FILED
SUPREME COURT
STATE OF WASHINGTON
4/2/2018 3:31 PM
BY SUSAN L. CARLSON
CLERK

No. 95468-2
(C/A 49631-3-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOSHUA BILLINGS, individually,

Petitioner,

v.

TOWN OF STEILACOOM, a municipal corporation, RONALD SCHAUB, individually, and PAUL LOVELESS, individually,

Respondents

BRIEF OF AMICUS CURIAE WASHINGTON EMPLOYMENT LAWERS ASSOCIATION (WELA)

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I. INTRODUCTION AND STATEMENT OF INTEREST

This case involves a fundamental misapplication of the principles of collateral estoppel, giving preclusive effect to a labor arbitrator's legal conclusions to bar the plaintiff's claims brought under this state's anti-discrimination statutes and wrongful discharge jurisprudence. This Court should accept review of this matter not only to resolve the conflict between the Court of Appeals' decision and prior decisions of this Court, but also to give effect to this Court's opinion in *Sprague v. Spokane Valley Fire Department*, 409 P.3d 160 (2018), which was decided after the Court of Appeals' decision below. Specifically, the Court should address the proper scope of collateral estoppel of an arbitrator's findings and conclusions on subsequent proceedings in Superior Court, and reaffirm the "substantial factor" standard under the Washington Law Against Discrimination and a claim of wrongful discharge in violation of public policy.

Review is warranted because the Court of Appeals decision is in conflict with decisions of the Supreme Court and involves an issue of substantial public interest. *See* RAP 13.4(b)(1)(4).

The Washington Employment Lawyers Association (WELA) is a chapter of the National Employment Lawyers Association. WELA is comprised of approximately 180 attorneys who are admitted to practice law in the State of Washington. WELA advocates in favor of employee rights, as employment with dignity and fairness is fundamental to the quality of life. WELA is a chapter of the National Employment Lawyers Association.

II. BACKGROUND

Joshua Billings worked for the Town of Steilacoom in the Public

Safety Department in a dual role as a police officer and fire fighter. On September 25, 2012, while Billings was on medical leave, Steilacoom terminated Billings' employment for purported violations of several policies and a pattern of poor performance. Billings grieved the termination, and it went to arbitration. *Billings v. Town of Steilacoom*, 2 Wn.App. 2d 1, 10-11, 408 P.3d 1123, 1130 (Wash. Ct. App. 2017)

After a 10-day arbitration proceeding, the arbitrator found just cause for the termination decision in written findings of fact and conclusions of law. Billings had apparently raised issues relating to *motive* for his termination, including that the Town fired him for union activities. *Id.* The arbitrator noticed this, stating: "If Billings believes he was discriminated against because of his Union activities, he should bring his claim in a different forum." *See* Pet. for Rev. at 4.

Billings subsequently filed a complaint in Superior Court alleging a wide variety of claims against the Town and individuals, including discrimination and retaliation because of Billings' disability and/or medical leave in violation of the WLAD, wrongful termination in violation of public policy (WTVPP), and retaliation for union activities. Defendants moved for summary judgment, arguing that the arbitrator's determination of "just cause" collaterally estopped Plaintiff from litigating whether Defendants had a "legitimate basis" for terminating Billings' employment, thus precluding both the WLAD and WTVPP claims. The Superior Court dismissed the WLAD and WTVPP claims solely on collateral estoppel. *Billings,* 2 Wn.App. 2d at 11-13.

On appeal, Division II affirmed, finding the WLAD and WTVPP

claims collaterally estopped.[1] The Court held that Plaintiff's WLAD claims (discrimination and retaliation) are precluded because the finding of just cause was "identical" to the issue of whether there was a "legitimate, non-discriminatory explanation" for the termination decision. The Court then reasoned that Billings did not provide evidence of "pretext," so the claim failed, without addressing whether the disability or protected activity were a "substantial factor" in the termination decision. The Court also applied the Perritt formulation and held that the WTVPP claim was barred because the finding of "just cause" was "identical" to the causation element and the "overriding justification" element.

III. ARGUMENT

Collateral estoppel, or "issue preclusion," bars re-litigation of issues that have been fully and fairly litigated and decided in a prior litigation. Collateral estoppel requires:

> (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.

Hadley v. Maxwell, 144 Wn.2d 306, 311, 27 P.3d 600, 602 (2001). In addition, any "issues" that a party seeks to have precluded must have been "actually litigated and necessarily decided" in the prior proceeding.

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[1] The Court of Appeals also dismissed Plaintiff's Section 1983 claim, which was premised on violations of the First Amendment, for failure to make out a prima facie case. While WELA submits that the dismissal of that claim was also in error, this memo addresses only the issue of the application of collateral estoppel to bar issues and claims brought under state law.

Shoemaker v. City of Bremerton, 109 Wn.2d 504,508, 745 P.2d 858 (1987). The party to be barred from re-raising a particular issue must have had a "full and fair opportunity" to litigate those identical issues. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004).

This Court recently had the opportunity to address the application of collateral estoppel to federal civil rights claims in *Sprague v. Spokane Valley Fire Department*, 409 P.3d 160 (2018). There, the Spokane County Civil Service Commission determined that Plaintiff Johnathan Sprague had been terminated "in good faith 'for cause' within the meaning of RCW 41.08.090." *Id.* at 184. The Commission found that the "actual reason" for the County's termination decision was Sprague's "disobedience to a 'direct order of Chief Thompson,'" and *not* for "religious reasons." *Id.*

Sprague then sued in Superior Court, claiming *inter alia* that the termination decision was in retaliation for his free speech activities using a County email system, which violated his rights under the First Amendment. *Id.* at 168-169. Division III held that Sprague's "claims" were collaterally estopped by "two factual findings made by the Commission: (1) 'Sprague was not terminated for religious reasons' and (2) 'there was no evidence presented . . . that the rules were applied unevenly and with discrimination based upon Sprague's expression of his Christian views.'" *Id* at 169.

This Court reversed, first holding that the issues presented and decided were not identical. This Court reasoned that the Commission decided issues of free exercise of religion while the civil claims addressed "free speech," that Sprague was terminated for failure to follow orders "he perceived to be unconstitutional," and that the Commission had "misperceived" the nature of

Sprague's claim in the first instance. *Id.* at 184-85. This Court then held under the additional factors applied to an "administrative proceeding," that the Commission was without authority to decide Constitutional issues, *id.* at 185, that there was a "disparity of relief offered by the Commission" as opposed to the court, *id.,* and that "public policy concerns" militated against barring an "important public question of law," *id.* at 185-86 (quoting *Kennedy v. City of Seattle*, 94 Wn.2d 376, 379, 617 P.2d 713 (1980)).

As set forth below, this Court's reasoning in *Sprague* should apply here to prevent application of collateral estoppel to bar Mr. Billings' claims.

A. A "Just Cause" Determination Cannot Preclude A Finding That Discrimination or Retaliation Were A "Substantial Factor" in the Termination; The Court Of Appeals' Holding That "Pretext" Is Required Conflicts With This Court's Decision in *Scrivener v. Clark College*.

Here, the arbitrator determined that Billings' termination was supported by "just cause." The Court of Appeals then applied the *McDonnell Douglas* "burden shifting framework" and found that "just cause" for termination was identical to saying that the employer had a "legitimate, nondiscriminatory explanation" for the termination, and that issue could not be re-litigated. The Court of Appeals then *required* the plaintiff to show that the explanation was mere "pretext," and because Billings had presented none, the claim was precluded. The Court of Appeals is wrong.

That holding is flatly contradictory to this Court's 2014 decision in *Scrivener v. Clark College.* Proving pretext is not required:

> Today, we clarify the standard plaintiffs must meet to overcome summary judgment. Employees may satisfy the pretext prong of the *McDonnell Douglas* framework by offering sufficient evidence to create a genuine issue of material fact **either** (1) that the employer's articulated reason

> for its action is pretextual **or** (2) that although the employer's stated reason is legitimate, discrimination nevertheless was a substantial factor motivating the employer. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

181 Wn.2d 439, 441–42, 334 P.3d 541, 544 (2014) (emphasis added). Under the "substantial factor" test, "an employer may be motivated by multiple purposes, both legitimate and illegitimate, when making employment decisions and still be liable . . . ." *Id.* at 446-47.

Thus, the issues are not identical. A finding of just cause does not preclude a finding of substantial factor. Neither the arbitrator nor the Court of Appeals discussed or addressed whether an unlawful discriminatory or retaliatory motive was a "substantial factor" in the decision to terminate Billings. In fact, the arbitrator specifically carved this kind of subject out, noting "[i]f Billings believes he was discriminated against because of his Union activities, he should bring his claim in a different forum." Further, the application of collateral estoppel requires that Billings "actually litigated" the substantial factor issue. The record does not reveal that this issue was litigated, and nowhere did the arbitrator "necessarily decide" those issues. *See Shoemaker v. City of Bremerton*, 109 Wn.2d 504,508, 745 P.2d 858 (1987). While collateral estoppel *may apply* to prohibit re-litigation of the disciplinary facts that the Town says led to the termination, it cannot bar Plaintiff from proving that despite such stated reasons, retaliation was a "substantial factor" in the termination decision.

B. A "Just Cause" Determination Cannot Preclude A Wrongful Termination In Violation Of Public Policy Claim

The Court of Appeals held that the arbitrator's "just cause" determination was dispositive of both the "causation" element and the

"overriding justification" element of the public policy tort. Not only did the Court of Appeals erroneously apply the Perritt formulation of the tort, "just cause" cannot be identical to these separate elements.

1. The Court Of Appeals' Application of the "Perritt" Formulation Conflicts With This Court's Decision In *Rose v. Anderson Hay & Grain Co.*

This Court recently clarified the tort of Wrongful Discharge in Violation of Public Policy. Where the facts of a case fall into one of "four scenarios" that "potentially expose the employer to liability," the cause of action lies, and an employer is left to defend that the improper motive to terminate was not a substantial factor. Those four scenarios are:

> (1) when employees are fired for refusing to commit an illegal act, (2) when employees are fired for performing a public duty or obligation, such as serving jury duty, (3) when employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims, and (4) when employees are fired in retaliation for reporting employer misconduct, i.e., whistle-blowing.

Rose v. Anderson Hay & Grain Co., 184 Wn.2d 268, 286–87, 358 P.3d 1139, 1147 (2015). Only "when the facts do not fit neatly into one of the four above-described categories, a more refined analysis may be necessary. In those circumstances, the courts should look to the four-part Perritt framework for guidance. *Id.* at 287.

Here, the Court of Appeals erroneously applied the Perritt formulation without discussion of this Court's 2015 trilogy of cases clarifying the tort. But that formulation should never have applied to Billings' claim because the claim fell within one of the four traditional categories of wrongful discharge, namely, that the Town terminated in retaliation for his exercise of a legal right or privilege, namely his Union activities.

2. A "Just Cause" Determination Is Not Identical To The Affirmative Defense Of "Overriding Justification" Or A Lack Of "Causation" Under The Wrongful Discharge In Violation Of Public Policy Tort; The Court Of Appeals' Holding Conflicts With This Court's Decision in *Rickman v. Premera Blue Cross*

Even if the Perritt formulation applied, the overriding justification element only becomes relevant if the employer admits that it terminated the employee because of public policy related conduct. *Rickman v. Premera Blue Cross*, WL 2869083 *4 (2016) (unpublished) ("[u]nlike the employer in *Gardner,* Premera does not concede that it terminated Rickman for any public policy linked-conduct" so the overriding justification doesn't apply); Henry H. Perritt. Jr., *Employee Dismissal Law & Practice*, §7.08 at p. 7-100.1 (overriding justification applies *only* where "employer does not deny that the determining factor or dominant reason for the dismissal was the employee's public-policy-linked conduct"). In this case, the employer claimed that it terminated the employee for insubordination and other reasons and not for public policy related conduct including the pursuit of union activities. The overriding justification defense should never have been considered.

Moreover, "just cause" by itself cannot satisfy the "overriding justification" element. To hold otherwise would eviscerate the tort, as employers could terminate employees for absenteeism or poor performance, for example, both of which could qualify as "just cause" and are unrelated to public policy conduct. But neither absenteeism nor poor performance reflect a competing public policy which can qualify as overriding justification. The existence of just cause unrelated to the protected conduct is insufficient if retaliation was a substantial factor in the decision to terminate.

On causation, the Court of Appeals reasoned that the arbitrator's finding of insubordination, or "just cause," meant that Billings' "protected union activity" could not have been a substantial factor in the Town's decision to terminate him. These issues are not identical. The existence of a facially legitimate reason for termination does not preclude or obviate the existence of an illegitimate and illegal motive which was a substantial factor in the decision to terminate. *See Scrivener,* 181 Wn.2d at 441–42.

C. The Disparity Of The Remedies Offered At Arbitration As Compared To Superior Court, As Well As The Importance Of The Public Policies Involved In This Case, Weigh Against Applicability Of Collateral Estoppel

As this Court noted in *Sprague,* "when deciding whether to apply collateral estoppel to an administrative proceeding, the court examines three more factors:

> 1) whether the agency acting within its competence made a factual decision; (2) agency and court procedural differences; and (3) policy considerations."

Sprague v. Spokane Valley Fire Dep't, 409 P.3d 160, 183 (Wash. 2018) (quoting *Shoemaker,* 109 Wn.2d at 508, 745 P.2d 858 (quoting *State v. Dupard,* 93 Wn.2d 268, 275, 609 P.2d 961 (1980))).

Amicus WELA submits that there is no principled reason why these factors should not be considered with respect to labor arbitration decisions. For example, in *Sprague*, this Court noted the significant disparity to remedies available from the Spokane County Civil Service Commission (reinstatement and back pay) versus the full panoply of remedies available in court, finding that it would be "unjust" to apply collateral estoppel to Sprague's claims. "When the disparity between the reliefs available creates the risk that

'litigants [may] forgo their administrative remedies for fear of preclusion in other, more substantial claims,' collateral estoppel is inappropriate." *Sprague v. Spokane Valley Fire Dep't*, 409 P.3d at 185 (quoting *Shoemaker,* 109 Wn.2d at 513, 745 P.2d 858).

This Court also noted that collateral estoppel should not be applied in a case that "presents important issues of state and federal law." *Sprague*, 409 P.3d at 186. The present case concerns issues of the utmost public concern: the application of our anti-discrimination laws and the enforcement of important public policies of the State of Washington. Just as courts should be reticent to apply collateral estoppel to constitutional claims, so should they be cautious in applying that principle to the claims in this case.

IV. CONCLUSION

Access to courts is one of our most precious rights.[2] Any mechanism that deters such access, or which makes an employee choose between forums at their peril for fear of the application of collateral estoppel, should be narrowly applied. Here, the Court of Appeals erroneously applied this preclusive doctrine in a way that would fundamentally undermine the enforcement of important public policies of our state. This Court should grant review, reverse the judgment, and remand for further proceedings.

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[2] *See Borough of Duryea, Pa. v. Guarnieri*, ___ U.S. ___, 131 S.Ct. 2488, 2494 (2011) ('"[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government.'"); *Bounds v. Smith*, 430 U.S. 817, 828 (1977) ("Access to courts is a fundamental constitutional right.")

Respectfully submitted this 2nd day of April, 2018.

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I certify that on the date noted below I electronically filed this document entitled **BRIEF OF AMICUS CURIAE WASHINGTON EMPLOYMENT LAWERS ASSOCIATION (WELA)** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following persons:

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April 02, 2018 - 3:31 PM

Transmittal Information

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Superior Court Case Number:	15-2-14029-4

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