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— SUPREME COURT
— COURT OF APPEALS
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1-406

IN THE SUPREME COURT OF THE STATE OF OREGON

D. GRANT WALTER and
SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 140,

Petitioners on Review,

v.

JAMES SCHERZINGER and
PORTLAND SCHOOL DISTRICT NO. 1J,

Respondents on Review.

SC S51669;
CA A118491;
ERB DR-4-02

ORIGINAL

**BRIEF OF AMICUS CURIAE PORTLAND HABILITATION CENTER
IN SUPPORT OF RESPONDENTS' PETITION FOR RECONSIDERATION**

Review of the Decision of the Supreme Court Reversing Decision of the Court of Appeals
and the Employment Relations Board

Date of Opinion: October 13, 2005
Author of Opinion: De Muniz, J.
Dissenting: Balmer, J., joined by
Carson, C. J., and Gillette, J.

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I. PRELIMINARY MATTERS

A. Portland Habilitation Center and Its Interest.

Portland Habilitation Center (“PHC”) is a non-profit corporation that employs disabled Oregonians. PHC is a qualified entity under Oregon’s Production of Disabled Individuals Law (ORS 279.835 *et seq*). PHC is the entity that contracted with Respondent Portland School District (the “District”) in 2002 to provide custodial and janitorial services for the District.

B. Importance of the Court’s Decision.

This case presents a fundamental question as to how the District can allocate resources in financially difficult times. This is not a case of management vs. labor. PHC’s employees are represented by the Service Employees International Union (“SEIU”)—the same union that represented the former District custodians. PHC’s employees’ wages, hours, and conditions of employment are the same as those of every unionized commercial janitor in Portland.

Rather, this is a case of teachers vs. custodians. The District had to choose between the lesser of two evils: layoff teachers and jeopardize the education of Portland’s children, or contract with an outside custodial service. The District’s decision to choose the latter presents an important question relating to the value it places on the public education of Portland children.

II. THE COURT’S INTERPRETATION OF THE CCSL DID NOT CONSIDER RELEVANT CONTEXT

A. The PGE v. BOLI Framework.

In interpreting a statute, the Court’s task is to determine the intent of the legislature. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993). The starting points in that determination are the text and context of the statute, including related statutes on the same subject. *Id.*

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B. Other State and Federal Laws Provide Meaningful Context to the CCSL.

In its statutory interpretation, the Court's Opinion failed¹ to consider several federal and state employment laws that provide context to the CCSL.

1. The District cannot comply with both the CCSL as interpreted by the Court, and state and federal wage and hour laws.

This Court interpreted the CCSL as mandating that the District employ custodians and assistant custodians. Because the statute excludes hourly employees from its reach, ORS 242.320(2), the Court's interpretation requires that the custodians and assistant custodians be compensated on a salary basis. However, the District cannot at the same time comply with the CCSL's requirement that the custodians and assistant custodians be salaried employees and Oregon's wage and hour laws.²

Oregon's wage and hour statute was first passed in 1967, thirty years after the passage of the CCSL.³ The Oregon statute was modeled after the federal Fair Labor Standards Act

¹ PHC recognizes that, because of the nature of the case presented to it, these issues were not directly before the Court. PHC respectfully submits, however, that, in reconsidering its decision, these statutory conflicts cannot be ignored.

² Because it cannot (see discussion *infra*), the District has not treated the former janitorial employees as salaried. Instead, the employees were compensated on an hourly basis. The collective bargaining agreement between Petitioner Local 140 and the District provides that employees "shall be compensated at time and one-half the employee's hourly rate of pay for all work time scheduled by the District in excess of eight (8) hours in one day or forty (40) hours in one week." (Ex. 1, p. 15) (emphasis added). As further evidence that the former janitors were in fact hourly employees, Petitioner Walter testified in a related proceeding that he was paid "close to 18" dollars per hour by the District. (Page 6, lines 10-17, Deposition of Grant Walter in *SEIU Local 140 et al. v. Portland Habilitation Center*, Multnomah Co. Case No. 0304-04116.)

³ Bluntly stated, the job of "custodian" as defined by the CCSL is an anachronism. The passage of time has simply rendered the concept of a "custodian"—as it existed in 1937—meaningless. By way of examples, according to the CCSL, one of the primary functions of a custodian is the "cleaning and operation of heating plants." (ORS 242.310(3).) But if the heating plant is a boiler, then that work may only be performed by a licensed boiler operator. The same can be said of electrical and plumbing work, which is work "necessary to keep the physical plants of the school board in maintenance and operation." Today that work must be performed by state licensed electricians and plumbers. There were no such licensing requirements in 1937. As further proof time has passed by the job of custodian, the United States Department of Labor's Dictionary of Occupational Titles does not even list "custodian" as an occupation.

("FLSA") of 1938. Under Oregon's wage and hour laws, a true salaried employee receives the same amount of pay regardless of the hours actually worked in a given workweek (e.g., the individual receives the same pay whether he works forty (40) minutes or forty (40) hours). OAR 839-020-004(30). In order to comply with the CCSL requirement that the custodians and assistant custodians be salaried (i.e., they receive the same amount of pay regardless of the hours actually worked), the District would be required to not pay overtime to its custodians and assistant custodians for any hours worked in excess of forty (40) hours per week.⁴

Under regulations promulgated by the Commissioner of the Oregon Bureau of Labor and Industries, pursuant to ORS 653.261 individuals may be treated as exempt from overtime only where their job duties fall within certain very narrow exemptions. The exempt employee categories are Executive, Administrative, Professional and Outside Sales. OAR 839-020-005. Of these, only the Executive exemption could be applicable here. In order to qualify for the Executive exemption, the individual must:

- Have as his or her primary duty the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; and
- Have the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion of any other change of status of

⁴ The forty (40) hour work week and overtime were not issues in 1937 because there were no statutes that required them. That began to change with the passage of the Fair Labor Standards Act in 1938, 29 USC § 201 *et seq.* As originally enacted the FLSA required that overtime be paid for all hours in excess of forty four (44) hours per week. The forty (40) hour work week was implemented in 1940. In 1974, the FLSA was amended to extend the overtime provision of the FLSA to employees in federal, state and local governmental employment.

The 1974 amendments were initially struck down as an unconstitutional infringement on state sovereignty in *National League of Cities v. Usury*, 426 US 883 (1976). Nine years later, *National League of Cities* was overruled by the Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 US 528 (1985).

other employees will be given particular weight. OAR 839-020-005(1).

The statutory duties of the custodians and assistant custodians do not fall within this exemption.

The CCSL defines the duties of a custodian as the “supervision of property, keeping it in sanitary condition and tending to the cleaning and operation of heating plants and other necessary work by way of care and labor to keep the physical plants of the school board in maintenance and operation.” ORS 242.320(3).

Thus, there is an irreconcilable conflict between the statutorily defined duties of custodians and the administrative definition of the duties of an exempt employee. Under the CCSL, the custodians (and assistant custodians) supervise property—not people. Under the CCSL, the essential duties of a custodian (and assistant custodian) is “tending to the cleaning and operation of heating plants and other necessary work by way of care and labor”—not management. Under the CCSL, custodians (or assistant custodians) have no authority to hire or recommend promotions because that authority is ceded solely to the custodians’ Civil Service Board.

In short, the District cannot comply with both the CCSL statutory definition of custodians and the requirements of federal and state wage and hour laws. As part of its contextual analysis, the Court should take this irreconcilable conflict into consideration.

2. The District cannot comply with both the CCSL and Oregon and federal laws prohibiting discrimination against individuals with disabilities.

Both the Americans with Disabilities Act (“ADA”) and ORS 659A.133 prohibit discrimination against qualified individuals with disabilities. *See* 42 USC § 12112(a) (“No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”); ORS 659A.112 (“(1) It is an unlawful employment practice for an employer to refuse to hire, employee or promote, to bar or discharge from employment or to

discriminate in compensation or in terms, conditions or privileges of employment because an otherwise qualified person is a disabled person.”)

One of the salient provisions of the CCSL, however, requires the CCSB created by it to conduct examinations to “ascertain the fitness of applicants for beginning employment ...,” ORS 242.530, which examinations “shall include a test for physical qualifications, health and manual or professional skill.” ORS 242.540. Further, the CCSB “may require an applicant for a custodial position to furnish evidence satisfactory to the Board of good character, mental and physical health, and such other evidence as it may deem necessary to establish the applicant’s fitness” ORS 242.550.

These provisions are, however, at odds with both the ADA and Oregon’s disability discrimination law: they are precisely the type of artificial barriers to employment that the federal and state discrimination statutes prohibit. For example, 42 USC § 12112(d) generally prohibits medical examinations before employment (42 USC § 12112(d)(2)), and only allows an employer to require a medical examination after an offer of employment has been made and then only under certain circumstances. *See* 42 USC §§ 12112(d)(3) and (4).

Similarly, ORS 659A.133 makes it an unlawful employment practice for an employer to conduct a medical examination of a job applicant or otherwise make inquiry of a job applicant. *See* ORS 659A.133 (1). And, after an offer has been made, medical examinations are restricted. *See* ORS 659A.133 (3).

As a consequence, the express provisions of the CCSL are inconsistent with laws relating to disabled employees. The impact of federal and state laws relating to individuals with disabilities on the provisions of the CCSL should be considered by the Court on reconsideration.

3. Other state laws protect children.

In support of its conclusion that the CCSL mandated that custodians and assistant custodians be District employees, the Court referenced the CCSL’s child protection element. *See Walter v. Scherzinger*, 339 Or 408, 413, 121 P3d 644 (2005) *quoting* ORS 242.550 (“The board shall not approve the employment of any applicant unless the board is satisfied that the applicant

poses no danger to school children.”). PHC submits that the Court’s reliance on this element is misplaced. First, it cannot be gainsaid that the Legislature intended to mandate the employment of custodians over the employment of teachers. Nor may it be said that the Legislature was only concerned about the safety of Portland’s school children. Second, if the safety of the children is of real concern, the Court should know that the annual background and criminal record checks required by the PPS/PHC contract are more extensive and rigorous than the pre-employment checks conducted by the CCSB.

Finally, the reference fails to consider other state laws that provide for the protection of school children. ORS 181.539 requires that all school district contractors, and all of the contractor’s employees who have unsupervised contact with students, be fingerprinted and subjected to a criminal background check. ORS 181.539(1), (2), (5). Moreover,

- All district contracts must contain notice that contractors are subject to criminal background checks. ORS 326.603(6)(b);
- Districts are forbidden to contract with individuals convicted of crimes listed in ORS 342.143. ORS 326.603(3)(a);
- Districts are forbidden from continuing to contract with such a person or to allow a contractor to continue to assign such an individual to a school project who is convicted of such a crime. ORS 326.303(6)(a).

III. CONCLUSION

In 1977, forty (40) years after the passage of the CCSL, the legislature enacted Oregon’s Products of Disabled Individuals (PDI) law. ORS 279.835, *et seq.* In enacting this statute, the legislature declared that it is the public policy of this state:

. . . to encourage and assist disabled individuals to achieve maximum personal independence through useful and productive gainful employment by assuring an expanded and constant market for sheltered workshop and activity center products and services, thereby enhancing their dignity and capacity for self-support and minimizing their dependence on welfare and need for costly institutionalization. ORS 279.840.

To implement this policy, the PDI requires public agencies (such as the District) who determine that it is more cost efficient to outsource certain services to contract with qualified

entities such as PHC. That is precisely what the District did in this case. The District simultaneously addressed its crippling budget problems and provided the opportunity for hundreds of disabled Oregonians "to achieve maximum personal independence through useful and productive gainful employment." It was the proverbial win-win solution.

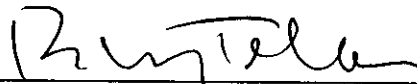
The Court's decision that the CCSL mandates that the District employ custodians, whether it can afford them or not creates; is, instead, a lose-lose resolution. The District loses the ability to control its own budget and to allocate its limited resources. The children of Portland lose because the District may be required to employ custodians instead of teachers. The people of the State of Oregon lose because the public policy inherent in the PDI is thwarted. Finally, over 300 hard working disabled Oregonians lose the opportunity for gainful employment.

Justice Balmer's dissent recognized that "Nothing in the text of the statute [CCSL] requires that every person who performs those duties must be hired by the district as an employee; neither does it bring within the compass of the CCSL persons who are not district 'employees.'" *Walter*, 339 Or at 429. The existence of other, conflicting law also suggests both that the CCSL cannot be lawfully implemented and its purposes are elsewhere achieved.

Because of the posture in which this case came to the Court, these conflicts were not properly presented to it. The District's Petition for Reconsideration should be granted to consider, in addition to the issues raised by the District, Portland Business Alliance, and others, the effect of those laws on the Court's interpretation of the CCSL.

RESPECTFULLY SUBMITTED this 20th day of December, 2005.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the date below I filed the foregoing **BRIEF OF AMICUS CURIAE PORTLAND HABILITATION CENTER IN SUPPORT OF RESPONDENTS' PETITION FOR RECONSIDERATION** by mailing the original and 15 copies via U.S. mail,

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