No. 333523

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

JONATHAN J. SPRAGUE, a married man,

Plaintiff/Appellant,

v.

SPOKANE VALLEY FIRE DEPARTMENT, a fire district; MIKE THOMPSON and LINDA THOMPSON, husband and wife, and the marital community composed thereof,

Defendants/Respondents.

BRIEF OF RESPONDENTS

Michael J. McMahon, WSBA No. 6895
Jeffrey R. Galloway, WSBA No. 44059
Etter, McMahon, Lamberson, Van Wert & Oreskovich, P.C.
618 W. Riverside, Suite 210
Spokane, WA 99201-0602
(509) 747-9100
Attorneys for Respondents

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I. INTRODUCTION

Plaintiff/Appellant Mr. Jonathan Sprague (hereinafter referred to as "Sprague") began working for the Spokane Valley Fire Department (hereinafter referred to as "SVFD") in March of 1995. Clerk's Papers ("CP") 14. By 2005, Mr. Sprague had attained the rank of Captain. CP 25.

In the year prior to his termination from SVFD, Mr. Sprague repeatedly used his official SVFD email account to disseminate his personal emails. CP 153-155; 164-166; 172-196, 208-211. Mr. Sprague's personal use of the SVFD email system was in violation of SVFD policies and procedures, namely SVFD's Safety and Operations Manual (hereinafter referred to as "S&O") #171. CP 106-114. In response and in accordance with its policies, SVFD utilized progressive discipline to encourage Mr. Sprague to stop violating policy and follow direct orders. CP 153-155; 164-166; 172-196; 208-211. SVFD's efforts to curtail Mr. Sprague's behavior were unsuccessful. On October 9, 2012, the SVFD Board of Fire Commissioners terminated Mr. Sprague's employment. CP 213-214.

Mr. Sprague appealed the decision of the Board of Fire Commissioners to the Civil Service Commission (hereinafter referred to as the "Commission"). CP 216. Consequently, on January 14, 2013, the

Commission held a full evidentiary hearing to decide whether Mr. Sprague was properly discharged from SVFD. CP 63-96. On March 31, 2013, the Commission issued its ruling which upheld Mr. Sprague's termination. CP 98-104.

On February 4, 2014, Mr. Sprague filed the underlying litigation against Defendants/Respondents Spokane Valley Fire Department and Mike and Linda Thompson (collectively referred to as "SVFD"). CP 3-10. Mr. Sprague filed an Amended Complaint wherein he alleged SVFD had violated his constitutional rights, discriminated against him due to his religious beliefs, and wrongfully terminated his employment. CP 13-23.

Both parties moved for summary judgment. CP 325-327; 334-406. Following oral argument, the trial court granted SVFD's Motion for Summary Judgment and dismissed Mr. Sprague's claims in their entirety. RP 51:7 – 51:9. The trial court also denied Mr. Sprague's Motion for Partial Summary Judgment. *Id.* The parties' respective orders were entered on May 15, 2015. CP 489-495.

The instant appeal was filed the same day. CP 496-504.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court properly denied Mr. Sprague's Motion for Partial Summary judgment in finding that SVFD's policy was applied

neutrally and did not favor one viewpoint over another. CP 496-500.

2. The trial court properly granted SVFD's Motion for Summary Judgment dismissing Mr. Sprague's claims, finding that his claims were barred by the doctrine of collateral estoppel. CP 492-495.

3. The trial court properly dismissed Mr. Sprague's claim for injunctive relief and claim of retaliation in finding that such claims were barred by collateral estoppel. CP 492-500.

III. STANDARD OF REVIEW

Appellate courts "review a summary judgment order de novo, engaging in the same inquiry as the trial court." *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976). In a motion for summary judgment, the moving party bears the initial burden of showing the absence of any genuine issue of material fact. *Young v. Key Pharm.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). "[A] party moving for summary judgment can meet its burden by pointing out to the trial court that the nonmoving party lacks sufficient evidence to support its case." *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 21, 851 P.2d 689 (1993). Once the moving party meets this initial burden, the non-moving party must respond by setting forth specific facts showing that there is a genuine issue for trial. *Young*, 112 Wn.2d at 225, 770 P.2d 182. The non-moving

party "may not rest upon the mere allegations or denials of a pleading." CR 56(e).

An appellate court reviewing a grant of summary judgment must place itself in the same position as the trial court by considering the evidence and reasonable inferences therefrom in a light most favorable to the non-moving party. *Young*, 112 Wn.2d at 226, 770 P.2d 182. Summary judgment is appropriate if, based upon all the evidence, reasonable minds could reach only one conclusion. *Senn v. Nw. Underwriters, Inc.*, 74 Wn. App. 408, 419, 875 P.2d 637 (1994).

IV. STATEMENT OF THE CASE

A. Factual Background.

Mr. Sprague held the rank of Captain while employed with SVFD. CP 4.

In the year leading up to his termination, Mr. Sprague repeatedly used his official SVFD email account to disseminate personal emails. CP 153-155; 164-166; 172-196; 208-211. This conduct violated Department policies, including S&O #171. *Id.*

S&O #171 provides that "[t]he electronic mail system hardware is SVFD property and all messages composed, sent, or received on the system are SVFD property. Therefore, the use of the electronic mail system is reserved solely for SVFD business and should not be used for

personal business." CP 106-114. In accordance with S&O #171, Mr. Sprague was given orders from his superiors to discontinue using SVFD email for personal matters. CP 153-155; 164-166; 172-196; 208-211. However, Mr. Sprague continued to send personal emails to other firefighters at their business email addresses regarding his Spokane Valley Christian Firefighters Fellowship in violation of S&O #171. *Id.* He was offered the opportunity to communicate his Christian message by way of his personal email, but he declined. CP 147.

In response, SVFD utilized progressive discipline to encourage Mr. Sprague to stop violating policy and follow direct orders. CP 153-155; 164-166; 172-196; 208-211. Progressive discipline was unsuccessful. *Id.* Mr. Sprague persisted. *Id.* Mr. Sprague made it clear "both through words and conduct that he would not follow Chief Thompson's direct order not to use department property to express his religious views, including quoting scripture from the Bible." CP 102.

As a result of serial violations of policy and orders, SVFD was forced to recommend termination to the Spokane Valley Board of Fire Commissioners. CP 116-119.

On October 8, 2012, the Board of Fire Commissioners held a public hearing at Mr. Sprague's request. CP 121-131. Mr. Sprague participated in the hearing, was given an opportunity to be heard, and

argued against the proposed disciplinary action. *Id.* Counsel for the International Association of Firefighters Local 876 ("hereinafter referred to as the "Union") was present and argued on behalf of Mr. Sprague and the Union. CP 64-96. Mr. Sprague's arguments included Federal, State, and biblical based contentions for being able to use public property to promote his personal Christian beliefs. CP 128-130. For example, Mr. Sprague argued:

> I believe that God has established authority for the betterment of men, and to rebel against it is to rebel against God himself. Authority is not a club to be wielded for its own ends. It must be used for the purposes intended by those who bestow it. The highest authority in my life, and this should surely come is [sic] no surprise, is God. He alone has the right to judge all men, and judge them he will. Indeed, the most supreme use of God's authority and power has been most clearly demonstrated in his judgment but not on those who reject him or even on evil men, rather it was on his own perfect son, Jesus Christ, who was nailed to a Roman cross, not for anything he had done wrong but because of what we all have done wrong, and what we continue to do wrong today.

CP 129.

At the conclusion of the hearing, the Board of Fire Commissioners voted to accept the proposed termination of Mr. Sprague for repeated

refusal to follow policy, intentional contravention of orders, and for insubordination. CP 130.

Mr. Sprague appealed his termination to the Civil Service Commission. CP 133. On January 14, 2013, the Civil Service Commission conducted a full hearing under the authority of RCW 41.08.090. CP 63-96. Mr. Sprague was represented by union provided counsel, Sydney Vinnedge. CP 64. Mr. Sprague gave his own opening statement. CP 65-66. Mr. Sprague was present throughout the entire proceeding; his lawyer presented witnesses; cross examined SVFD's witnesses; submitted exhibits; and made evidentiary objections. CP 63-96; 249-294. At the end of the investigative hearing, Mr. Sprague was given a month to submit a post-hearing brief. CP 95. On February 14, 2013, Mr. Sprague submitted and executed a twelve page post hearing brief which again advanced his arguments. CP 313-324.

To illustrate the common issues, in his opening statement to the Commission, Mr. Sprague asserted that his Constitutional, Federal, and State rights of free speech, religious expression, and his civil liberties to be free from discrimination were being violated. CP 65. Specifically, Mr. Sprague argued:

> ...Fire Chief Mike Thompson acting as the appointed authority wrongfully discharged me from my civil service employment under

color of law, citing portions of the civil service rules, specifically Rule 7, Section 2, subsections C, D, and N.

The actions of the appointing authority [the Spokane Valley Fire Department Board of Fire Commissioners] were in contradiction with the rules of the Civil Service Commission in that they were discriminatory in nature against my religious beliefs and practices. These actions clearly violate the rights guaranteed each employee of the Spokane Valley Fire Department under the First Amendment of the U.S. Constitution, Article 1, Section 11 of the State of Washington Constitution, federal law as found in Title [VII] of the Civil Rights Act, and as fully articulated under EEOC guidelines, as Washington state law is found in the RCWs and a large consistent body of current case law.

...

A government employer of any size, including Spokane Valley Fire Department, must justify any actions which infringe on civil liberties, no less so in the area of employment. This commission as the guardian of the long-cherished principles of employment equity must hold them to account.

We will show from the testimony and exhibits presented today that the appointing authority has manifestly violated Rule 1.6, which exists to ensure equal opportunity in employment, regardless of non-merit factors such as one's religious faith and lawful exercise thereof.

Id. (emphasis added) (alterations added).

Approximately two months later, on March 21, 2013, the Commission issued its Findings and Decision. CP 98-104. By statute, the Commission was required to decide whether Mr. Sprague's termination by the Board of Fire Commissioners and SVFD was made in good faith, for cause, and not for religious reasons. RCW 41.08.090. The Commission affirmed that Mr. Sprague was terminated for repeated violations of policy and orders, as well as insubordination. CP 98-104. As shown, Mr. Sprague vigorously argued that SVFD had violated his civil rights, Federal law, and State law; the Commission rejected Mr. Sprague's theories. CP 63-96; 98-104; 313-324.

Mr. Sprague had a right to appeal to Superior Court under RCW 41.08.090; but did not exhaust this remedy. Instead, the Civil Service proceeding became final on April 22, 2013, and Mr. Sprague filed the instant collateral action. RCW 41.08.090.

B. Procedural Background.

On February 4, 2014, Mr. Sprague filed this lawsuit against SVFD and Mike and Linda Thompson (collectively referred to as "SVFD") as a result of his alleged wrongful termination. CP 3-10. Pursuant to a stipulation among the parties, Mr. Sprague amended his Complaint to

include the parallel state law claims; his Amended Complaint was filed on July 23, 2014. CP 11-23.

On December 19, 2014, SVFD filed a Motion for Summary Judgment arguing that Mr. Sprague's claims were barred by collateral estoppel. CP 325-327.

On February 27, 2015, Mr. Sprague filed his own Motion for Partial Summary Judgment seeking declaratory judgment that "SVFD's policy was and remains unconstitutional, and that Mr. Sprague is entitled to an order enjoining its future enforcement." CP 334-344.

Mr. Sprague filed his response to SVFD's Motion for Summary Judgment on April 24, 2015. CP 407-420. In turn, SVFD responded to Mr. Sprague's Motion for Partial Summary Judgment on April 27, 2015. CP 421-451.

SVFD filed its Reply in Support of its Motion for Summary Judgment on May 1, 2015. CP 459-466. On May 4, 2015, Mr. Sprague filed his reply. CP 470-487.

On May 8, 2015, the trial court heard oral argument from the parties on SVFD's Motion for Summary Judgment, as well as Mr. Sprague's Motion for Partial Summary Judgment. CP 488.

By orders entered May 15, 2015, the trial court granted SVFD's Motion for Summary Judgment and dismissed Mr. Sprague's lawsuit in its

entirety. The trial court entered an order denying Mr. Sprague's Motion for Partial Summary Judgment. CP 489-495. The same day, Mr. Sprague filed his initial appeal. CP 496-504.

On May 21, 2015, SVFD filed its Cost Bill for statutory attorney's fees. Statutory attorney's fees were paid, and SVFD filed a Satisfaction of Judgment later that day. CP 507-509.

On July 1, 2015, Mr. Sprague filed his Amended Notice of Appeal. CP 510-520.

V. ARGUMENT

A. The trial court properly determined that SVFD's policy was constitutional and denied Mr. Sprague's Motion for Partial Summary Judgment.[1]

Mr. Sprague alleges that the trial court improperly denied his Motion for Partial Summary Judgment because "SVFD did not apply a policy that was 'content neutral,' but instead imposed a 'religion-free zone' in the workplace." Mr. Sprague has misconstrued the applicable law and misstated the nature of SVFD's policy and its restrictions. As the trial court properly found:

[1] Respectfully, the Court need not address Mr. Sprague's constitutional claims as his claims are barred by the doctrine of collateral estoppel. Because all of the issues raised by Mr. Sprague were previously determined by the Civil Service Commission, the Court need not evaluate the constitutionality of SVFD's policy; his claims are barred in their entirety based upon collateral estoppel. *See State v. Labor Ready, Inc.*, 103 Wn. App. 775, 782, 14 P.3d 828 (2000) ("courts will not reach constitutional issues when a case can be decided on other grounds").

> In this case the fire department preferred to go with the position of 'we do not want to go there,' I supposed would be the best way to put it. We do not want to get into religious discussions, they do not really have any place in official fire department e-mail and bulletin boards. If you want to discuss religious issues with fellow employees, you privately send e-mails to them outside of work at their home e-mail. Stay away from the forums. An employee can ask fellow employees if they would like to be part of your discussions and get their home e-mail.
>
> What is clear from looking at the briefing on this subject is that governmental entities, whether public or non-public forums, they still have concerns about being fair, both in public and non-public settings, to the employees and to the public. The fire department made a decision that rather than try to parse this out, or just have an open system which allowed for complete discussion of religious issues in connections with fire department issues, they chose not to have any of that type of religious discussion. They were not favoring one position or another.

RP 48:5 – 49:1. In accordance with the trial court's findings, SVFD's policy and restrictions are viewpoint and content neutral. Therefore, consistent with well-established law and precedent, SVFD's policy and restrictions are constitutional.

1. SVFD's email system is a non-public forum, thus, SVFD's policy must be, and is, viewpoint neutral.

"'The constitution allows the regulation of protected speech in certain circumstances.'" *Herbert v. Washington State Pub. Disclosure Comm'n*, 136 Wn. App. 249, 259, 148 P.3d 1102 (2006) (quoting *City of Seattle v. Huff*, 111 Wn.2d 923, 926, 767 P.2d 572 (1989)). Under the First Amendment, speech in a *public* forum is subject to restrictions based upon "time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 350, 96 P.3d 979 (2004) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). However, "[i]f the forum is determined to be nonpublic, the restriction is constitutional if it is reasonable in light of the purposes of the forum and is viewpoint-neutral." *Herbert*, 136 Wn. App. at 263, 148 P.3d 1102; *accord Knudsen v. Washington State Executive Ethics Bd.*, 156 Wn. App. 852, 864, 235 P.3d 835 (2010).

A governmental agency's "e-mail system [is] a nonpublic forum." *Knudsen*, 156 Wn. App. at 866, 235 P.3d 835; *Herbert*, 136 Wn. App. at 265, 148 P.3d 1102 ("the school mailbox and e-mail systems are nonpublic forums"). "A nonpublic forum is '[p]ublic property which is

not by tradition or designation a forum for public communication.'" *Herbert*, 136 Wn. App. at 263, 148 P.3d 1102 (quoting *Perry*, 460 U.S. at 46). "The prohibition is on the use of facilities, not on [the] speech generally." *Herbert*, 136 Wn. App. at 258, 148 P.3d 1102. State e-mail systems are nonpublic forums as they "exist to facilitate communications for purposes of state business" and are not open to the public. *Knudsen*, 156 Wn. App. at 866, 235 P.3d 835.

Further, "'the government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.'" *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 652 (9th Cir. 2006) (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund,* 473 U.S. 788, 802 (1985)). Even "selective access does not transform government property into a public forum." *Perry*, 460 U.S. at 47. As stated by Judge Posner of the Seventh Circuit:

> A public employer does not, by permitting its employees to use their lunch breaks or coffee breaks or other down time during the workday to talk to each other, turn over its premises to the employees for organized and scheduled meetings on topics unrelated to work. Just because like other workers they can converse on varied topics during slack periods of work or breaks between work, *public employees do not obtain squatters' rights to take over the employer's property*

> *and turn it into Hyde Park corner or town hall.*

May v. Evansville-Vanderburgh Sch. Corp., 787 F.2d 1105, 1110 (7th Cir. 1986) (emphasis added). Unless an agency opens up its e-mail system and computers to the general public, an agency's e-mail system is still a nonpublic forum "although the computers may be used to contact those outside the [agency]." *Herbert*, 136 Wn. App. at 264, 148 P.3d 1102.

Restrictions of speech in a nonpublic forum must be viewpoint neutral. *Herbert*, 136 Wn. App. at 263, 148 P.3d 1102. "A viewpoint neutral regulation is one not in place 'merely because public officials oppose the speaker's view.'" *Knudsen*, 156 Wn. App. at 865, 235 P.3d 835 (quoting *Perry*, 460 U.S. at 46). The restriction must not "intend[] to discourage one viewpoint and advance another." *Perry*, 460 U.S. at 49. "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity." *Id.* An agency may restrict speech by limiting discussion on the email servers to official business. *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 711 (9th Cir. 2010) ("We assume the First Amendment would not prevent the district from restricting use in that manner.").

Mr. Sprague concedes that the SVFD email and bulletin board systems are non-public forums. CP 337 ("Neither system is open to the public – they were accessible **only** by employees of SVFD") (emphasis in original). Under the nonpublic forum analysis, a restriction on speech must be "reasonable and viewpoint-neutral." *Herbert*, 136 Wn. App. at 265, 148 P.3d 1102.

2. SVFD's policy properly restricts all personal use of the SVFD email system.

Mr. Sprague argues that the trial court erred in ruling that S&O #171 was constitutional. He claims the policy is not "content neutral" because it allows others to use the email system for personal purposes other than religion. Moreover, Mr. Sprague is in error and confuses the standard by which SVFD's email policy is judged. Because SVFD's email system is a non-public forum, the standard is not content neutrality, but rather, the policy must only be "reasonable and viewpoint-neutral." *Herbert*, 136 Wn. App. at 265, 148 P.3d 1102. SVFD's policy is constitutional is viewpoint neutral by reasonably restricting all personal use of the SVFD email system. CP 108.

S&O #171, which governs SVFD employee's use of the SVFD email system, provides that:

> [t]he electronic system hardware is SVFD property and all messages composed, sent,

> or received on the system are SVFD property. Therefore, *the use of the electronic mail system is reserved solely for SVFD business and should not be used for personal business.*

CP 108 (emphasis added). In her deposition, Ms. Valerie Biladeau, as the representative of SVFD, testified regarding S&O #171. Ms. Biladeau provided the following testimony concerning what "personal use" means under S&O #171:

> Q: [By Mr. Albrecht] What does personal business mean to you?
> A: [By Ms. Biladeau] Anything that's not SVFD business.

CP 457.

Mr. Sprague alleges that emails concerning the SVFD Employee Assistance Program ("EAP") are not related to SVFD business, and thus, S&O is not applied as Ms. Biladeu represented. Mr. Sprague's argument is contrary to Ms. Biladeau's deposition testimony and common sense regarding what constitutes a business purpose. *See* CP 352. Ms. Biladeau offered the following testimony at her deposition:

> Q: [By Mr. Albrecht]: Okay. What's EAP?
> A: [By Ms. Biladeau]: Employee assistance program.
> Q: Okay. And what exactly does that do? What does it accomplish?
> A: If we have employees that need assistance with marital counseling, depression, drug issues, family issues,

> health issues, alcohol issues, a whole bunch of mental health issues, then they call – it's part of their benefits package, and they call the 1 800 number, and they're designated a specific counselor for whatever issue it is that they need[.]
>
> ...
>
> Q: *Are those work purposes when those emails are sent?*
> A: *Yes, it's part of the benefits plan.*

CP 352 (emphasis added). The EAP newsletters are disseminated by SVFD; SVFD does not comment or opine on the topics discussed within the newsletters. The emails comply with SVFD's policy because, as is evidenced by Ms. Biladeau's deposition testimony, the EAP newsletters are associated with SVFD's benefits package; thus, they are related to SVFD business. *See* CP 352. On the other hand, Mr. Sprague's emails, expressed his personal opinions on how to address and cope with mental health issues based upon his personal Christian beliefs. CP 354-55. Mr. Sprague's expression of his personal beliefs is not associated with SVFD business. Thus they are in violation of SVFD policy. CP 106-114.

Mr. Sprague also alleges that SVFD permitted personal emails, but singled out Mr. Sprague for sending similar email due to his religious beliefs. Mr. Sprague's comparison of his emails to others is misplaced. In her deposition, Ms. Biladeau testified:

> Q: [By Mr. Albrecht]: So that would even be if it has some tangential connection to business, like, 'I'm staying late tonight, and I need to arrange a dog sitter to drop off the dog,' in your mind enforcing this, that would be personal business, not SVFD business?
> A: [By Ms. Biladeau]: That could be linked to SVFD business inasmuch as you have to stay late and you have to find a way to manage your time to stay late. ...

CP 351. The above described hypothetical situation is permitted under SVFD's policy because the email deals with SVFD business, *i.e.* staying late, as opposed to personal business. *Id.* Mr. Sprague could have chosen to send emails analogous to the one described in the dog sitter example. For instance, under SVFD's policy, Mr. Sprague could have sent an email stating that he needed shift coverage in order to attend an organizational (church, PTA, Boy Scouts, etc.) function; such an email is associated with SVFD business, *i.e.* making sure all shifts are covered, and is, therefore, permissible. Instead, Mr. Sprague included personal and non-business related messages and opinions in his emails in violation of S&O #171. CP 147-149; 151; 153-155; 157-158; 160-162; 164-166; 168-170; 172-196; 201; 203; 208-211.

S&O #171 explicitly states that the "use of the electronic mail system is reserved solely for SVFD business and should not be used for personal business." CP 108. SVFD's policy is viewpoint neutral in that it

prohibits all personal communications that are not related to official SVFD business. CP 106-114. Such a restriction is constitutional. *See Rodriguez*, 605 F.3d at 711.

3. SVFD must "maintain an attitude of neutrality" concerning religious matters. As such, SVFD may restrict Mr. Sprague's religious emails and bulletin board postings.

The United States Constitution, which applies to all governmental entities, requires government neutrality in matters concerning religion. U.S. Const. amend. I. At the same time, the Free Exercise Clause recognizes an individual's liberty and independence concerning religious matters. *See id.* This presents a conflict for government entities who attempt to regulate the speech of their employees. *See Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973). The United States Supreme Court has stated that "as a result of this tension, our cases require the State to maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion." *Id.*

SVFD may limit religious expression in the workplace, if done in a constitutional manner. *See Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1100 (9th Cir. 2011) (citing *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004)); *see also Pickering v. Bd. of Educ. Of Twp. High Sch. Dist. 205, Will Cty., Ill.*, 391 U.S. 563, 568 (1968). SVFD cannot thrust religious belief, or non-belief, upon anyone, including its own employees.

It must remain neutral in the context of religion. In order to achieve the constitutionally required neutrality, SVFD may impose limitations on religious expressions in the workplace. *See Pickering*, 391 U.S. at 568.

The Ninth Circuit has found that while the State has an interest in not violating the Establishment Clause of the United States Constitution, the State also has an interest in curtailing the speech of its employees in certain circumstances. *See Berry*, 447 F.3d at 646 (citing *Pickering*, 391 U.S. 563). In order for a governmental entity to curtail the speech of its employees, the restraint on the employee's speech must be balanced with "the interests of the [employee]...in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Berry*, 447 F.3d at 649 (quoting *Pickering*, 391 U.S. at 568). The government "has a greater interest in controlling what materials are posted on its property than it does in controlling the speech of the people who work for it." *Berry*, 447 F.3d at 651 (quoting *Tucker v. State of CA Dept. of Ed.*, 97 F.3d 1204 (9th Cir. 1996)).

The logic of the *Berry* court is applicable in the present situation. In that case, Plaintiff Mr. Berry was self-described as, "an evangelical Christian who holds sincere religious beliefs that required him to share his faith...." *Berry*, 447 F.3d at 646. Mr. Berry was employed with the

Tehama County Department of Social Services ("Department"), a public employer. *Id.* at 645. The Department had a policy that employees "were not allowed to talk about religion with clients and the agencies the employees contacted." *Id.* at 646. The Department did not prohibit Mr. Berry from talking about religion with his colleagues. *Id.* Nonetheless, Mr. Berry did not agree with the policy and continued to organize monthly employee prayer meetings in a conference room in the Department's facility. *Id.* The Department informed Mr. Berry that he could not use the conference room for his meetings, and reiterated its position in a letter. *Id.*

Mr. Berry also displayed various religious items in his cubicle. *Id.* at 647. The Department informed Mr. Berry that he could not display his religious items. *Id.* Mr. Berry continued to display his religious items and as a result he was issued a letter of reprimand. *Id.* Mr. Berry did not feel the Department's restrictions were appropriate and initiated legal action. *Id.* at 648.

The *Berry* court reasoned that "[t]he Department...must run the gauntlet of either being sued for not respecting an employee's rights under the Free Exercise and Free Speech clauses of the First Amendment or being sued for violating the Establishment Clause of the First Amendment by appearing to endorse its employee's religious expression." *Id.* at 650.

The *Berry* court found that the speech restrictions implemented by the Department were reasonable. *Id.*

The *Berry* court also found that "the Department's restrictions on the display of religious items are reasonable under the *Pickering* balancing test." *Id.* at 651. The court reasoned that "the government 'has a greater interest in controlling what materials are posted on its property ....'" *Id.* (citing *Tucker*, 97 F.3d at 1214). The *Berry* court found that the Department's restrictions were reasonable as the Department complied with the Establishment Clause. *Id.* at 657. The same logic employed by *Berry* should be applied to the instant situation.

SVFD's restriction on Mr. Sprague's speech was constitutional under *Pickering* as applied by *Berry*. Allowing Mr. Sprague to use SVFD email to send religious emails and to post religious material on the bulletin boards would give the impression or appearance of a governmental endorsement of Mr. Sprague's religious messages. Such an endorsement would be unconstitutional. *Berry*, 447 F.3d at 651. Mr. Sprague was informed that he could not post materials on either the electronic or physical bulletin boards maintained by SVFD that had a religious message. CP 147-149; 153-155; 164-166; 172-196; 205-206; 208-211. Mr. Sprague deliberately ignored the lawful directive and continued to

post religious materials on SVFD bulletin boards. CP 160-162; 168-170; 201.

Mr. Sprague was informed that his conduct amounted to an unconstitutional endorsement of religion by SVFD. CP 147-149. He was also informed that SVFD could constitutionally limit his religious expressions in the workplace, specifically with regard to the religious emails and religious bulletin board postings. *Id.* SVFD never attempted to restrict Mr. Sprague's oral speech nor did it ever suggest it had the ability to do so. In fact, as early as January 9, 2012, Mr. Sprague was informed that he could use SVFD internet access to send personal emails using his personal email address. Specifically, SVFD stated:

> If you wish to send personal emails while on duty (if otherwise permitted under [SVFD] policy), you may do so using a personal email account (such as Hotmail, Gmail, Yahoo, or Comcast account). Using a personal email account, you may only send messages to other personal email accounts. You may not use a personal email account to send messages or solicitations to official SVFD accounts.

CP 147. Mr. Sprague did not use his personal email account to send his messages; instead he continued to use his official SVFD email account to send his personal messages. CP 160-162; 168-170; 201.

Mr. Sprague argues that SVFD disseminated EAP newsletters on a variety of topics and, thereby, "invited follow-up discussion by employees." He alleges that when he engaged in such discussion by espousing his personal Christian perspective, he was subject to discipline. Mr. Sprague mischaracterizes SVFD's emails relating to EAP.

The EAP newsletters are created by a third party, APS Healthcare, and received by SVFD. CP 289. SVFD in turn disseminates the newsletters to SVFD employees as part of the SVFD benefits plan. CP 352. It is an announcement of resources available under the benefits plan. *Id.* In forwarding this material to plan members, SVFD does not opine or comment on the topics contained within the EAP newsletters, nor does it invite comment or discussion from SVFD employees. However, it would be permissible for an employee to respond to a particular EAP email and inform SVFD employees of other resources available on the topics discussed within the EAP newsletters, as well as the time, place, and contact information of the organization or event. CP 148. This use of the SVFD email system is permissible under S&O #171. CP 106-114.

Mr. Sprague was not invited to offer his own personal Christian viewpoint on the topics contained within the EAP newsletter. Rather, he was informed that he could:

> post flyers or advertisements of local events, food drives, and meetings. The posting may contain information as to the organization, the place, the time/date, the contact information, and the event. These type of postings are acceptable for both the electronic and physical bulletin boards. For example, *you might post a notice that the Fellowship is meeting at a particular time and place, but the posting may not have religious content.*

CP 148 (emphasis added). SVFD has consistently maintained this position in its enforcement of S&O #171. As explained by Ms. Biladeau in her deposition:

> ...because you can have a message – you could have religious information. He could send an e-mail that said the Spokane Christian firefighter fellowship is going to meet on Monday at six p.m. at such and such a place for fellowship. He could have done that all day long if he wanted to. It was because he was using religious signs and Scripture that was the problem.

CP 481. Mr. Sprague chose not to comply with SVFD's policy, and instead chose to send personal emails which contained scripture and created the impression of excessive government entanglement with religion in violation of the Establishment Clause. CP 147-149; 151; 153-155; 157-158; 160-162; 164-166; 168-170; 172-196; 201; 203; 208-211.

SVFD was constitutionally obligated to curtail the speech of Mr. Sprague in order to prevent the appearance that SVFD, a governmental

entity, was endorsing religion. *See Berry*, 447 F.3d at 657. To do otherwise would have violated the Establishment Clause of the United States Constitution. *See id.*

Government action will be found to be consistent with the Establishment Clause if it: (1) has a secular purpose; (2) has a principal or primary effect that neither advances nor disapproves of religion; and (3) does not foster excessive governmental entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

Mr. Sprague's actions, performed in his official capacity as Captain for SVFD, violated the Establishment Clause per the *Lemon* test. *See Lemon*, 403 U.S. at 612-13. His actions had a non-secular purpose and the effect of furthering religion, as well as his own personal religious beliefs. His actions created the impression of excessive government entanglement with religion. As a result, SVFD constitutionally limited Mr. Sprague's dissemination of religious content, while acting in his official capacity, and utilizing public resources.

Despite being directed otherwise, Mr. Sprague continued to express his personal religious beliefs via posting religious messages on both the electronic and physical bulletin boards. CP 147-149; 151; 153-155; 157-158; 160-162; 164-166; 168-170; 172-196; 201; 203; 208-211. SVFD cannot appear to endorse religion. As such, SVFD's limits on

religious expression in the workplace are constitutional under both *Pickering* and *Lemon*.

B. The trial court properly granted SVFD's Motion for Summary Judgment as Mr. Sprague's claims are barred by collateral estoppel.

"Collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties." *Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). Collateral estoppel "prevent[s] a second litigation of *issues* between the parties, even though a different claim or cause of action is asserted." *Christensen*, 152 Wn.2d at 306, 96 P.3d 957 (emphasis in original) (quoting *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983)). It "promotes judicial economy." *Id.* It involves "principles of repose and concerns about the resources entailed in repetitive litigation." *Id.* at 306-307, 96 P.3d 957 (citing Tegland, *Civil Procedure* § 35.21, at 446). Collateral estoppel "provides for finality in adjudications." *Christensen*, 152 Wn.2d at 306, 96 P.3d 957 (citation omitted).

A party against whom collateral estoppel is asserted must have had "a full and fair opportunity to litigate the issue in the earlier proceeding." *Christensen*, 152 Wn.2d at 307, 96 P.3d 957 (citing *Nielson by and through Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 264-65, 956 P.2d 312 (1998)). There are four elements:

> (1) identical issues, (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.

Shoemaker v. City of Bremerton, 109 Wn.2d 504, 508, 745 P.2d 858 (1987). When collateral estoppel is applied to administrative adjudications there are three additional "factors" to consider: "(1) whether the agency acting within its competence made a factual decision; (2) agency and court procedural differences; and (3) policy considerations." *Id.* The *Shoemaker* court determined *En Banc* that the Civil Service Commission's hearing process satisfies the three additional factors for application of collateral estoppel. *Id.* at 508-511, 745 P.2d 858.

1. Analysis of the four general elements for collateral estoppel.

i. The issues decided by the Commission are the same issues now before this Court.

As shown, Mr. Sprague argued that he was discriminatorily discharged based on his religious beliefs, practice and violation of his civil rights in the Civil Service proceeding. CP 65. To reiterate, Mr. Sprague contended the Department:

> violate[d] the rights guaranteed each employee of the Spokane Valley Fire

> Department under the First Amendment of the U.S. Constitution, Article 1 Section 11 of the State of Washington Constitution, federal law as found in Title [VII] of the Civil Rights Act, and as fully articulated under EEOC guidelines, as Washington state law is found in the RCWs and a large consistent body of current case law.

Id.

Review of the Amended Complaint demonstrates that Mr. Sprague has made the same arguments in the instant case. CP 17-22. Even if the Court accepts for the sake of argument that the claims in this case are different, they are foreclosed because they are dependent on the same facts decided by the Civil Service Commission, i.e. Mr. Sprague was terminated in good faith, for cause and not for religious reasons. CP 98-104; RCW 41.08.090.

As the trial court correctly stated:

> Here, there is not a substantial question among the parties about the issues that were before that commission. Obviously it resulted in the termination of Mr. Sprague. The reasons for the termination centered around the communication of his religious point of view in internal e-mails, a non-public forum, there is no disagreement about that. This is a non-public forum with regard to the fire department. The issues are clearly set out by the parties in that case.
>
> Let me put it this way. Those issues are the same in this case.

RP 45:22-46:7. The first element of collateral estoppel is met.

ii. The Civil Service Commission proceeding ended in a judgment on the merits.

The Commission conclusively determined that Mr. Sprague was properly terminated; and the decision was not appealed within the thirty days required by the controlling statute, RCW 41.08.090. CP 98-104. Consequently, the determination of good faith, for cause and no religious discrimination became final and binding on Mr. Sprague. The second element of collateral estoppel is met.

iii. The party against whom collateral estoppel is asserted, (Mr. Sprague), was a party to the Civil Service Commission proceeding.

It cannot be disputed that Mr. Sprague was a party to the Civil Service Proceeding. CP 98-104. The third element for application of collateral estoppel is met.

iv. Application of collateral estoppel does not work an injustice to Mr. Sprague.

"The injustice component is generally concerned with procedural, not substantive irregularity." *Christensen*, 152 Wn.2d at 309, 96 P.3d 957 (citation omitted). "This is consistent with the requirement that the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the first forum." *Id.* It cannot be

disputed that Mr. Sprague had a full hearing on his theory for religious discrimination in violation of his civil rights before the Civil Service Commission. CP 63-96; 98-104. The fourth element for application of collateral estoppel is met.

2. Analysis of the three factors for application of collateral estoppel to an administrative proceeding.

The *Shoemaker* case involved a police officer who submitted that he had been demoted in retaliation for exercising his rights. 109 Wn.2d at 505-06, 745 P.2d 858. Like Mr. Sprague, the police officer participated in a Civil Service administrative proceeding. *Id.* at 506, 745 P.2d 858. Shoemaker was represented by union counsel; allowed to give an opening statement; offer witnesses; offer exhibits; cross examine department witnesses; and submit a post-hearing brief on his theories. *Id.* As shown above, Mr. Sprague utilized these features of procedural fairness in this case. CP 63-96. The *Shoemaker* court assessed these features and "determined that administrative collateral estoppel is appropriate" in a Civil Service setting. *Id.* at 511, 745 P.2d 858.

i. The Civil Service acted within is competence and made a factual decision.

Mr. Sprague attempts to suggest that the Civil Service Commission evaluated the constitutionality of SVFD's policy. However, as the trial court correctly noted, the Civil Service Commission did not address the

constitutionality of SVFD's policy, but rather, addressed the application of the policy, which is squarely within the competence of the Commission. As the trial court stated:

> The Civil Service Commission addressed the underpinnings of the fire department's policy from a constitutional perspective because that was at issue.
>
> ... I believe there is no question that an administrative agency cannot make a finding of unconstitutionality; they do not have the competence and authority to do so. But the agency can make findings with regard to the evaluation of the policy and the applicability of the policy to the facts.
>
> ... While an agency cannot rule that the policy was unconstitutional, they could reject the fire department policy and its application in this case.
>
> By the same token, when there is a challenge to the constitutionality, either directly or indirectly, of either the fire department policy or the application of the policy, they can take testimony on the policy content, how it is applied on a regular basis, and they can make findings in order to address those issues. They are not prohibited from doing that. That is not outside their competence.
>
> In this case, they made findings that the policy applied to a non-public forum. We all agree there is no dispute about that. They included both the bulletin board and the e-mail system in their findings. They articulated what they believe the standard to

> be; that any restrictions on speech with regard to use of the e-mail system must be reasonable, and not an effort to suppress particular points of view that the fire department may not like.
>
> ...
>
> The Civil Service Commission recognized that and said that policy, in their view, passes muster under the Supreme Court cases they cited, the *Perry* case and the *Cornelius* case. They were satisfied that this was not a situation where there was an intent to support one viewpoint as opposed to another. The department was neutral.

RP 46:7 – 47-15; 49:3 – 49:9.

RCW 41.08.090 empowers the Civil Service Commission to determine whether a firefighter was removed, suspended, demoted, or discharged in good faith, for cause and not for religious reasons. In Mr. Sprague's case, the Commission exercised its statutory authority and made factual findings that Mr. Sprague was terminated in good faith, for cause and not for religious reasons. CP 98-104.

ii. The relevant procedural protections for administrative collateral estoppel were present in the Civil Service proceeding.

In *Shoemaker*, the court analyzed the "differences between agency and ordinary adjudication which are relevant in determining the adequacy of agency adjudication for collateral estoppel" and concluded the Civil

Service process satisfies the second administrative collateral estoppel factor. *Shoemaker*, 109 Wn.2d at 508-510, 745 P.2d 858. The procedure provided by the Civil Service in Mr. Sprague's case were equal to or exceeded the process approved in *Shoemaker*.

As indicated, Shoemaker was represented by union counsel; as was Mr. Sprague in the instant case. *Id.* at 506, 745 P.2d 858. Shoemaker's lawyer was allowed to give an opening statement. *Id.* Herein, Mr. Sprague chose to give his own opening statement. CP 65. Shoemaker was allowed to call witnesses; as was Mr. Sprague in the instant case. *Shoemaker*, 109 Wn.2d at 506, 745 P.2d 858. Shoemaker was allowed to cross examine the department witnesses; as was Mr. Sprague in the instant case. *Id.* Shoemaker was allowed to examine documents of the Department; as Mr. Sprague did in the instant case. *Id.* Mr. Sprague also submitted his own exhibits. CP 249-294. Objections were heard and ruled on; as they were in Mr. Sprague's case. *Shoemaker*, 109 Wn.2d at 506, 745 P.2d 858. In the instant case, in lieu of closing argument the parties submitted post hearing briefs. CP 296-311; 313-324. As in *Shoemaker*, the Commission issued findings of fact and conclusions of law. 109 Wn.2d at 510, 745 P.2d 858; CP 98-104. The Civil Service Commission in *Shoemaker* had a lawyer assist in the proceedings, facilitate due process and make legal rulings. 109 Wn.2d at 506, 745 P.2d

858. Similar to *Shoemaker*, in the instant case, the Civil Service Commission had a lawyer who facilitated due process and helped it rule on evidentiary issues. CP 98-104. Mr. Sprague's Civil Service administrative proceeding equaled or exceeded the process authorized in *Shoemaker*.

The trial court recognized that Mr. Sprague was properly afforded all the procedural safeguards available. The trial court stated:

> Procedurally, nobody has really argued that there was not full procedures here for all the parties to appear, present testimony, evidence, final briefing. There was a transcript. All of these indicate that as an administrative action, this was done fairly, it was done with full due process and opportunity to be heard.

RP 50:13-50:19.

As the trial court recognized, during the January 14, 2013 hearing, Mr. Sprague was afforded all the necessary procedural protections.

iii. The policy factor for application of administrative collateral estoppel does not support litigating Mr. Sprague's issues a second time.

In *Shoemaker* the court determined that the procedural fairness summarized above provided a "high degree of formality in ... proceedings" and that the Civil Service Commission complied with the applicable statute. 109 Wn.2d at 511, 745 P.2d 858. In turn, the

Shoemaker court found that the necessary policy considerations had been met. *Id.* As shown above, the procedure afforded to Mr. Sprague was the same or greater than that which satisfied policy considerations in *Shoemaker*. Moreover, the *Christiansen* court subsequently cited *Shoemaker* with approval and found that policy favored application of collateral estoppel to an administrative proceeding with the safeguards afforded in a civil service proceeding. *Christiansen*, 152 Wn.2d at 306-308; 312-316, 96 P.3d 957; *Shoemaker*, 109 Wn.2d at 513, 745 P.2d 858.

In sum, the third factor for application of administrative collateral estoppel is met.

3. Collateral estoppel properly bars Mr. Sprague's suit in Superior Court.

Mr. Sprague suggests that collateral estoppel does not bar the instant litigation because collateral estoppel only applies to factual issues which have been previously determined. He suggests that the Commission's legal determinations do not bar relitigation. Mr. Sprague has misinterpreted the doctrine of collateral estoppel.

In support of his position, Mr. Sprague asks the Court to rely on *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 254 P.3d 818 (2011). *Williams* is inapplicable to the instant situation. The *Williams* court reached its decision by interpreting Idaho law. *Williams*, 171 Wn.2d at

731, 254 P.3d 818. Idaho's interpretation of collateral estoppel is irrelevant to this case.

Collateral estoppel "prevents a second litigation of *issues* between the parties, even though a different claim or cause of action is asserted." *Christensen*, 152 Wn.2d at 306, 96 P.3d 957 (emphasis in original) (quoting *Rains*, 100 Wn.2d at 665, 674 P.2d 165).

In granting SVFD's Motion for Summary Judgment, the trial court found that:

> My view is the Civil Service Commission has the competence to make the findings of fact that they did based upon the evidence that was produced to them. They would not have the competence to make a legal conclusion about constitutionality. Certainly you can infer from their ruling that they believe that the underpinnings of what makes the policy constitutional were met in this particular case and supported their decision that the agency had acted appropriately.
>
> ...this type of forum can make factual findings, including factual findings which may support or not support a constitutional finding. It is just the constitutional finding they cannot make. But they made all the necessary findings to support one and the issue was argued to them. This was not appealed and therefore the decision of the Civil Service Commission collaterally estops re-litigation of any of the matters before them, including whether or not the

> fire department rule in question here is unconstitutional.

RP 50:4-50:12; 50:21-51:6. As the trial court properly found, the Commission made factual findings based upon the issues which were presented by the parties. As correctly noted by the trial court, the issues which were determined by the Commission are the identical issues which were before the trial court, thus Mr. Sprague's claims are barred by collateral estoppel. *Christensen*, 152 Wn.2d at 306, 96 P.3d 957; *Shoemaker*, 109 Wn.2d at 513, 745 P.2d 858.

C. Because SVFD's policy is constitutional, Mr. Sprague is not entitled to injunctive relief.

Mr. Sprague contends that the trial court erred in failing to grant the injunctive relief sought by way of his Amended Complaint. Such an argument ignores the facts before the Court.

Following the May 8, 2015 summary judgment hearing, the trial court ruled that SVFD's policy was constitutional and did not infringe upon Mr. Sprague's rights. CP 489-491. Based upon the trial court's ruling, Mr. Sprague's request for injunctive relief was moot and properly denied by the trial court.

VI. CONCLUSION

Based upon the foregoing argument and authority, Spokane Valley Fire Department and Mike and Linda Thompson respectfully request the Court to affirm the trial court's summary judgment orders.

RESPECTFULLY SUBMITTED this 11th day of January 2016.

ETTER, McMAHON, LAMBERSON,
VAN WERT & ORESKOVICH, P.C.

By: _____
Michael J. McMahon, WSBA 6895
Jeffrey R. Galloway, WSBA 44059
Etter, McMahon, Lamberson,
Van Wert & Oreskovich, P.C.
618 W. Riverside Ave., Suite 210
Spokane, WA 99201
Telephone: (509) 747-9100
Facsimile: (509) 623-1439
Attorneys for Respondents

DECLARATION OF SERVICE

I, Kristie M. Miller, declare and say as follows:

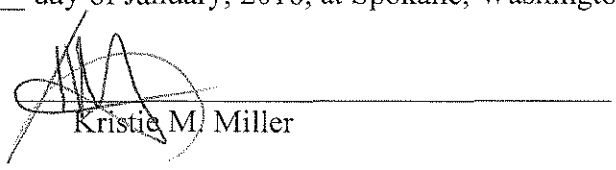
1. I am a citizen of the United States and resident of the State of Washington, over the age of 18 years, not a party to the above-entitled action, and am competent to be a witness herein. My business address is 618 W. Riverside Ave., Ste. 210, Spokane, Washington 99201-5048, and telephone number is 509-747-9100.

2. On January 11, 2016, I caused to be served BRIEF OF RESPONDENTS on the individuals named below in the specified manner indicated.

Matthew C. Albrecht David K. DeWolf Albrecht Law, PLLC 421 W. Riverside Ave., Suite 614 Spokane, WA 99201	___ U.S. Mail _X_ Hand-Delivered ___ Overnight Mail ___ Facsimile ___ Email

I declare under the penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 11th day of January, 2016, at Spokane, Washington.



Kristie M. Miller