Honorable Catherine Shaffer
Hearing: May 11, 2007, 10:00 a.m.
With Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

DOUGLAS L. MOORE, MARY CAMP, GAYLORD CASE, and a class of similarly situated individuals, Plaintiff, v. HEALTH CARE AUTHORITY, and STATE OF WASHINGTON, Defendants.	NO. 06-2-21115-4 SEA

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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RELIEF REQUESTED

This case is brought by state employees who work at least half-time on nonstandard work schedules. These employees are entitled to year-round paid health insurance, but they receive State health insurance only intermittently or not at all. Plaintiffs move under CR 23 to certify the class, which includes at least several hundred employees.

The statutes and regulations governing health insurance for state employees provide health coverage if they work half-time or more. "Half-time" does not mean 20 hours each and every week; the Health Care Authority (HCA) has long provided for *averaging* hours of work in calculating half-time. And the regulations provide year-round coverage for nine-month seasonal employees, such as higher education employees, who have an "off-season." The regulations also provide continuing health coverage to employees whose work hours are reduced by their employer after the employee is enrolled in health insurance. (See p. 10 below and Exs. 7-13 to Festor Dec.)

Despite the provisions for health coverage for state employees with nonstandard work hours, the State has denied many employees the health coverage to which they are entitled. The members of this class can be identified from personnel/payroll records. The defendants admitted that "each state employee's eligibility for health benefits can be determined by examining that employee's employment records." Answer to Amended Complaint, ¶11.

Plaintiffs move to certify as a class action the claims of these state employees who do not have year-round health insurance, but who work at least half-time with nonstandard work hours.[1]

ISSUE PRESENTED

The proposed class includes at least several hundred state employees with nonstandard work schedules who are denied health insurance. Class members can be identified from state

[1] The technical definition of the class is on page 17 below.

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personnel and payroll records. The employees share a common claim for health insurance, involving common issues of law, and their claims are relatively small. Should this class be certified under CR 23?

EVIDENCE

This motion is based on plaintiffs' amended complaint, defendants' answer, the declaration of Karen Robinson, the declaration of Stephen Festor and accompanying exhibits, and the declaration of Stephen Strong.

STATEMENT OF FACTS

Prior Supreme Court Decision in Mader

This case is largely a follow-up to the class action of *Mader v. HCA*, 149 Wn.2d 458 (2003)(King County No. 98-2-30850-8). In *Mader*, a class of part-time community college instructors sought year-round health insurance, which they were denied in the off-season or summer quarter. After the Supreme Court's 2003 decision, the *Mader* case was settled and this case arises from the HCA's failure to comply with the settlement agreement.

The *Mader* part-time faculty case arose because the regulations governing state employee health insurance have several eligibility provisions permitting employees who work half-time to receive year-round insurance, including a "career seasonal/instructional employees" category so employees who work nine-month seasons can receive insurance in the employees' off-season. 149 Wn.2d at 471. But part-time community college faculty were not treated as "nine-month" instructional year employees. The HCA said that they were "quarterly" employees and could obtain health insurance only under a special rule that applied just to part-time faculty and they therefore could not receive employer-paid health insurance in the off-season. *Id.* at 470-74. The Court of Appeals agreed with the HCA, saying that part-time faculty work on quarterly contracts and therefore cannot be considered "career seasonal/instructional employees." *Mader v. HCA*, 109 Wn.App. 904, 914 (2002), *reversed*, 149 Wn.2d 458 (2003). The Court of Appeals held that the faculty "work on a quarterly

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basis, not an 'instructional year (school year)' or 'equivalent nine-month seasonal basis,'" regardless of their actual work schedule, due to their quarterly contracts. 109 Wn.App. at 914.

The Supreme Court reversed, holding that part-time faculty's eligibility is determined under the same general rules as "[a]ny state employee," and they are not limited to eligibility under the special rule for part-time community college faculty. 149 Wn.2d at 472-74. The Court further held that each part-time faculty member's eligibility is based on actual work hours, not on quarterly contracts. *Id.* at 475-76. Accordingly, the Supreme Court said it appeared that the plaintiffs were eligible for year-round health insurance in the "career seasonal/instructional employee" category. *Id.* at 476-77. The Court based its decision on several statutes, as well as HCA regulations. *Id.* at 470, 474, 475-76.

The Settlement in Mader Included HCA's Promise of Good Faith Review of Part-Time Faculty's Eligibility as Instructional Year Employees

Following the Supreme Court's remand, the parties discussed settlement. During settlement discussions, the teachers' union representing plaintiff Mary Camp and others at Whatcom Community College raised concerns about part-time faculty who worked half-time or more on an instructional-year basis, but who might occasionally have a class dropped by the college and fall below half-time in a particular quarter. For example, a part-time instructor may typically work two-thirds of full time (*e.g.*, two classes for ten class/credit hours, out of the typical full-time 15), but a college may drop a class in the winter quarter due to insufficient enrollment in one class, reducing the instructor's teaching load in that quarter to one-third of full time (five class/credit hours). This instructor would still work more than half-time for the instructional year as a whole (25/45 or five-ninths of full time), but such an instructor was considered *not eligible* for health insurance, *since no two consecutive quarters* of teaching were at least half-time.

The parties in *Mader* realized that under the Supreme Court's decision, 149 Wn.2d at 472, 477, such instructors could qualify as "career seasonal/instructional employees" because

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they worked half-time or more as an "instructional (school year) or equivalent nine-month seasonal basis."[2] Accordingly, the parties agreed in settlement to expand the *Mader* class definition[3] and provide money damages to part-time instructors who *averaged* half-time or more for at least two years. As part of the settlement agreement, the HCA also promised to "undertake a good faith review" of health insurance eligibility for instructors who *on average* work half-time on an instructional-year basis, but who do not work half-time in every quarter. Festor Dec., ¶3. The HCA specifically promised to review their "eligibility for health benefits under the instructional-year employee regulation..."[4]

HCA Preempts Its Promised "Good Faith" Review of Eligibility by Secretly Deciding Its Outcome Before the Review

A few months after the settlement was signed, the parties communicated about the good faith review that the HCA had promised. Festor Dec., ¶¶4-5. In April 2005, after class counsel discovered the HCA's review was going on *with only state agencies* participating, class counsel started requesting public records from the HCA and other agencies. *Id.*, ¶6. When received, documents disclosed that ***HCA staff and counsel had secretly decided the outcome of the "good faith" review before the review even commenced.***

Specifically, before or nearly simultaneous with the signature of HCA's counsel to the *Mader* Settlement Agreement in February 2004, HCA's counsel asked HCA's staff to prepare

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[2] WAC 182-12-115(4) defined eligible employees to include (as quoted in *Mader*, 149 Wn.2d at 471):

> "Career seasonal/instructional employees[.]" Employees who work half-time or more on an instructional year (school year) or equivalent nine-month seasonal basis .... These employees are eligible to receive the employer contribution for insurance during the off-season following each period of seasonal employment.

[3] The class previously included only instructors who worked half-time each term in the instructional year, but not in the summer. The definition was expanded to include instructors who worked half-time but dipped as low as one-third in a quarter.

[4] *Mader* Settlement Agreement ¶47 states (Ex. 1 to Festor Dec.):

> As part of this Settlement Agreement, the State has further agreed to undertake a good faith review of eligibility for health benefits under the instructional-year employee regulation [WAC 182-12-115(4)] of those who work on average half-time or more in an entire instructional year (the Fall, Winter, and Spring Quarters) for two or more consecutive years, but who do not work more than half-time in each of those three quarters.

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a policy document to "clarify that averaging was no longer allowed." Ex. 4, p. 10, Festor Dec. The HCA also removed its longstanding guidance on averaging to agency employers from its website (Ex. 6, p. 12, Festor Dec.):

> Q. When does an intermittent employee become eligible for health care coverage?
>
> A. The qualifying period for an intermittent employee is *six consecutive months in which employment averages half-time* or more. [Emphasis added.]

See also Festor Dec. ¶¶6-9 and Exs. 7-13 (document showing the HCA's guidance).

Thus, HCA promised to make a "good-faith" review of part-time community college faculty's eligibility for health insurance based on working an *average* of half-time in each instructional year. *Mader* Settlement Agreement, ¶47. However, HCA's staff and counsel secretly decided the outcome of this review before it even began – by seeking to "*clarify" the end of averaging* to compute half-time. Ex. 4, p. 10, Festor Dec.

Doug Moore Sought Health Insurance Based on Averaging Half-Time Under Mader

The HCA staff's aim to "clarify" the end of averaging – disclosed only to state agency employers, not to class counsel or to the affected unions (Festor Dec., ¶7) – inflicted collateral damage on other state employees. Plaintiff Doug Moore, for example, worked on a nonstandard work schedule at the Horse Racing Commission for more than six years. His workload follows the horse-racing season, and he typically works in a year anywhere from 130 to 200 hours per month for seven months, 16 to 80 hours in two or more other months, and no hours in one to three months. He generally received health insurance, sometimes with only 24 paid hours per month, but he did not receive health insurance in the three-month off-season. Ex. 15, pp. 28-29, Festor Dec.

Moore apparently lost health insurance in some months due to the HCA's attempt to "clarify" the end of averaging. For example, in June 2004, three months after the HCA agreed "to undertake a good faith review," Moore and other employees at the Horse Racing

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Commission complained to the HCA "requesting . . . a review of the determination denying [them] state-paid medical benefits in the off-season." Ex. 14, pp. 22-23, Festor Dec. A few months later Moore told the HCA that his "payroll records will indicate that [he] averaged more tha[n] half time for the required [nine] months" and he was eligible for health insurance under the *Mader* decision. *Id.*, p. 25.

HCA refused to view Moore's eligibility. In October 2004 the HCA staff told Moore that "the HCA does not investigate the determinations made by employing agencies regarding eligibility for its employees" and the "HCA has no jurisdiction to consider your appeal." Ex. 14, p. 24, Festor Dec. After Moore repeated his efforts to get the HCA to act, the HCA responded in December 2004 by again saying "HCA does not investigate employee eligibility issues" and the "HCA lacks jurisdiction" to review his eligibility for health insurance. *Id.*, p. 26.

HCA Staff Asked the Agency's Board to Change the Eligibility Rules to "Correct" the Supreme Court's Decision In Mader

After the HCA staff spent 24 months on the "good faith review," staff recommended to the agency's board (PEBB) that it "correct" the Supreme Court's *Mader* decision and "reestablish the HCA's previous interpretation" of the eligibility rules.[5] Ex. 18, p. 43, Festor Dec. The HCA staff said that they wanted to preclude individuals from being eligible for benefits under other laws or rules that may apply or for which they may be eligible by limiting employees to "a single eligibility criteria." Ex. 18, p. 39, Festor Dec. The proposal to "correct" the Supreme Court, which the PEBB adopted, therefore provides that an employee "shall have his or her *eligibility determined solely by the criteria of the one category that most closely describes his or her employment* situation" and the "*instructional year employees"*

[5] The instructors' unions complained to the Legislature, which then enacted a bill that requires the HCA to recognize that part-time instructors are eligible for health insurance in the summer if they average half-time or more for two instructional years. Ch. 308, Laws of 2006. The Legislature also said the bill "does not preclude individuals from being eligible for benefits under other laws or rules that may apply or for which they may be eligible." *Id.*, §5.

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rule "do[es] not apply to persons employed on a quarter-to-quarter or semester-to-semester *contract basis*." *Id.*, p. 44 (emphasis added). Thus, the HCA purported to reinstate the precise reasoning of the Court of Appeals that the Supreme Court had rejected in *Mader*. See 109 Wn.App. at 914-15, *reversed*, 149 Wn.2d at 474-77.

The Class Here Includes Many State Employees on Nonstandard Schedules Who Do Not Receive Year-Round Health Insurance

The plaintiffs' facts are typical of at least several hundred employees. Plaintiff Mary Camp worked more than 106 hours per month [⅔ full-time] for the fall, winter, and spring quarters for two consecutive years, but when her hours dropped to 55 hours per month [⅓ full-time] for a few months in the fall of 2005, the State stopped paying for her health insurance. Ex. 16, p. 32, Festor Dec. The State pays for plaintiff Doug Moore's health insurance whenever he works more than eight hours in a month, but it does not provide him health insurance in the three-month off-season after his work hours averaged more than half-time for nine-months. Ex. 15, pp. 28-29, Festor Dec. Plaintiff Gaylord Case was labeled "on-call" by the State and he worked more than half-time for 28 consecutive months starting in December 2003, but the State did not provide him health insurance until April 2006. Ex. 17, pp. 35-36, Festor Dec.

These plaintiffs are representative of many other employees. Public records requests have revealed there are at least several hundred employees at many different state agencies who are not receiving health insurance when they average half-time or more or, after they become eligible, when they work eight or more hours in a month. Robinson Dec.

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ARGUMENT

I. PLAINTIFFS' CLAIM SHOULD BE CERTIFIED AS A CLASS ACTION BECAUSE THE HOURS STATE EMPLOYEES ON NONSTANDARD SCHEDULES MUST WORK TO RECEIVE HEALTH INSURANCE IS A COMMON LEGAL QUESTION THAT AFFECTS HUNDREDS OF EMPLOYEES.

A. The Class Certification Rule is Liberally Construed, Certification Is Made Without Considering the Merits of Plaintiffs' Claim and Assumes Plaintiffs' Allegations Are True, and Any Doubts Are Resolved in Favor of Certification.

"Washington courts favor a liberal interpretation of Civil Rule 23 as the rule avoids a multiplicity of litigation, 'saves members of the class the cost and trouble of filing individual suits[,] and ... also frees the defendant from the harassment of identical future litigation.'" *Smith v. Behr Process Corp.*, 113 Wn.App. 306, 318-19 (2002)("*Behr*") (quoting *Brown v. Brown*, 6 Wn.App. 249, 256-57 (1971)). A class action also provides a procedure to vindicate claims "which, taken individually, are too small to justify individual action but which are of significant size and importance if taken as a group." *Brown, supra,* 6 Wn.App. at 253; *Behr, supra*, 113 Wn.App. at 318-19. Indeed, "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

A decision whether to certify a class is *not* a decision on the merits; it is instead a procedural decision based on whether there is a common legal issue affecting numerous people. *WEA v. Shelton School Dist.*, 93 Wn.2d 783, 790 (1980). And because Washington courts "favor a liberal interpretation of CR 23" any doubts about certification are resolved in favor of maintaining a class action. *Behr, supra*, 113 Wn.App. at 319; *Brown, supra*, 6 Wn.App. at 256. The following sections show why this case meets the requirements for a class action.

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B. The Class Includes Hundreds of Individuals with Small Claims and Joinder of Them All as Formal Parties is therefore Impracticable.

Under CR 23(a)(1) a class is appropriate when "the class is so numerous that joinder of all members is impracticable." "As a general rule, where a class contains at least 40 members, federal courts have recognized a rebuttable presumption that joinder is impracticable." *Miller v. Farmer Bros. Co.*, 115 Wn.App. 815, 821 (2003) (citations omitted). "Impracticability" is also found where each individual's claim is small and the only way to obtain a remedy is through a class action. *Brown, supra*, 6 Wn.App. at 253; *Roper, supra*, 445 U.S. at 339.

Here, the defined class includes hundreds of employees and the class members work at agencies throughout the state. Robinson Dec. Each class member's claim is also relatively small, *e.g.,* class member Mary Camp's claim involves only a couple thousand dollars, and cases such are this are economically practical only as class actions. Strong Dec., ¶4. Accordingly, joinder is impracticable because there are hundreds of class members with small claims and these class members are widely dispersed. *Miller, supra,* 115 Wn.App. at 821; *Brown, supra*, 6 Wn.App. at 253; *Roper, supra*, 445 U.S. at 339.

C. Plaintiffs' Claim for Health Insurance Raises Questions Common to the Class.

The second element of a class action is that there must be a question of law or fact common to the class. CR 23(a)(2). There is "a low threshold to satisfy this test" because "a single issue common to the class" satisfies this requirement. *Behr, supra*, 113 Wn.App. at 320. Thus, "a common question need only *exist*, not predominate, for the [commonality] requirement to be satisfied." *Id.* (italics original). There are common questions of law whenever the defendant has acted or refused to act on grounds generally applicable to the class. *Zimmer v. City of Seattle*, 19 Wn.App. 864, 869 (1978).

Here, there are numerous questions common to the class, and this discussion only addresses a few major common questions. One of the main common issues is the number of

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hours that state employees on nonstandard schedules must work to receive health insurance. Plaintiffs allege employees who average at least half-time (80 hours per month) for six or more months are eligible for health insurance and they remain eligible in the following months when they work eight or more hours. And when the eligibility rules were adopted in 1988, the HCA told all state agencies that "nonpermanent" state employees who work these hours are eligible for health insurance (Ex. 7, pp. 13-14, Festor Dec.):

> The phrase 'scheduled to work at least half-time' is paramount in the determination of eligibility...The qualifying period means six full calendar months in which employment actually averaged half-time or more. ***Once an employee becomes eligible*** under this rule, ***the employer contribution shall be made for each month in which the employee is in pay status for eight or more hours***. [Emphasis on "averaged" in original; bold italics added.]

After the HCA issued these 1988 guidelines, it repeatedly told state agencies that employees are eligible for health insurance if they "average half-time" and the employees remain "forever eligible as long as they don't change positions and have at least 8 hours of pay status per month." Ex. 9, p. 17, Festor Dec. and Exs. 8, 10-13, Festor Dec.

The HCA, however, did not apply the averaging half-time rule or the eight-hour eligibility rule to part-time community college instructors because it said that a special "part-time faculty" rule requires that they work half-time in *each* quarter to establish and retain health insurance. Ex. 4, p. 10, Festor Dec. The Supreme Court in *Mader* specifically rejected the HCA's interpretation of the eligibility rules, saying the part-time instructors are not limited to the special "part-time faculty" rule for obtaining health insurance and they can instead obtain and retain health insurance under the general rules covering "[a]ny state employee." *Mader, supra,* 149 Wn.2d at 472.

Accordingly, under the Supreme Court's construction in *Mader* of WAC 182-12-115 and related statutes, part-time faculty (and all other state employees on nonstandard schedules) are eligible for health insurance when they *average* half-time or more for six months and they remain eligible for the employer contribution in any month that they work

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eight or more hours. But when the issue of instructors averaging half-time was raised in settlement discussions, the State did not disclose the 1988 guidelines showing that it had the "averaging" and "eight-hour" rules. Instead, the State agreed to review in "good faith" whether such instructors are eligible for health insurance in the summer under the "career seasonal/instructional employees" provision. Ex. 1, Festor Dec.

Yet, at the same time the HCA was promising in the *Mader* settlement agreement that it would perform a "good faith" review, "HCA legal counsel advised" the agency to stop providing health insurance to ***all*** state employees who establish eligibility by "averaging" their work hours to calculate half-time. Ex. 4, p. 10, Festor Dec. And this advice was made secretly with no notice to affected parties, no rulemaking procedure, and no change in the statues or regulations. Accordingly, one common class-wide issue here is whether "averaging" half-time is the eligibility rule as the HCA declared in 1988 and continued for the next 16 years, or, as the HCA apparently contends, its rule consists of "legal counsel's advice" to end averaging in 2004, in response to (or contradiction to) its promise of a "good faith review."

Another common question is the validity and effect of the HCA's June 2006 amendment to the eligibility rules, which was explicitly intended to "correct the *Mader* court's interpretation of WAC 182-12-115 and reestablish the HCA's previous interpretation." Ex. 18, p. 43, Festor Dec.[6] The HCA's attempt to "correct" the Supreme Court was erroneous for several reasons. First, the Legislature expressly limited the HCA's authority to change the eligibility rules in RCW 41.05.065(2)(g), which states "[t]o maintain the comprehensive nature of employee health benefits, employee eligibility criteria related to the number of hours

[6] The HCA intended to "correct" the Supreme Court in two ways. First, the HCA wanted to preclude individuals from being eligible for benefits under other laws or rules that may apply or for which they may be eligible by limiting employees to "a single eligibility criteria" in WAC 182-12-115. Ex. 18, p. 39, Festor Dec. Second, the HCA intended that the "single eligibility criteria" for part-time faculty be based on their contracts rather than their work hours, *e.g.*, the amendment thus states that the "instructional year employees" rule does "*not apply to persons employed on a quarter-to-quarter* or semester-to-semester *contracts*." (Emphasis added). *Id.*, p. 44.

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worked . . . shall be substantially equivalent to the . . . eligibility criteria in effect on January 1, 1993." In 1993 "averaging half-time or more" was the threshold for receiving health insurance. Ex. 7, pp. 13-14 and Ex. 4, p. 10, Festor Dec. The Supreme Court's holding in *Mader* was that part-time instructors are not limited to establishing eligibility under a restrictive special rule for part-time faculty, but can instead qualify for and retain health insurance under the eligibility rules covering "[a]ny state employee." 149 Wn.2d at 472-74.

Accordingly, part-time instructors (just like all other state employees) were eligible for health insurance when they averaged half-time (80 or more hours) for six months or longer and they remained eligible in the following months in which they worked eight or more hours. A common issue therefore is whether the HCA's attempt to "reestablish its previous interpretation" to restrict part-time faculty to a special eligibility rule different from the general eligibility rules for all state employees is contrary to RCW 41.05.065(2)(g) because, if effective, it would materially alter the "eligibility criteria in effect on January 1, 1993."

In addition, the Supreme Court's decision that part-time instructors' eligibility for health insurance is not limited to the special "part-time faculty" rule is based not only on the language in WAC 182-12-115, but also on several statutes. *Mader, supra,* 149 Wn.2d at 470, 474, 475-76. The Supreme Court said RCW 49.44.160 and -.170, the public employee misclassification statute, require that eligibility for public employee benefits be based on the employees' "actual work circumstances," rather than the type of contracts they sign or "arbitrary labels" such as "part-time," "intermittent," and "seasonal." *Id.* at 475 (quoting RCW 49.44.170(2)(d)). But the HCA now apparently maintains that part-time faculty (including those at four-year institutions) are not eligible for the health insurance under the same rules as other part-time state employees because, it says, part-time faculty members' eligibility is again based on their contracts. Ex. 18, p. 39, Festor Dec. Another common issue is therefore whether the HCA's amendment to "correct" the Supreme Court by basing eligibility on contracts, or the "part-time" label, rather than the employees' actual work

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circumstances is contrary to RCW 49.44.160-.170. *Mader,* 149 Wn.2d at 475.

If the Court finds the State breached its duty to provide plaintiffs and the class health insurance, then the appropriate compensatory, equitable, and/or declaratory relief necessary to remedy the State's breach for all affected class members also raises common question.

D. Plaintiffs' Claims are Typical of the Class's Claims Because the Claims All Arise From the State's Failure to Provide Health Insurance to Employees Whose Work Hours Average Half-Time or More and/or Employees Who Work Eight or More Hours in a Month After Becoming Eligible for Health Insurance.

The third element of a class action is that plaintiffs' claim must be "typical" of the class's claim. CR 23(a)(3). And the plaintiffs' claim is "typical" when it arises from the same course of events that give rise to the class members' claim and it is based on the same basic principles, even though the facts may vary. *Behr, supra,* 113 Wn.App. at 320; *Brown, supra,* 6 Wn.App. at 255-56. Thus, "[w]here the same unlawful conduct is alleged to have affected both the named plaintiffs and class members, varying fact patterns in individual claims will not defeat the typicality requirement." *Smith, supra,* 113 Wn.App. at 320; *Brown v. Brown,* 6 Wn.App. at 255.

Here, plaintiffs' claim arises from the same events that give rise to the class members' claim and it is based on the same legal theory, *i.e.*, the State fails to provide health insurance to employees on nonstandard schedules when their work hours average half-time or more and/or when they work eight or more hours in a month after becoming eligible. For example, plaintiff Doug Moore works more than half-time on a nine-month or longer basis, but the State does not recognize him as eligible for health insurance in the off-season because his work dips below half-time in two particular months. Ex. 15, pp. 28-29, Festor Dec. Plaintiff Gaylord Case also worked more than half-time on a nonstandard schedule for the State for 28 consecutive months, but the State did not provide him health insurance because it labeled him "on-call." Ex. 17, pp. 35-36, Festor Dec. Plaintiffs' claims are thus typical of the class's claim that state employees who average at least half-time for six months are eligible for health

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insurance, no matter how they are labeled.

The State also stopped paying for plaintiff Mary Camp's health insurance when it reduced her teaching schedule at Whatcom Community College to one-third of full-time in the Fall of 2005, after she had taught two-thirds of full-time in the preceding two years. Ex. 16, p. 32, Festor Dec. In contrast, the HCA told higher education institutions that after part-time employees become eligible for health insurance, they remain eligible for health insurance even under a "temporary contract just for 8 hours per month." Ex. 10, p. 18, Festor Dec. and Exs. 10-11. Plaintiff Camp's claim is thus typical of the class's claim that after state employees become eligible for health insurance, the employees remain eligible for health insurance when they work eight or more hours in a month (as Camp did).

Accordingly, plaintiffs' claims are "typical" of the class's claims under CR 23(a)(3).

E. Plaintiffs and Their Counsel Will Adequately Represent the Class.

Under CR 23(a)(4) a class action may be maintained if "the representative parties will fairly and adequately protect the interest of the class." This requires that the representative parties have a qualified attorney, that the lawsuit is not collusive, and that the plaintiffs' interests are not antagonistic to the class. *Marquardt v. Fein*, 25 Wn.App. 651, 657 (1980).

Here, plaintiffs' counsel have successfully represented employees in many class actions. Strong Dec. And these actions include *Mader v. HCA, supra,* 149 Wn.2d 458, which is similar to the case here because, in both cases, the State failed to provide health insurance to employees due to their "part-time" label and their "quarterly" contracts.

Plaintiffs' lawsuit is also not collusive and plaintiffs have no conflicts with the class. Accordingly, plaintiffs will adequately represent the class as required by CR 23(a)(4).

II. PLAINTIFFS' HEALTH INSURANCE CLAIM SHOULD BE CERTIFIED AS A CLASS ACTION UNDER CIVIL RULE 23(b)(1) AND (b)(2).

A. If Possible, Class Actions Should be Maintained Under CR 23(b)(1) and/or (b)(2), Rather Than Under (b)(3).

In addition to fulfilling the prerequisites of 23(a), a class action must also satisfy CR

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23(b)(1), (b)(2), or (b)(3). There is a preference for maintaining a class action under (b)(1) and/or (b)(2), rather than (b)(3), because it resolves the claims of all class members in one lawsuit and no one can opt out to raise another claim in a separate lawsuit. *Wetzel v. Liberty Mutual Ins. Co.,* 508 F.2d 239, 253 (3rd Cir. 1975); *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 119-120 (3d Cir. 1990).

B. The Court Should Certify the Class Under CR 23(b)(1) Because Individual Lawsuits Could Result in "Incompatible Standards of Conduct" for the State.

A class is certified under CR 23(b)(1)(A) when "the prosecution of separate actions by ... individual members of the class" would, if filed, "create a risk" of "incompatible standards of conduct for the party opposing the class[.]" Cases are thus certified as class actions under CR 23(b)(1)(A) when individual lawsuits could result in conflicting orders imposing incompatible standards on the defendant. *Behr, supra,* 113 Wn.App. at 321.

Here, the declaratory relief plaintiffs seek creates a risk courts will impose inconsistent obligations on the State if individual actions were filed. For example, if the Court enters a declaratory judgment in plaintiffs' action stating the hours a state employee must work to receive health insurance, and at the same time other individual cases were brought that resulted in different hourly requirements, the State would have different and conflicting obligations to its employees. Class certification is therefore appropriate under CR 23(b)(1)(A) to avoid the possibility of varying adjudications resulting in incompatible standards of conduct. *Behr, supra,* 113 Wn.App. at 321.

C. The Court Should Certify the Class Under CR 23(b)(2) Because the State Acted on Grounds Common to the Class, and the Class Seeks Declaratory and Injunctive Relief.

Cases are certified under CR 23(b)(2) when the "party opposing the class has acted or refused to act on grounds generally inapplicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole..." "Certification under subsection (b)(2) is [thus] appropriate when injunctive or declaratory

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relief is requested, and when the defendant has acted or refused to act or failed to perform a legal duty on grounds generally applicable to the class." *Sitton v. State Farm,* 116 Wn.App. 245, 251 (2003).

Here, the proposed class action falls within CR 23(b)(2) because the State failed to perform a legal duty on grounds applicable to the class, *i.e.*, the State failed to correctly apply the hourly rules for health insurance eligibility. And plaintiff seeks injunctive and declaratory relief concerning the State's duties to the class as a whole. Class certification under CR 23(b)(2) is thus appropriate. *Sitton, supra,* 116 Wn.App. at 251.

D. Certifying the Class Under CR 23(b)(1) and (b)(2) is also Appropriate Because Any Potential Monetary Relief for the Class is "Incidental" to the Class's Request for Declaratory and Injunctive Relief.

Monetary relief is available in cases certified under CR 23(b)(1) and (b)(2), where the relief is "incidental" to the claim for injunctive or declaratory relief. And "incidental" damages are those that flow directly from liability to the class as a whole and do not require subjective judgments to determine their value. *Sitton*, 116 Wn.App. at 252. "Incidental" damages is thus *not a quantitative measure — i.e., not the amount* of money the defendant will pay — *but is instead a qualitative measure*, *i.e.,* whether any damages are capable of computation by objective standards, such as by a formula, as opposed to subjective decisions such as valuing emotional distress or pain and suffering. *Id.* In numerous prior employee class actions involving class counsel, including *Mader v. HCA, supra,* courts certified each class under CR 23(b)(1) and (b)(2), or its federal equivalent, when the damages could be calculated based on personnel and payroll records, which is "essentially a mechanical task." Strong Dec., ¶3.

Here, any monetary relief owed to the class is incidental to the declaratory relief, *i.e.*, the monetary relief would flow directly from a declaration regarding the hours a state employee must work to receive health insurance. And the monetary relief could then be computed by a mechanical formula based on the State's records, *e.g.*, a database program that

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calculates the amount of lost monthly employer health insurance contributions for each employee based on the number of months the employee should have, but did not, receive the employer contribution for health insurance. Strong Dec., ¶2. Calculating relief in this method for class members is exactly what the parties did in settling the class action *Mader v. HCA, supra*. *Id.* And the State even "admit[s] that each state employee's eligibility for health benefits can be determined by examining that employee's employment records." Answer to Pls. Amend. Comp., ¶11 (emphasis added). In other words, after the Court issues a declaratory ruling concerning the eligibility rules, whether class members are entitled to relief will be determined by "examining that [class members'] employment records." *Id.* The Court should therefore certify the class under CR 23(b)(1) and (b)(2).

III. THE COURT SHOULD ADOPT PLAINTIFFS' PROPOSED CLASS DEFINITION BECAUSE IT INCLUDES EMPLOYEES READILY IDENTIFIABLE FROM THE STATE'S RECORDS.

Under CR 23 courts should define the class in the certification order so that the ultimate decision will apply to an ascertainable group of individuals. Rule 23(c)(3). Plaintiff requests the class include all state employees on nonstandard work schedules who worked half-time or more, but did not receive health insurance year-round, technically defined as:

> all state employees who worked half-time or more for six months, and who were denied health insurance (a) commencing in the seventh month of employment, and/or (b) at any time in the nine or more months or in the corresponding off-season for those employees who work half-time or more on a nine-month (or more) seasonal basis, and/or (c) in any month after the employees became eligible in which the employees received pay for eight or more hours of work in the same position.

Plaintiffs' proposed class definition is thus based on the months and hours state employees worked, and did not receive paid health insurance. These facts are contained in employment records. The Court should thus adopt this class definition because class members are identifiable from employment records.

CONCLUSION

The hours state employees on nonstandard schedules must work to receive health

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insurance is a common claim affecting hundreds of employees. The employees' claims are all relatively small and the only economically practical way for the employees to obtain any redress is through a class action. Plaintiffs therefore request that the Court certify the class under CR 23(a) and both (b)(1) and (b)(2).[7]

DATED this 23rd day of March, 2007.

Respectfully submitted,

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[7] The class could also be certified under the looser standards of CR 23(b)(3), although that is not requested unless the Court were to find both (b)(1) and (b)(2) inapplicable.

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Honorable Catherine Shaffer

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

DOUGLAS L. MOORE, MARY CAMP, GAYLORD CASE, and a class of similarly situated individuals, Plaintiff, v. HEALTH CARE AUTHORITY, and STATE OF WASHINGTON, Defendants.	NO. 06-2-21115-4 SEA [PROPOSED] ORDER CERTIFYING CLASS

This matter came before the Court on plaintiffs' motion for class certification. Having considered the materials submitted, the arguments of counsel, and the record in the case, the Court hereby finds and orders as follows:

1. Plaintiffs' first amended complaint asserts that the defendants breached their duty to provide health insurance to employees who work on nonstandard schedules when their hours average half-time or more for six or more months and, after they become eligible for health insurance, when they work eight or more hours in a month. Plaintiffs seek declaratory relief concerning these duties, *i.e.*, a ruling concerning the minimum hours a state employee must work to receive health insurance, an injunction requiring defendants to provide plaintiffs and the class health insurance under the applicable provisions, and monetary relief for the health insurance the State previously failed to provide the class members.

2. It is a common question whether defendants have a duty to provide health in-

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surance to employees whose work hours average at least half-time for six or more months and whether the employees remain eligible for health insurance when they work eight or more hours in a month and the question affects hundreds, if not thousands, of state employees. Because the class includes hundreds of employees, and each class member's claim is relatively small, joinder of all class members is impracticable under CR 23(a)(1).

3. In addition to the common questions concerning defendants' duty to provide health insurance to employees on nonstandard work schedules, if plaintiffs prevail on their claims, other questions common to the class will include the appropriate monetary, equitable and/or declaratory relief necessary to remedy the breach. The defendants also assert defenses common to the class. These are questions common to the class as required under CR 23(a)(2).

4. Plaintiffs' claims also arise from the same event or course of conduct that gives rise to the class members' claims, *i.e.*, plaintiffs allege their hours averaged half-time or more for longer than six months and/or they worked eight hours in a month after they became eligible, but defendants failed to provide them health insurance. Plaintiffs' claim is thus "typical" of the class's claim as required under CR 23(a)(3).

5. The class here is represented by experienced class counsel who have extensive experience in litigating class actions on behalf of employees. Plaintiffs also have no conflict of interest with the class, and the lawsuit is not collusive. The requirements of CR 23(a)(4) are therefore met.

6. Accordingly, the class claim here satisfies the requirements for a class action in CR 23(a). For purposes of class certification, a class action must also satisfy CR 23(b)(1), (b)(2), or (b)(3).

7. Here, the relief sought creates a risk of inconsistent obligations. For example, if the Court enters a declaratory judgment or injunction in this case requiring the defendants to provide health insurance to employees whose work hours average half-time or more for six

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months or longer and/or to employees when they work eight or more hours in a month after becoming eligible, and at the same time other cases were brought that result in different requirements, the defendants would be placed in a position where they have conflicting obligations. To avoid this, certification under CR 23(b)(1)(A) is appropriate.

8. Plaintiffs also allege that defendants failed to perform a legal duty on grounds applicable to the class, *i.e.*, they failed to provide employees health insurance when their work hours qualified them for that insurance. And plaintiffs seek declaratory relief concerning the defendants' duties to the class. Injunctive relief may also be appropriate to ensure that defendants comply with their duties in the future. Class certification is thus also appropriate under CR 23(b)(2).

9. Class certification is also appropriate under CR 23(b)(1) and (b)(2) because any monetary relief would be incidental to any declaratory relief, *i.e.*, the monetary relief would flow directly from any declaratory relief that defendants breached their duty to provide plaintiffs and the class health insurance. Any monetary relief can be computed based on objective facts, such as the hours the class members worked each month, the months the class members did not receive health insurance, and the monthly cost of the health insurance.

10. The class is defined as:

> all state employees who worked half-time or more for six months, and who were denied health insurance (a) commencing in the seventh month of employment, and/or (b) at any time in the nine or more months or in the corresponding off-season for those employees who work half-time or more on a nine-month (or more) seasonal basis, and/or (c) in any month after the employees became eligible in which the employees received pay for eight or more hours of work in the same position.

This class definition includes employees identifiable from defendants' records.

DATED this _____ day of _____, 2007.

_____

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