on SJ).
11 The Court applies the following principles when determining the measure of damages.

12 The measure of damages is an issue of law and "[i]n making any compensation award,
13 the court should use a measure of damage that makes the injured party as whole as possible."
14 *Pugel v. Monheimer*, 83 Wn.App. 688, 692 (1996). The principles for calculating such damages
15 are well-established. First, when the "fact of damages is established" the amount may be shown
16 with the evidence available, even if there are uncertainties. *Brear v. Klinker Sand and Gravel*,
17 60 Wn.2d 443, 449 (1962). Difficulty in ascertainment of the precise amount does not affect
18 recovery. It is sufficient if the plaintiff produces the best evidence available, and that evidence
19 provides a reasonable basis for estimating his loss. *Id.* at 449-50; *Wenzler & Ward v. Sellen*, 53
20 Wn.2d 96, 98-100 (1958). "The most elementary conceptions of justice and public policy
21 require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has
22 created." *Moore*, 181 Wn.2d at 314 (quoting *Wenzler & Ward*).

23 The State cannot retain a windfall from its wrongful conduct in withholding sick leave.
24 *Moore*, 181 Wn.2d at 314. Since liability has already been determined in this action, Dkt. 49, the
25 measure of damages will be calculated on an aggregate basis without any individualized claim
26 process regarding individual sick leave usage rates. *Id.* at 315.

1 Paid sick leave is a form of wages. *Naches Valley Sch. Dist. v. Cruzen*, 54 Wn.App. 388,
2 399 (1989); *South Bend Sch. Dist. v. White*, 106 Wn.App. 309, 314-15 (2001). Here, the
3 calculation method should compensate class members for the lost wages. *Moore*, 181 Wn.2d at
4 311-12.

5 The Court therefore rules that damages in the class period will be measured as lost wages.
6 *Moore*, 181 Wn.2d at 311-12; *Naches Valley Sch. Dist.*, 54 Wn. App. at 399; *South Bend Sch.*
7 *Dist.*, 106 Wn. App. at 314-15. The wages will be calculated based on the hourly rates of part-
8 time faculty set forth in the college CBAs. The pay should be calculated each year on an
9 academic year basis. This pay will be subject to prejudgment interest from each year. *Hill v.*
10 *Garda*, 191 Wn.2d 553, 572 (2018) (judgments for back wages are liquidated and subject to
11 prejudgment interest). As the Court ruled previously on summary judgment regarding the statute
12 of limitations, sick leave that was withheld prior to the class period can be accumulated by class
13 members so long as they were employed by an eligible employer within the six-year limitations
14 period.

15 Plaintiffs have also sought a summary judgment ruling that they are entitled to exemplary
16 damages as a matter of law.

17 As stated above, paid sick leave is a form of wages. “The Washington Legislature has
18 strong policy in favor of payment of wages due to employees and have enacted comprehensive
19 schema to ensure payment of wages, including the remedy of exemplary damages.” *Schilling v.*
20 *Radio Holdings, Inc.*, 126 Wn.2d 152, 157 (1998). Summary judgment is granted on exemplary
21 damages under RCW 49.52.070 when the material facts are not in dispute. *Id.*, at 159-66. Here,
22 it is undisputed that the State provided less than proportionate sick leave to part-time academic
23 employees thus depriving them of the full amount of wages due.

24 The critical determination for exemplary damages under RCW 49.52.070 is “whether the
25 employer’s failure to pay wages was ‘willful.’” *Schilling*, 136 Wn.2d at 159. The test for
26 willfulness is a showing that the employer’s failure to pay was volitional, meaning the employer
27

1 “knows what he is doing, intends to do what he is doing, and is a free agent.” *Id.* at 160. The
2 undisputed evidence shows that the State’s withholding of proportionate sick leave, a form of
3 wages, was willful.

4 The State argues that willfulness is negated because there is a bona fide dispute over the
5 duty to pay the sick leave wages and the colleges were acting in “subjective good faith.” A bona
6 fide dispute has both objective and subjective components—whether the failure to pay was
7 objectively reasonable and whether the employer had “a genuine belief in dispute *at the time of*
8 *the wage violation.*” *Hill v Garda CL Northwest, Inc.*, 191 Wn.2d 553, 562 (2018) (internal
9 quotations omitted, emphasis added). The State argues that the colleges’ individual collective
10 bargaining agreements could affect part-time faculty rights to proportionate sick leave, and
11 therefore the failure to provide proportionate sick leave was not willful. The statutes governing
12 part-time faculty sick leave directly prohibit the colleges from negotiating part-time faculty
13 rights to proportionate sick leave. It is undisputed that the State Board of Community and
14 Technical Colleges for over 20 years informed the various community and technical colleges of
15 the requirement in collective bargaining to provide part-time faculty sick leave proportionate to
16 that of full-time faculty. It is undisputed that part-time faculty members did not receive sick
17 leave proportionate to full-time faculty.

18 There was no bona fide dispute at the time of the wage violation about the State’s
19 obligations to pay the wages, nor was the failure to pay wages a result of “good faith”
20 carelessness. There can be no “subjective good faith” violation of the sick leave statute when the
21 colleges were repeatedly advised to follow it. Moreover, the State’s collective bargaining
22 argument is not objectively reasonable since it is contrary to legislative intent found in express
23 statutory language. It is undisputed that the State’s community and technical colleges did not
24 comply with the statutes. This Court finds the State’s failure to provide part-time faculty with
25 sick leave proportionate to full-time faculty was willful. Exemplary damages are due pursuant to
26 RCW 49.52.070. The class members will receive twice the amount of compensation— withheld
27

1 wages and sick leave—as exemplary damages.

2 **IMPLEMENTATION OF FORMULA**


3 The State argues that plaintiffs’ proposed formula does not sufficiently account for the
4 individualized nature of sick leave policies at various institutions, specifically citing the
5 collective bargaining agreements. The plaintiffs’ disagree, pointing to state statutes that require
6 full-time equivalency be individually calculated based on a ratio of in-class teaching hours and
7 reported to the state board as a percentage of the “full-time academic workload in a given
8 discipline in a given institution.” RCW 28B.50.489; -.4891. The Court agrees with plaintiffs
9 that the formula which utilizes the full-time equivalency percentage reported to the state board
10 sufficiently accounts for variations across institutions and individual class members. The parties
11 will cooperate in implementation including disclosure of data and review of the formula applied
12 to the data. Individual issues, if any, that arise concerning implementation of this order shall be
13 addressed first by the parties, and if they cannot agree, by the Court.

14 The Court reserves jurisdiction over this case and any disputes that arise out of
15 implementation of this order. Pursuant to CR 23(d)(1), any further motions will be brought
16 consistent with LCR 7.

17 The Court’s oral ruling is incorporated herein by reference.

18 **IT IS SO ORDERED.**

1 DATED this 11th day of July, 2024.

2 

3 Hon. LeRoy McCullough
4 King County Superior Court

5 Presented By:

6 STOBAUGH & STRONG, P.C.

7 /s/ Alexander F. Strong

8 Alexander F. Strong, WSBA #49839

9 David F. Stobaugh, WSBA #6376

10 Stephen K. Strong, WSBA #6299

11 126 NW Canal Street, Suite 100

12 Seattle, Washington 98107

13 (206) 622-3536

14 *Attorneys for Plaintiffs*