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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

DANA RUSH, and a class of similarly situated individuals,

Plaintiffs,

v.

STATE OF WASHINGTON

Defendants.

No. 21-2-04314-0 SEA

Consolidated with No. 23-2-20449-2 SEA (Gary Wolf)

AMENDED COMPLAINT

PARTIES

1. Dana Rush is a named plaintiff. He worked for the State of Washington as a part-time community college instructor at Green River College from March 1991 until his retirement in March 2020. Mr. Rush represents a certified class, as explained below.

2. Gary Wolf is a named plaintiff. He worked for the State of Washington as a part-time instructor at the Community Colleges of Spokane from 1993 until his retirement in 2017. The *Wolf* case, which raises the same issue as the original *Rush* case filing, was originally filed as a class action in Thurston County Superior Court on October 30, 2019 under Thurston County Cause No. 19-2-05358-34. The parties agreed to transfer the case to King County for consolidation with this *Rush* case and the *Wolf* case was assigned King County Cause No. 23-2-

1 20449-2 SEA. Dkt. 32, Notice of Transfer.¹ An order consolidating the two cases under this
2 *Rush* cause number was entered on November 16, 2023. Dkt. 36, Consolidation Order.

3 3. The defendants are the State of Washington and the Washington State Board of
4 Community and Technical Colleges.

5 **VENUE**

6 4. The facts giving rise to plaintiff Dana Rush's claims occurred at Green River
7 College in King County, Washington, as described below.

8 5. An action against a college district "is an action against the state." *Centralia Coll.*
9 *Ed. Ass'n. v. Bd. of Trustees of Comm. Coll. Dist. No. 12*, 82 Wn.2d 128, 129 (1973).

10 6. Venue is proper in King County Superior Court under RCW 4.92.010. Venue is
11 also proper because the defendants agreed to venue in King County in order to transfer the *Wolf*
12 case to King County.

13 **DANA RUSH'S FACTS KNOWN AT THE TIME OF FILING SUIT**

14 7. Plaintiff Dana Rush was employed by the defendant State of Washington as a
15 part-time community college instructor at Green River College starting in 1991. Mr. Rush taught
16 at Green River College from 1991 through 2020.

17 8. After 27 consecutive years of teaching, Mr. Rush took one quarter off work in
18 winter quarter 2018 to travel. Mr. Rush resumed teaching as a part-time community college
19 instructor at Green River College in spring quarter 2018 and continued working at Green River
20 College until he retired at the end of winter quarter 2020.

21 9. When he was working at Green River College, Mr. Rush participated in the State
22 Board's Retirement Plan which includes a defined contribution benefit and a supplemental
23 defined benefit.

24 10. At the time of Mr. Rush's hire the retirement plan was contained in regulations.
25

26 ¹ Copies of the *Wolf* case records originally filed with Thurston County (approx. 220
27 pages) were filed under docket 32 with the Notice of Transfer.

1 In 1998 a written plan document was adopted making it subject to the six-year statute of
2 limitations. The written plan incorporated the requirements previously stated in the regulations.

3 11. Under *Bakenhus v. Settle*, 48 Wn.2d 695 (1958), employees have a vested right to
4 retirement benefits promised to them at the time of hire.

5 12. Thus, the State, since 1998, could only change the retirement plan to the benefit
6 of the covered employees, not to their detriment.

7 13. Mr. Rush became eligible for participation in the Plan prior to 1998.

8 14. The Plan stopped accepting new participants on July 1, 2011.

9 15. Under the 1998 plan, Mr. Rush was entitled to have the State Board make TIAA,
10 formerly TIAA/CREF, retirement contributions on his behalf.

11 16. In 2016, the State modified the Plan to add the term “break in service.”

12 17. The State Board interprets the 2016 plan’s language regarding a “break in
13 service” as requiring employees to re-establish eligibility for benefits after time off work.

14 18. However, the 2016 plan cannot apply to Mr. Rush (or any class member) to his
15 detriment because employees have a vested right to retirement benefits upon hire.

16 19. Mr. Rush had a vested right to the retirement plan provisions in the 1998 Plan.

17 20. All plan participants had a vested right to the retirement eligibility in place prior
18 to July 1, 2011.

19 21. The defendants, however, failed to provide Mr. Rush the retirement benefits after
20 his return from his one quarter off.

21 22. Upon his return, Green River College required him to “re-qualify” for employer
22 contributions.

23 23. The State’s failure to pay those contributions violates the Plan.

24 24. Mr. Rush was also eligible to receive a supplemental retirement benefit under the
25 Plan. The Plan defined “Supplemental Retirement Benefit” as:

26 “Supplemental Retirement Benefit” means a benefit determined in accordance
27 with RCW 28B.10.400(3) and WAC 131-16-061, which, if payable to an

1 individual, shall be payable by the State Board from assets of the State Board.
2 (SBCTC 2019-PRR-009-00785).

3 25. The Plan explained those eligible for supplement retirement benefits as follows:

4 6.2 SUPPLEMENTAL RETIREMENT BENEFITS

5 (a) A Participant is eligible to receive Supplemental Retirement Benefit
6 payments if at the time of termination of employment the Participant is age sixty-
7 two or over and has at least ten Years of Service in either the Predecessor Plan,
8 this Plan, or a combination of both at a Washington public institution of higher
9 education, provided that the amount of the Supplemental Retirement Benefit, as
10 calculated in accordance with the provision of this Section, is a positive amount.
11 (SBCTC 2019-PRR-009-00796).

12 26. Public records provided by the defendant State Board disclosed the pertinent
13 regulations for the supplemental retirement benefit as follows:

14 **WAC 131-16-011 Definitions.** For the purpose of WAC 131-16-010 through
15 131-16-066, the following definitions shall apply:

16 (1) "Participant" means any employee who is eligible to purchase retirement
17 annuities through the TIAA/CREF plan who, as a condition of employment, on
18 and after January 1997, shall participate in the TIAA/CREF plan upon initial
19 eligibility.

20 (2) "Supplemental retirement benefit" means payments, as calculated in
21 accordance with WAC 131-16-061, made by the state board to an eligible retired
22 participant or designated beneficiary whose retirement benefits provided by the
23 TIAA/CREF plan do not attain the level of the retirement benefit goal established
24 by WAC 131-16-015.

25 (3) "Year of full-time service" means retirement credit based on full-time
26 employment or the equivalent thereof based on part-time employment in an
27 eligible position for a period of not less than five months in any fiscal year during
which TIAA/CREF contributions were made by both the participant and a
Washington higher education institution or the state board or any year or
fractional year of prior service in a Washington public retirement system while
employed at a Washington public higher education institution: *Provided*, that the
participant will receive a pension benefit from such other retirement system and
that not more than one year of full-time service will be credited for service in any
one fiscal year. (SBCTC 2019-PRR-009-00495)

WAC 131-16-061 Supplemental retirement benefits. (1) A participant is
eligible to receive supplemental retirement benefit payments if at the time of
retirement the participant is age sixty-two or over and has at least ten years of
full-time service in the TIAA/CREF plan at a Washington public institution of
higher education: *Provided*, that the amount of the supplemental retirement
benefit, as calculated in accordance with the provision of this section, is a positive

1 amount. (SBCTC 2019-PRR-009-00491)

2 27. Mr. Rush had much more than ten years of service as calculated under the Plan.

3 28. Mr. Rush was thus entitled to a supplemental benefit calculation based, in part, on
4 his years of service.

5 29. However, Green River College did not include the time of service after his return
6 from travel (Spring 2018—Winter 2020) for the calculation of Mr. Rush’s eligibility for the
7 supplemental retirement benefit.

8 30. The State’s failure to include Mr. Rush’s service after his return from one quarter
9 off work in his supplemental benefit calculation violated the Plan.

10 **DANA RUSH’S FACTS LEARNED AFTER FILING SUIT**

11 31. When Mr. Rush filed this lawsuit, the State had already denied him retirement
12 contributions, but the State had not yet decided whether he was eligible for the supplemental
13 defined benefit plan. The State makes that determination after an eligible employee retires.

14 32. Mr. Rush learned that there is a two-step process to obtain benefits under the
15 supplemental benefit plan. The local community college first determines whether the teacher has
16 enough service to be eligible. Under the State’s theory, a part-time faculty member must have at
17 least ten years of unbroken service to be eligible. Thus, faculty who exceed the service credit
18 requirements but have a break in service (such as co-plaintiff Gary Wolf) are considered
19 ineligible for benefits. They are considered ineligible because they had a period not working and
20 did not have ten years of unbroken service.

21 33. Mr. Rush retired on March 30, 2020. Although he retired in March 2020, the
22 State did not determine whether he was eligible for the supplemental defined benefit plan until
23 February 2022, almost two years after he retired. A copy of the State’s February 2022 email
24 notice and Supplemental Calculation worksheet are attached as Exhibit A to the May 4, 2024
25 declaration of Dana Rush.

26 34. The Supplemental Calculation determined that Mr. Rush was not eligible for
27

1 benefits under the supplemental defined benefit plan because his assumed monthly income from
2 the State's defined contribution plan (\$880.81) was greater than the monthly Goal Income from
3 the defined benefit plan (\$876.99).

4 35. The first thing Mr. Rush noticed was that the Supplemental Calculation listed his
5 years of service as 12.89 years. This is not correct because Mr. Rush began working at Green
6 River Community College in 1991 and worked substantially more than half-time over the course
7 of his career. Indeed, many quarters he had a teaching load very similar to full-time faculty.

8 36. Mr. Rush then requested from Green River College the information it provided to
9 the State Board for determining his eligibility. That eligibility determination worksheet dated
10 January 6, 2022 is attached as Exhibit B to the May 4, 2024 Declaration of Dana Rush.

11 37. It shows that his employment began in 1991, which is correct. However, it does
12 not list his service from 1991 to 1999, omitting 5.62 years of full-time equivalent service. Nor
13 does it list his service after returning to work in Spring 2018 to his retirement in March 2020,
14 omitting another 1.71 years of full-time equivalent service.

15 38. The service credit worksheet also does not use in-class/student contact hours to
16 calculate a part-time instructor's workload, as compared to a full-time instructor, as required by
17 RCW 28B.50.489 and -.4891. This error eliminated another 1.1 years of service.

18 39. These errors reduced Mr. Rush's full-time equivalent years of service by 8.43
19 years. His correct total should be 21.4 years of full-time equivalent service.

20 40. Mr. Rush estimates the resulting loss in monthly benefits is \$569 per month, *i.e.*,
21 \$379 per month for the years of service between 1991 and 1999; \$115 per month for the time
22 worked after not teaching for a single quarter; and \$74 per month for the erroneous calculation of
23 his full-time equivalency. These are estimates based on the documents related to eligibility for
24 the supplemental retirement benefit given to him by the State Board and Green River College.

25 41. After learning of these errors in administering the plan, Mr. Rush tried
26 unsuccessfully to get Green River College and the State Board of Community and Technical
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1 College, which administers the plan, to correct these errors. They refused to do so.

2 42. When Mr. Rush brought this retirement case concerning the State supplemental
3 defined benefit plan for part-time community and technical college employees the only error in
4 administering the plan that he knew about was whether eligible service had to be continuous.

5 43. The other two errors concerning the administration of the plan he learned about
6 after this case was filed.

7 44. The other two errors are direct violations of the *Mader* retirement case and RCW
8 28B.50.489 and -.4891. The *Mader* retirement case and RCW 28B.50.489 and -.4891 are
9 explained in the April 18, 2023 declaration of Stephen Strong (Dkt. 20) filed in this action.

10 45. Mr. Rush was a class representative in the *Mader* retirement case. (It is noted in
11 *Mader v. HCA*, 149 Wn.2d 464, n. 5.) The *Mader* retirement class Mr. Rush represented
12 obtained retirement benefits for thousands of part-time faculty working at least half-time based
13 on the requirements of RCW 28B.50.489 and -.4891 (eligibility for retirement benefits is “based
14 on calculating the hours worked by part-time academic employees as a percentage of...the full-
15 time academic workload...”). The State’s error in *Mader* was eligibility for retirement benefits
16 required half-time work. But in determining the part-time instructors’ percentage of full-time,
17 the State did not compare in-class hours of part-time instructors to the in-class hours of full-time
18 instructors, as the above statute required, but instead compared in-class hours of part-time
19 instructors to the *total* hours worked for full-time instructors. Thus, the State’s calculation made
20 half-time instructors ineligible for retirement benefits.

21 46. Superior Court Judge Steven Scott certified the *Mader* retirement class and
22 determined that the State’s action violated RCW 28B.50.489, -.4891. The State settled the case
23 and then made omitted retirement contributions for the part-time instructors to the defined
24 contribution plan for all their omitted years of service. The case covers the time period from
25 1991 to 1999, the precise time period omitted from the calculation.

26 47. The State is repeating these errors in its administration of the supplemental
27

1 retirement plan. The 1991 to 1999 time period omitted from the service calculation is the service
2 that was awarded in the *Mader* retirement case and the State is miscalculating Mr. Rush's FTE
3 percentage by not comparing his in-class teaching hours to the in-class teaching hours of full-
4 time teachers. This is the same error that the Superior Court ordered corrected in the *Mader*
5 retirement case.

6 48. Mr. Rush's investigation into the State administration of the supplemental
7 retirement plan led him to discover an additional problem. He only learned about the
8 supplemental defined benefit plan because a colleague told him about it. He did not receive any
9 notice regarding the plan from Green River College nor the State. Neither the community
10 colleges nor the State notify retiring part-time instructors about the supplemental plan.
11 Consequently, Mr. Rush knows several long-term instructors who are eligible under the plan but
12 who, when they retired, were never informed of the plan's existence nor the procedures for
13 applying for the retirement benefit. Mr. Rush believes this lack of notice to retiring part-time
14 instructors is a widespread problem.

15 49. The retirement plan is a unilateral contract with Mr. Rush and the class. The State
16 breached that contract by not providing contributions upon Mr. Rush's return from one quarter
17 off work. The State also breached the contract by not including Mr. Rush's service after he took
18 time off for a quarter.

19 50. The retirement benefits owed under the plan are deferred compensation and
20 wages. The State has withheld wages by relying on an inapplicable 2016 Plan, rather than the
21 plan that actually applies to Mr. Rush. The State has also withheld wages by violating the *Mader*
22 retirement case and RCW 28B.50.489 and -.4891 by not including the service credit awarded by
23 the *Mader* case from 1991 to 1999 and by not using in-class hours to determine full-time
24 equivalency. The State knew of the earlier plans and the requirements of the *Mader* case and
25 RCW 28B.50.489 and -.4891. The State has willfully withheld wages owed to Mr. Rush and the
26 class.

1 **GARY WOLF’S FACTS**

2 51. Plaintiff Gary Wolf was employed by the defendant State of Washington as a
3 part-time instructor at the Community Colleges of Spokane starting in 1993. Mr. Wolf taught at
4 the Community Colleges of Spokane from 1993 through 2002. In the summer of 2002, Mr. Wolf
5 stopped teaching at the Community Colleges of Spokane in order to care for his children. Mr.
6 Wolf resumed teaching as a part-time instructor at the Community Colleges of Spokane starting
7 in fall quarter 2006. He continued working at the Community Colleges of Spokane until he
8 retired at the end of spring quarter 2017.

9 52. When Mr. Wolf was working at the Community Colleges of Spokane he
10 participated in the State Board’s Retirement Plan which is a defined contribution plan and a
11 supplemental retirement plan which is a defined benefit plan.

12 53. When he retired Mr. Wolf was 62 years old and he applied for supplemental
13 retirement benefits, which are administered by the defendant State Board.

14 54. The Community Colleges of Spokane submitted a service calculation worksheet
15 (a State Board form) to the State Board showing that Mr. Wolf had 15.17 years of full-time
16 equivalent service. It did not assign serviced credit to those periods when Mr. Wolf was not
17 working at the Community Colleges of Spokane. The form showed that the Community
18 Colleges of Spoke made the State Board Retirement Plan contributions for all of Mr. Wolf’s
19 service. Although Mr. Wolf stopped working for a while at the Community Colleges of
20 Spokane, when he returned to work in 2006 it immediately made contributions to the State Board
21 Retirement Plan defined contribution plan and he retained all his service and contributions in that
22 plan.

23 55. The Plan Administrator, John Boesenberg, the Deputy Executive Director of
24 Business Operations for the State Board, denied Mr. Wolf’s application for supplemental
25 retirement benefits. April 16, 2018 letter from John Boesenberg to Mr. Wolf. Mr. Boesenberg
26 said that “the governing Plan Document...defines ‘Year of Service’ to mean retirement credit
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1 based on unbroken full-time employment or the equivalent of part-time employment...
2 ‘Unbroken Service’ to mean service without a ‘break in service,’ [and]... ‘Break in Service’ to
3 mean termination of all employment with a participating employer for a full academic quarter or
4 equivalent period of time, excluding summer or equivalent off-season quarter.” Mr. Boesenberg
5 denied Mr. Wolf’s application because he did not have “ten years of unbroken full-time service
6 or the equivalent full-time service” due to the fact that he stopped working for a time to care for
7 his children.

8 56. Mr. Wolf responded that he did not agree with the conclusion of Mr.
9 Boesenberg’s letter and asked for Boesenberg to supply him with the procedures for appealing.

10 57. Mr. Boesenberg responded in a July 17, 2018 letter in which he explained the
11 appeal procedures:

12 The State Board Supplemental Benefit Plan is governed by a Plan Document
13 approved by the Internal Revenue Service. Section 7.4 of the Plan Document
14 describes the claims and appeal procedures and timelines. I’ve copies and
15 enclosed the relevant Section. You can view the entire Plan Document on the
16 State Board’s website at [https://www.sbctc.edu/resources/documents/colleges-
staff/my-employment/supplemental-benefit-retirement-plan-401a.pdf](https://www.sbctc.edu/resources/documents/colleges-staff/my-employment/supplemental-benefit-retirement-plan-401a.pdf).

17 Mr. Wolf obtained a copy of the plan cited by Mr. Boesenberg from that website link.

18 58. The website reproduced the State Board’s 2016 plan. Mr. Wolf was not informed
19 nor aware there were earlier versions. Section 3.1 of the 2016 Plan referred to by Mr.
20 Boesenberg states the conditions for eligibility:

21 3.1 CONDITIONS OF ELIGIBILITY

22 (a) A Participant is eligible for a benefit calculation, as described in Section 6, if
23 all of the following are true:

- 24 (1) The Participant actively participated in the Retirement Plan prior to July
25 1, 2011.
- 26 (2) A Participant, who is actively participating in the Retirement Plan, dies
27 or elects to retire, consistent with a Participating Employers policies,
having reached age 62 or retires due to reasons of health or permanent
disability; and
- (3) The Participant has ten or more Years of Service,

1 (b) A Participant is eligible for a benefit under the Plan if the amount, as
2 calculated in Section 6, is a positive amount.

3 59. The 2016 Plan that Mr. Wolf obtained from the website provides that the
4 participants' rights "shall be 100% vested immediately, and at all times." 2016 Plan §1.36. And
5 "should not be subject to forfeiture under any circumstances." *Id.*, §6.3.

6 60. Mr. Wolf understood he was eligible for the Supplemental Benefit because he
7 participated in the plan prior to July 1, 2011, had reached the age of sixty-two when he retired,
8 and had more than 10 years of service, the stated requirements under the statute authorizing the
9 supplemental retirement plan, RCW 28B.10.400 and .415, and the plan.

10 61. Under the 2016 plan cited by Mr. Boesenberg, Mr. Boesenberg would decide the
11 appeal. Mr. Wolf was surprised that Mr. Boesenberg would be deciding his appeal: "I am
12 surprised that you will be the person who will be reading and deciding on the appeal. I would
13 have hoped to have an individual who was impartial deciding the appeal. Since this is my only
14 appeal I will follow the process."

15 62. Mr. Wolf followed the appeal and review procedures set forth in the 2016 plan.
16 Mr. Wolf appealed on the basis that nowhere in the 2016 plan or the authorizing statutes did it
17 say 10 years of continuous service was needed, only 10 years of service. Nowhere did the plan
18 state that service would be forfeited. In fact the plan said the opposite, providing for immediate
19 100% vesting and that it was "not subject to forfeiture under any circumstances."

20 63. Mr. Boesenberg denied Mr. Wolf's appeal in a November 19, 2018 letter. Mr.
21 Boesenberg again quoted and relied on the "Break in Service" definition and the "unbroken
22 service" phrase in the "Year of Service" definition in the 2016 Plan:

23 64. Mr. Boesenberg also relied on a Summary Plan description prepared by the
24 defendant State Board and an Administrator Handbook, both of which said that "10 years or
25 more of continuous" service was required. Boesenberg November 19, 2018 letter, pp. 8-9 ¶14.
26 Boesenberg said the "impact of a Break in Service" has been consistently applied in the plan,
27 Letter p. 7, and he said that "[c]onsistent with the Plan Document section 7.4(f) and (g)

1 you...have been referred to or provided copies of documents and information relevant to your
2 claim.” Letter p. 9 ¶15. Boesenberg denied Mr. Wolf’s appeal because he did not have “ten full-
3 time years of unbroken service or the equivalent of part-time service during which contributions
4 were made.” Letter p. 9. Mr. Boesenberg said “[c]onsistent with the Plan Document section
5 7.4(h), the decision is the final and conclusive administrative review proceeding under SBSRP.”

6 65. Wolf believed that Mr. Boesenberg’s interpretation of the plan was incorrect
7 because the “Break in Service” and “Year of Service” plan definitions relied on by Mr.
8 Boesenberg just meant that service was not earned during the year when the break occurred, not
9 the prior service was forfeited. He also thought Mr. Boesenberg’s interpretation violated the
10 statute, as well as the plan.

11 66. Mr. Wolf’s counsel made a Public Records Act request on behalf of Mr. Wolf.

12 67. These records show at the time of Mr. Wolf’s hire in 1993 the supplemental plan
13 was in regulations. These regulations are quoted *infra*. In 1998 a written plan document was
14 adopted making it subject to the six year statute of limitations. The written plan incorporated the
15 requirements previously stated in the regulations.

16 68. The records disclosed under PRA show that the unbroken service phrase was
17 added to the supplemental retirement plan in 2016 well after Mr. Wolf was hired in 1993 and
18 well after he returned to work in 2006. For example, the 1998 Plan (and all the plans between
19 1998 until the 2016 Plan) defined Year of Service as follows:

20 1.48 “Year of Service”

21 “Year of Service” means retirement credit based on full time employment or the
22 equivalent thereof based on part-time employment in an eligible position for a
23 period of not less than five months in any Fiscal Year during which Plan
24 contributions were made by a Washington public higher education institution
25 (whether or not it is a Participating Employer) or the State Board, or any year or
26 fractional year of prior service in a Washington Public Retirement System while
27 employed at a Washington public higher education system; and provided, that the
Participant will receive a pension benefit from such other retirement system; and
provided further, that not more than one Year of Service will be credited for
service in any one Fiscal Year. Periods of leave without pay or other periods in

1 which a Participant is not earning Compensation from a Participating Employer
2 shall not be included in a Participant's Years of Service.

3 Years of Service with any Participating Employer shall be recognized.
(SBCTC 2019-PRR-009-00786)

4 There is no mention of "unbroken service."

5 69. The Supplemental Retirement Plan prior to 2016 also did not have the definition
6 of Break in Service relied on by Mr. Boesenberg. In fact it had no definition of Break in Service
7 at all.

8 70. Prior to 2016 the plan defined "Supplemental Retirement Benefit" as:

9 "Supplemental Retirement Benefit" means a benefit determined in accordance
10 with RCW 28B.10.400(3) and WAC 131-16-061, which, if payable to an
11 individual, shall be payable by the State Board from assets of the State Board.
(SBCTC 2019-PRR-009-00785).

12 71. The plan explained those eligible for supplemental retirement benefit as follows:

13 6.2 SUPPLEMENTAL RETIREMENT BENEFITS

14 (a) A Participant is eligible to receive Supplemental Retirement Benefit payments if at
15 the time of termination of employment the Participant is age sixty-two or over and has at
16 least ten Years of Service in either the Predecessor Plan, this Plan, or a combination of
17 both at a Washington public institution of higher education, provided that the amount of
18 the Supplemental Retirement Benefit, as calculated in accordance with the provision of
19 this Section, is a positive amount. (SBCTC 2019-PRR-009-00796).

20 72. Section 3.7 provided that when an employee left and then returned to
21 employment, participation would resume and contributions would be made on their behalf if they
22 were in an eligible position upon rehire. It did not provide that the employee would forfeit their
23 prior service and the contributions made on their behalf, which would have been unlawful for a
24 defined contribution plan. The section provides:

25 3.7 REEMPLOYMENT OF FORMER PARTICIPANT

26 If any Former Participant shall be reemployed by a Participating Employer he or
27 she shall resume participation in the Plan subject to reestablishing eligibility in
accordance with Section 3.1 in the same manner as if such termination had not
occurred.

(SBCTC 2019-PRR-009-0789)

1 73. Public records provided by the defendant State Board disclosed the pertinent
2 regulations for the supplemental retirement benefit as follows:

3 **WAC 131-16-011 Definitions.** For the purpose of WAC 131-16-010 through
4 131-16-066, the following definitions shall apply:

- 5 (1) “Participant” means any employee who is eligible to purchase retirement
6 annuities through the TIAA/CREF plan who, as a condition of employment,
7 on and after January 1997, shall participate in the TIAA/CREF plan upon
8 initial eligibility.
- 9 (2) “Supplemental retirement benefit” means payments, as calculated in
10 accordance with WAC 131-16-061, made by the state board to an eligible
11 retired participant or designated beneficiary whose retirement benefits
12 provided by the TIAA/CREF plans do not attain the level of the retirement
13 benefit goal established by WAC 131-16-015.
- 14 (3) “Year of full-time service” means retirement credit based on full-time
15 employment or the equivalent thereof based on part-time employment in an
16 eligible position for a period of not less than five months in any fiscal year
17 during which TIAA/CREF contributions were made by both the participant
18 and a Washington higher education institution or the state board or any year
19 or fractional year of prior service in a Washington public retirement system
20 while employed at a Washington higher education institution: *Provided*, that
21 the participant will receive a pension benefit from such other retirement
22 system and that not more than one year of full-time service will be credited
23 for service in any one fiscal year. (SBCTC 2019-PRR-009-00495).

24 **WAC 131-16-061 Supplemental retirement benefits.** (1) A participant is
25 eligible to receive supplemental retirement benefit payments if at the time of
26 retirement the participant is age sixty-two or over and has at least ten years of
27 full-time service in the TIAA/CREF plan at a Washington public institution of
higher education: *Provided*, that the amount of the supplemental retirement
benefit, as calculated in accordance with the provision of this section, is a positive
amount. (SBCTC 2019-PRR-009-00491).

74. Thus, the regulation, which was in effect when Mr. Wolf was hired in 1993, did
not have the “unbroken service” phrase, nor did it have the definition of “break in service” relied
on by Mr. Boesenberg. And it provided that an employee was eligible if he or she had 10 or
more years of service.

75. All seven of the Administration Handbooks provided under the PRA by the State
Board and the five Summary Plan Descriptions provided by the State Board under the PRA – all
are based on the plan and regulations before the “unbroken service” language and the definition

1 of break in service were added in 2015 – are the same as stated in the plans above and the
2 regulation: only 10 years of service is needed to be eligible, not 10 years of continuous service.

3 76. For example, the October 2008 Summary Plan Description describes the
4 supplemental retirement benefit as follows:

5 **SUPPLEMENTAL RETIREMENT BENEFIT**

6 ***26. When will I be eligible for a Supplemental Benefit?***

7 You will be eligible for a Supplemental Benefit at retirement if:

- 8 • You have reached age 62; and
- 9 • *You have 10 or more years of full-time service, or its equivalent, in the*
10 *SBRP; and (italics added)*
- 11 • Your Supplemental Benefit calculation results in a positive amount.

12 ***27. What is the Supplemental Benefit?***

13 The Supplemental Benefit is a lifetime benefit, calculated for eligible employees
14 at the time of retirement. It is based upon a “retirement benefit goal” established
15 by the State Board. That goal is a pledge to provide no less than a pension
16 equivalent to a maximum of 50 percent of your final average salary, assuming you
17 have 25 years of full-time service at a Washington public higher education
18 institution, have attained age 65, and have contributed at the maximum allowable
19 rate during your years of employment. In effect, the goal is to provide a
20 guaranteed pension of two percent of your average annual salary for up to 25
21 years of service or who did not contribute at 10 percent after age 50, or who are
22 under the age of 65 at retirement, receive a reduced benefit. You are ineligible to
23 receive a supplemental benefit if, at the time of retirement, you are under age 62
24 and/or *have less than 10 years of full-time service, or its equivalent in the SBRP.*
25 (italics added) (SBCTC 2019-PRR-009-00832-33).

26 77. Similarly, the March 2006 Administration Handbook describes the supplemental
27 retirement benefit as follows:

Supplemental Retirement Benefits

In addition to receiving their basic annuity benefit, participants may be eligible to
receive a “supplemental retirement benefit” from the Community and Technical
College System. This additional pension amount will, if necessary, increase a
participant’s monthly state retirement benefit to a minimum level. The payment
of supplemental benefits is provided for in statute (RCW 28B.10.400) and State
Board administrative rule (WAC 131-16-061).

...

Supplemental Retirement Benefits Eligibility: A participant is eligible to
receive supplemental retirement benefit payments if at the time of retirement the

1 participant is at least age 62 and has 10 or more years of “full-time service” in a
2 Washington State Higher Education Retirement Plan (State Board’s TIAA-CREF
retirement plan or other Washington public higher education institutions).

3 ...

- 4 • “Year of full-time service” means retirement credit based on full-time
5 employment or the equivalent thereof of part-time employment in an eligible
6 position for a period of not less than five months in any fiscal year during
7 which TIAA-CREF contributions were made by both the participant and a
8 Washington public higher education institution or the State Board or any year
9 or fractional year of prior service in a Washington public retirement system
10 while employed at a Washington public higher education institution: *Provided*
11 that the participant will receive a pension benefit from such other retirement
12 system and that not more than one year of full-time service will be credited for
13 service in any one fiscal year. (WAC 131-16-011(3))

14 (SBCTC 2019-PRR-009-00555) (footnote omitted).

15 78. All the plans, including those with the later added “unbroken service” phrase,
16 provide that they are to be interpreted under Washington law. And under Washington law, a
17 public employee pension rights are based on the plan in effect when hired. *Bakenhus v. Seattle*,
18 48 Wn.2d 695, 698 (1956); *Bowles v. DRS*, 121 Wn.2d 52, 65 (1993). Employees receive any
19 positive changes to the pension plan, but their pension rights cannot be changed to the detriment
20 of employees from the plan in effect when hired. *Id.*

21 79. Mr. Wolf’s pension rights are thus not based on the changed 2016 plan, but on the
22 plan in effect in 1993 which did not have the “unbroken service” phrase relied on by Mr.
23 Boesenberg. The plan(s), the regulations, the Administration Handbooks, and the Summary Plan
24 Descriptions for the plans that pertain to Mr. Wolf do not have the “unbroken service” phrase
25 relied on by Mr. Boesenberg as the basis for forfeiting service before or after a break. There has
26 been no review by Mr. Boesenberg or the State Board of the actual plan that determines Mr.
27 Wolf’s rights.

80. Even without the *Bakenhus* principle of vesting at hire, Mr. Wolf had more than
10 years of service when the plan was changed by adding the “unbroken service” phrase relied
on by Mr. Boesenberg. Thus Mr. Wolf had already earned a right to a pension under the plan
before it was changed.

1 81. The Legislature restricted eligibility for the Supplemental Plan to those
2 participating in the State Board Retirement Plan prior to July 1, 2011, *i.e.*, those hired after July
3 1, 2011 are not eligible. Thus, there are no participating employees who are actually subject to
4 the “unbroken service” phrase relied on by Mr. Boesenberg. The State Board amended its
5 regulations to account for the change limiting application of the supplemental retirement benefit
6 to those hired before July 1, 2011. Sometime later, before Wolf’s request, it repealed the
7 regulations for the supplemental plan.

8 82. The “unbroken service” phrase and the definition of “break in service” were
9 added to the plan in 2016. Thus, there are no instructors eligible for the supplemental retirement
10 plan who are subject to the 2016 plan because the legislature eliminated that plan for any
11 instructor hired after July 2011.

12 83. The records provided in response to the public records request show Mr.
13 Boesenberg breached his duty to Mr. Wolf by not providing him with the relevant plans and the
14 regulations, and by not providing him with the Administration Handbooks and Summary Plan
15 Descriptions that contradicted the ones relied on by Mr. Boesenberg that are based on the
16 inapplicable 2016 Plan.

17 84. The defendant State of Washington was Mr. Wolf’s employer when he worked at
18 the Community Colleges of Spokane.

19 85. Historically, community college instructors participated in the state-managed
20 Teachers Retirement System (“TRS”) defined benefit plan, which provided a specified amount
21 of monthly benefits at retirement based on years of service and average final salary.

22 86. The state created a new defined contribution plan for community college
23 instructors managed by a national teachers’ retirement organization, TIAA-CREF. New hired
24 were mandated into the new defined contribution plan and those in TRS defined benefit plans
25 were given the option of transferring to the new defined contribution plan.

1 87. To assure that the community college instructors in the new defined contribution
2 plan – both those transferring and those mandated into the plan – received a retirement pension
3 that was equivalent to the TRS defined benefit pension, the Legislature direct the State Board to
4 adopt a supplemental retirement pension plan for those “who have served more than 10 years but
5 less than twenty-five years.” Washington Laws, 1971 1st Ex. Session, Ch. 261, Section 4,
6 codified at RCW 28B.10.415.

7 88. The State Board’s Administration handbook for the year 1991 (provided in
8 response to Wolf’s public records act request) explains:

9 SUPPLEMENTAL BENEFITS

10 In addition to the benefit based on the accumulated contributions made by the
11 employee and the college district, TIAA/CREF retirees may be eligible for a
12 supplemental benefit paid by the state of Washington. In order to qualify, the
13 retiree must be at least 62 years of age and have at least ten years of TIAA/CREF
14 service credit earned at any Washington public higher education institution.

15 The objective of the supplemental benefit feature is to ensure that the
16 TIAA/CREF retiree will receive a pension at least equivalent to the amount that
17 would be produced given the same length of service and earnings for a TRS Plan I
18 member. (SBCTC 2019-PRR-009-00744).

19 89. The TRS equivalency is important here because under the TRS plan a plan
20 member does not forfeit service credit when he or she leaves employment and later returns. The
21 plan member retains service credit unless the member withdraws their employee contributions
22 (RCW 41.32.820) and even if the employee withdraws his or her contributions, if the employee
23 returns to a TRS-eligible job, the employee can restore his or her service credit simply by paying
24 back the withdrawn contributions plus interest (RCW 41.32.825).

25 90. Because Mr. Boesenberg did not consider Mr. Wolf to be eligible for the
26 supplemental retirement plan, no calculation was made to determine whether Mr. Wolf’s defined
27 contribution pension should be supplemented with the supplemental defined pension.

91. Mr. Wolf is owed retirement benefits under the supplemental retirement benefit
plans.

1 92. Mr. Boesenberg initially denied Mr. Wolf’s application for compensation under
2 the 2016 Plan on the basis that he did not have “ten years of unbroken full-time service or the
3 equivalent part-time service.” That decision is irrelevant here because the 2016 supplemental
4 retirement plan does not apply to Mr. Wolf, nor does it apply to any of the class members, all of
5 who were hired before July 1, 2011, and under *Bakenhus v. Seattle*, 48 Wn.2d 695 (1956), their
6 pension rights are based on the plan at the time of hire. None of those plans have the “unbroken
7 service” phrase contained in the 2016 Plan.

8 93. Plaintiff Gary Wolf worked for the State pursuant to a written employment
9 contract and the supplemental retirement benefit is part of that contract. The defendants have
10 breached the contract.

11 94. The supplemental retirement benefit is also a unilateral contract for deferred
12 compensation, a retirement pension, offered by the defendants. Mr. Wolf accepted the offer by
13 providing service to the defendants for many years. Under Washington law, a public employee’s
14 pension rights, such as Mr. Wolf’s, are based on the plan and the law in effect when hired and
15 cannot be modified to the employee’s detriment after the employee start working. Under the
16 plan in effect when Mr. Wolf was hired, and those thereafter until the plan was changed in 2016,
17 there was no requirement that service be unbroken. The minimum service requirement was only
18 that the employee have 10 years of full-time service or the equivalent part time service, not that
19 the service be continuous or unbroken. Mr. Wolf satisfied this requirement because he had 15.17
20 years of full-time equivalent service when he retired. The defendants have breached the contract.
21 The provision of the later 2016 Plan relied on by Mr. Boesenberg cannot be applied to Mr. Wolf.

22 95. Assuming the supplemental retirement plans in effect when Mr. Wolf was hired
23 were not contracts for all purposes, they create enforceable rights that are contractual in nature
24 and cannot under *Bakenhus*, 48 Wn.2d at 698, and subsequent cases, be violated without
25 impairing the obligations of contracts. Here, the plan in effect in 1993 was in the regulations
26 quoted *supra*.

1 96. The defendants violated the plan because the relevant plans, including the
2 regulations when Mr. Wolf was hired, as opposed to the later changed 2016 Plan, only require 10
3 years of service, not 10 years of “unbroken” service. Mr. Wolf is eligible under the relevant plan
4 when he was hired and is owed compensation under the plan because he has over 15 years of
5 service.

6 97. The statute establishing the supplemental retirement plan requires “10 years of
7 service” to be eligible. The statute is part of the plan by operation of law.

8 98. Nowhere does the plan state that a break in service during a year or more requires
9 the employee to start over in determining the employee’s service under the plan. Rather the
10 plan(s) provide only that no service is earned during the year or years when a break in service
11 occurred. If the plan(s) actually required 10 years of unbroken service to be eligible, the plan(s)
12 would violate the law establishing the plan (RCW 28B.10.400 and -.415). The statute controls
13 and Mr. Wolf is entitled to retirement compensation under the plan(s).

14 99. The retirement benefits owed under the plan are deferred compensation and
15 wages. The defendants have withheld wages by relying on an inapplicable 2016 Plan rather than
16 the plan that actually pertains to Mr. Wolf that does not have the unbroken service language
17 relied on by the defendants to deny retirement benefits to Mr. Wolf. The defendants knew of the
18 existence of the earlier plans and did not disclose them to Mr. Wolf. The defendants have
19 willfully withheld wages owed to Mr. Wolf and to the class members.

20 **CLASS ACTION ALLEGATIONS**

21 100. The parties agreed to class certification and the Court certified the class on May 8,
22 2023 under CR 23(a) and (b)(1) and (2).

23 101. The class definition should be revised to account for the two additional claims
24 raised by Mr. Rush, both of which are based on the *Mader* retirement case and RCW 28B.50.489
25 and -.4891.

1 102. The revised class definition is:

2 All half-time or more part-time (as defined in the State's retirement plan and
3 RCW 28B.50.489 and -.4891) academic employees who were hired before July 1,
4 2011 and who were employed within six years before October 30, 2019.

4 **CLAIMS**

5 The Retirement Plan is a unilateral contract with Mr. Rush, Mr. Wolf, and the class. The
6 State breached that contract by not providing contributions upon Mr. Rush's return from one
7 quarter off work. The State also breached the contract by miscalculating the supplemental
8 retirement benefit by not including time after Mr. Rush's one quarter off work and by not
9 including all of Mr. Wolf's service before and after he took time-off to care for his children.
10 Retirement benefits are deferred compensation and a form of wages. Because the plan was
11 changed expressly to the employees' detriment in 2016, the State's conduct is willful. The State
12 also breached the contract by not including the retirement service credit awarded in the *Mader*
13 retirement litigation and by not basing FTE percentage on in-class hours as required by the
14 *Mader* retirement litigation and RCW 28B.50.489 and -.4891. The State's failure to pay these
15 wages owed under the retirement plan is willful.

16 **PRAYER FOR RELIEF**

17 The plaintiffs on behalf of themselves and a class of similarly situated individuals seeks
18 the following relief:

19 A. Revision to the certification of the class under CR 23(a) and CR 23(b)(2) to cover
20 the two new claims;

21 B. Monetary relief, *i.e.*, payment or restitution for the retirement compensation
22 (wages) owed which were denied to Mr. Rush, Mr. Wolf, and others similarly situated;

23 C. Exemplary damages pursuant to RCW 49.52.050 and -.070 for willful
24 withholding of wages;

25 D. Attorney fees pursuant to the common fund doctrine under RCW 49.48.030;

26 E. Lost investment returns on retirement contributions;

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- F. Interest on the monetary relief; and
- G. Any other relief the Court deems just and equitable.

DATED this 10th day of May, 2024.

STOBAUGH & STRONG, P.C.

/s/ Alexander F. Strong
Alexander F. Strong, WSBA #49839
David F. Stobaugh, WSBA #6376
Stephen K. Strong, WSBA #6299
126 NW Canal Street, Suite 100
Seattle, Washington 98107
(206) 622-3536

Attorneys for Plaintiffs

1 **DECLARATION OF SERVICE**

2 I, Erika Haack, declare that I effected service of the following document(s) on the parties
3 listed below via the King County Superior Court eFiling application and via email according to
4 the parties' eservice agreement.

5 Document(s):
6 1. Amended Complaint

7 Parties:
8 Eric A. Mentzer, WSBA #21243
9 7141 Cleanwater Dr SW
10 Tumwater, WA 98501
11 (360) 709-6470
12 *eric.mentzer@atg.wa.gov*

13 *Attorney for Defendant*

14 I declare under penalty of perjury that the foregoing is true and correct.

15 DATED this 3rd day of July, 2024.

16 */s/ Erika Haack*
17 Erika Haack
18 *ehaack@bs-s.com*