95468-2

Supreme Court No.
COA No. 49631-3-II

SUPREME COURT OF THE STATE OF WASHINGTON

JOSHUA BILLINGS

Appellant,

v.

TOWN OF STEILACOOM, ET AL

Respondents.

PETITION FOR REVIEW

RICHARD H. WOOSTER, WSBA 13752
Kram & Wooster, P.S.
Attorney for Appellants
1901 South I Street
Tacoma, WA 98405
(253) 572-4161

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Table of Cases **Page**

Washington Cases

All other jurisdictions

United States Code

Statutes

Court Rules and Regulations

I. INDENTITY OF PETITIONER.

Petitioner, Joshua Billings, ("Billings" or "Employee") a terminated Union employee asks this Court to accept review.

II. CITATION TO COURT OF APPEALS DECISION.

Petitioner seeks review of the Opinion in *Joshua Billings v. Town of Steilacoom, et. al* case Number 49631-3-II published January 17, 2018. Appendix 1. ("The Opinion").

III. ISSUES PRESENTED FOR REVIEW.

1. Does the Opinion's statement: "In Washington, it remains unresolved as to whether an arbitration decision can preclude a [42 U.S.C.] §1983 suit on the basis of collateral estoppel" undermine U.S. Supreme Court precedent that a labor arbitration decision cannot collaterally estop a First Amendment claim creating a significant question of law under the U.S. Constitution and/or an issue of substantial public interest?

2. Does the Opinion conflict with *Sprague v. Spokane Valley Fire Department, et al*, Wa. Supreme Ct. Decision No. 93800-8, _____Wn.2d _____, _____ P.3d ____, 2017 WL 6987827 (Jan. 25, 2018) finding important policy considerations prevent applying collateral estoppel to a Civil Service Commission decision to block a public employee's First Amendment claim?

3. What procedural and substantive aspects must a labor arbitration proceeding have to apply collateral estoppel to a First Amendment and public policy wrongful termination claim?

4. When the sole basis for summary judgment is affirmative collateral estoppel may the court review *sua sponte* analysis of the underlying claims which were not placed in issue by the motion?

5. Does injustice result from collateral estoppel blocking wrongful termination claims where arbitration is controlled by a Union, remedies are limited, the proceedings are private without a reviewable record or judicial review, and the arbitrator specifically directed the victim to use other forums for the claims at issue?

6. Do mixed motive analysis applied to Public Policy, WLAD and First Amendment claims make the application of collateral estoppel from a labor arbitration inappropriate?

7. Is the doctrine of "overriding justification" inapplicable where the Employer does not admit the termination was for public policy linked conduct?

8. Did Billings provide sufficient evidence supporting 42 U.S.C. §1983, the WLAD and RCW 41.56 and/or the Public

Policy claims where the factual or legal basis for such claims were not placed in issue by Defendants' Summary Judgment Motion?

9. Do an employer's discriminatory hiring practices, refusal to follow promotional practices established by law, waste of governmental resources, retaliation for lawful union activities, or disability discrimination implicate the public policy of Washington State or First Amendment Rights making summary judgment inappropriate?

10. Is citation to statutes and cases authorizing attorneys' fees sufficient argument to justify a fee award?

IV. STATEMENT OF THE CASE

A. Procedural History.

Arbitration. Billings began employment as a Public Safety Officer in 2001. (CP 1639). Steilacoom Public Safety Officers perform dual functions of law enforcement officers and fire fighters. (CP 113) Billings was promoted to Sergeant and Fire Operations Chief. (CP 1639, 1652). Billings assumed the lead negotiating position with his Union in 2011 after the Town took adverse actions against the Union's President. (CP1640-41). Billings was demoted in May 2012 and fired on September 25, 2012. (CP 1639). The Arbitrator overturned the demotion (CP 70-74) but affirmed the termination on the sole issue of "just cause." (CP 92).

The Arbitrator did not determine the employer's motivation, expressly leaving left that analysis to a different forum. (CP 91, 1691). "If Billings believes he was discriminated against because of his Union activities, he should bring his claim in a different forum" *Id.*

Superior Court Claims. Billings filed his Complaint alleging his termination violated public policy, was discriminatory and in retaliation for Billings' disability or perceived disability; retaliation for his lawful union activities; violating RCW Title 41 and the Washington Law Against Discrimination RCW 49.60, *et seq* (WLAD). (CP 1-4). Billings' First Amended Complaint (CP 1556-66) added a 42 U.S.C. 1983 for First Amendment retaliation. (CP 1832-33).

Summary Judgment Motion. Defendants' Summary Judgment relied solely on collateral estoppel[1] with no substantive analysis of facts or legal issues of Billings' claims. (CP 23) (CP 1716-1728).

Billings opposed both collateral estoppel and the implicit suggestion that no facts supporting his wrongful termination claims. (CP 1567—89). Billings detailed his active Union role, threats made by Chief Schaub and unlawful actions occurring in the year preceding his demotion and firing. (CP 1639-1705).

---

[1] Defendant asserted other basis which Billings did not oppose and are not at issue here.

Court of Appeals. The Opinion affirmed summary judgment on grounds not briefed in superior court (CP 14-102; 1716-1728) and *sua sponte* decided there was insufficient grounds for the wrongful termination claims under 42 U.S.C. §1983 and the Public Policy of Washington. The Opinion found that (1) collateral estoppel bars all of Billings state law claims; (2) it need not address the application of collateral estoppel to Billings' 42 U.S.C. §1983 claims; (3) Billings failed to allege facts implicating WLAD discrimination. (4) Billings failed to present sufficient evidence of pretext to overcome presumption Defendants had justification for the termination apart protected activities. (5) Billings' public policy wrongful discharge claim fails because the arbitrator's finding provided an "overriding justification" for his discharge. (6) Billings 42 U.S.C. § 1983 claim was not supported by sufficient evidence to present a *prima facia* case. (7) That Billings' fees request pursuant to 42 U.S.C. §1988 and RCW 49.60.030(2) lacked sufficient argument to justify an award of fees.

B. Factual Background

Within a year after Billings assumed the lead role in labor negotiations (CP 1640-41, 1648, 1651) Billings was demoted and fired. (CP 1639). Defendants' stated the alleged basis for termination in a September 25, 2012 letter. (CP 1293-1309). Departing from established policy, Chief Straub personally performed the disciplinary investigation. (CP 1642).

The Arbitrator overturned the demotion (CP 73-74), but affirmed termination. (CP 92). Billings was covered under a collective bargaining agreement "(CBA") with the Steilacoom Police Officers Guild ("SPOG"). (CP 1607-1636), a union with just ten members. (CP 1658). Arbitration is controlled by the Union, limited to interpretation or application of the CBA (CP 1605, 1657-58; 1616-17).

The arbitration hearing was not transcribed, the Union could not afford the expense and Steilacoom refused to consent to an electronic recording. (CP 1651) The Arbitration Award was inaccurate. (CP 1651-1657). Billings had no right of appeal. (CP 1657) The Arbitrator directed Billings to bring his retaliation claims in a different forum. (CP 1657, 1691). Billings' claims were not litigated in the Arbitration. (CP 1657). Defendants assert the "just cause" finding collaterally estops Billings from arguing he was satisfactorily performing his duties (CP 28) and that Steilacoom had "legitimate, non-discriminatory reasons for terminating Billings..." thereby baring all of his claims. (CP 27)

Billings' Concerns Raised Matters of Important Public Concern and Wrongful Termination in Violation of Public Policy.

Billings' public concern triggering first amendment and public policy protection include: **(1)** Billings' active Union role. (CP1640-41). **(2)** Failure to follow promotional procedures established by law. (CP 1640);

(**3**) Creating a new Fire Operations Chief position an improper procedure and unnecessary expense. (CP 1640,-41) (**4**) Threats and abuse by Chief Schaub and Fire Operations Chief McVay to Billings and others. (CP 1641, 1642-43, 1655, 1657, 1692-1700) (**5**) Opposition to splitting Public Safety Officer's function into separate positons of law enforcement and fire fighters as an unnecessary and unwarranted expense without taxpayer input. (CP 1649-50) (**6**) Defendants engaged in discriminatory hiring practices. (CP 1640-41, 1647-48, 1656) (**7**) Using volunteers to fill paid positions. (CP 1648, 1654) (**8**) Fire Operations Chief McVay operating a law enforcement vehicle in violation of law. (CP 1641, 1643-46) (**9**) Arbitrary change to Billings' Badge number obscuring his supervisory status creating safety issues. (CP 1648-479). (**10**) Chief Schaub dishonesty and Steilacoom blocking an outside investigation into the charge by falsely alleging the charge was already under investigation. (CP 1649-50). (**11**) Discrimination because of Billings' disability. (CP 1649-51). The Opinion characterized these issues as: "Complaints over internal affairs are not necessarily of public concern or protected speech." The Opinion, pg. 24.

The Arbitrator barred evidence on discriminatory hiring practices or the waste of funds from the splitting of the Public Safety Office into two separate bureaucracies. (CP 1657). Billings gave a time line showing

many of the issues of public concern he raised and Defendants' corresponding reactions in the year prior to the firing. (CP 1639-1705.

Plaintiff's Disability Discrimination Claims.

Sgt. Billings was assaulted and injured in the line of duty and was off work from May 2012 until September 2012. (CP 1649). Upon Billings' release to return to work, he was directed to go to separate doctor hired by Steilacoom to evaluate his ability to return to work. When that doctor agreed Billings was fit for duty, Billings was fired. (CP 1651).

V. LEGAL DISCUSSION

A. Petition for Review Should be Granted Pursuant to RAP 13.4 (b).

(1) **The Opinion conflicts with a U.S Supreme Court decision and This Court**: *McDonald v. City of W. Branch, Mich.*, 466 U.S. 284, 285–93, 104 S. Ct. 1799, 1800–04, 80 L. Ed. 2d 302 (1984) ("W.Branch") specifically holds collateral estoppel cannot apply to a labor arbitration decision to block a police officer's First Amendment claim under 42 U.S.C. §1983; and this Court's decision in *Sprague v. Spokane Valley Fire Department, et al*, Wa. Supreme Ct. Decision No. 93800-8, _____Wn.2d _____, _____ P.3d ____, 2017 WL 6987827 (Jan. 25, 2018) (Sprague) holding collateral estoppel from a Civil Service Commission Hearing cannot be applied to First Amendment claims because of

constitutional issues were not the focus but the employee's behavior, the limited competence of the commission, the disparity of relief available, and the public policy considerations of the implicated First Amendment issues.

(2) **A significant question of law under the Constitution of the State of Washington or of the United States is involved**: Applying collateral estoppel to a labor arbitration decision barring judicial review of mixed motive cases involving claims of public employees' First Amendment protection conflicts with *W. Branch and Sprague.*

(3) **The petition involves an issue of substantial public interest that should be determined by the Supreme Court**: Applying collateral estoppel to a labor arbitration decision preventing judicial review of mixed motive First Amendment, Public Policy or WLAD wrongful termination case significantly impacts public and private employees' choice of forum, available remedies; and creates irregularities that make collateral estoppel inappropriate.

(4) The extent an advocate must present argument supporting a fee award in private attorney general cases must be known to encourage attorneys to accept these type of cases.

B. Standard of Review.

The appellate courts performs the same inquiry as the trial court *de novo*. *Momah v. Bharti,* 144 Wn. App. 731, 749, 182 P.3d 455 (2008). Summary judgment is properly granted only where 'there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.' The court should view "the facts and reasonable inferences from those facts in the light most favorable to the nonmoving party." *Ruvalcaba v. Kwang Ho Baek*, 175 Wn. 2d 1, 6, 282 P.3d 1083, 1085-86 (2012) (citations omitted). Whether collateral estoppel applies is reviewed de novo. *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wash. 2d 299, 305, 96 P.3d 957, 960 (2004). Moving party's burden is to prove by uncontroverted facts that there is no genuine issue of material fact. If the moving party does not sustain that burden, summary judgment should not be entered irrespective of whether the nonmoving party has submitted affidavits or other materials. *Jacobsen v. State,* 89 Wn.2d 104, 108, 569 P.2d 1152 (1977).

Under RAP 13.4 (b) the court considers the impact of the Court of Appeals decision going forward; requisite degree of public interest, the public or private nature of the question presented, desirability of an authoritative determination for the future guidance of public officers, and

the likelihood of future recurrence of the question. People ex rel. *Wallace v. Labrenz*, 411 Ill. 618, 622, 104 N.E.2d 769 (1952).

Billings' case concerns Constitutional rights, public policy and anti-discrimination protections in the workplace and the judicial impact of a labor arbitration decision upon employee remedies in such cases. Review provides employees guidance how best to proceed where multiple forums exist to seek redress for unlawful work place conduct and how collateral estoppel will apply to claims of wrongful termination under public policy, WLAD or 42 U.S.C. §1983.

C. Both the Superior Court and the Court of Appeals Improperly Applied Collateral Estoppel Dismissing Plaintiff's Wrongful Termination Claims Involving Mixed Motive Analysis.

1. A Labor Arbitration Decision Cannot Be Used For Collateral Estoppel to Dismiss a Public Employee's First Amendment Claim Brought Pursuant to 42 U.S.C. §1983.

Constitutional rights held dear in a civilized society makes collateral estoppel preventing inquiry into unlitigated First Amendment claims inappropriate. *McDonald v. City of W. Branch, Mich.*, 466 U.S. 284, 285–93, 104 S. Ct. 1799, 1800–04, 80 L. Ed. 2d 302 (1984) ("*W. Branch*"), (That decision is attached as Appendix 2 to this petition.) and was shared with the Superior Court. (CP 1592-1597). The Opinion completely ignores *W. Branch.*

W. Branch observed "... an arbitrator's expertise "pertains primarily to the law of the shop, not the law of the land." An arbitrator may not, therefore, have the expertise required to resolve the complex legal questions that arise in § 1983 actions "Second, because an arbitrator's authority derives solely from the contract, an arbitrator may not have the authority to enforce § 1983." "Third, when, as is usually the case, the union has exclusive control over the "manner and extent to which an individual grievance is presented," there is an additional reason why arbitration is an inadequate substitute for judicial proceedings. The union's interests and those of the individual employee are not always identical or even compatible. As a result, the union may present the employee's grievance less vigorously, or make different strategic choices, than would the employee." " Finally, arbitral fact-finding is generally not equivalent to judicial fact-finding." *McDonald v. City of W. Branch, Mich.*, 466 U.S. 284, 290-91, 104 S. Ct. 1799, 1803-04, 80 L. Ed. 2d 302 (1984) (citations omitted).

This Court's analysis in *Sprague v. Spokane Valley Fire Department, et al*, Wa. Supreme Ct. Decision No. 93800-8, ___Wn.2d _____, _____ P.3d ____, 2017 WL 6987827 (Jan. 25, 2018) at pages 35-40 brought these concerns into sharp focus while observing "[w]e should not give

preclusive effect to agency decisions when they are intertwined with such important constitutional questions." *Id.* At pg. 40.

The Opinion's statement on page 22, "In Washington, it remains unresolved as to whether an arbitration decision can preclude a [42 U.S.C.] §1983 suit on the basis of collateral estoppel" undermines U.S. Supreme Court precedent holding important civil rights claims cannot be blocked by collateral estoppel use of a labor arbitration decision. Rather than squarely addressing the issue, the Opinion looked to the underlying factual and legal support for Billings' claims that were not brought into sharp focus or shown to be uncontroverted because collateral estoppel was the sole basis for summary judgment.

In *Yakima County v. Yakima County Law Enforcement Officers Guild*, 157 Wn.App. 304, 237 P.3d 316 (2010) the court concluded, in the reverse scenario, that issues presented in a lawsuit under RCW 49.60 and a CBA arbitration involve entirely different issues thus precluding the application of preclusion principles:

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual rights under a collective bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence.

Yakima County. 157 Wn.App. at 330 citing to *Civil Service Commission v. City of Kelso*, 137 Wn.2d 166, 175, 969 P.2d 474 (1999), quoting *Reese v. Sears, Roebuck and Co.* 107 Wn.2d 563, 575-579, 731 P.2d 497 (1987).

Yakima County held that the distinctly different nature of contractual and WLAD statutory rights the prevented *res judicata* from stopping the pursuit of a CBA grievance following dismissal on summary judgment of a discrimination lawsuit involving the same facts. The *Yakima County* court did not reach the collateral estoppel issue leaving it ultimately to be resolved by the arbitrator. *Id. 157 Wn. App.* at 332.

The WLAD "embodies a public policy of the highest priority..." *Martini v. Boeing Company*, 173 Wn.2d 357, 364, 971 P.2d 45 (1999). Should issues of highest priority be relegated to back room arbitrations where discrimination victims are not even in control of the proceedings? Mixed motives may drive employer's unlawful actions, liability attaches if discriminatory motives were a "substantial factor." *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wash. 2d 302, 898 P.2d 284 (1995). An employer need only be motivated in part by retaliatory influences to violate RCW 49.60.210 *(Davis v. W. One Auto. Grp.*, 140 Wn.App. 449, 460, 166 P.3d 807 (2007).

The Opinion further muddies the waters of collateral estoppel arising from unreviewable private arbitrations that was approved in *Robinson v. Hamed*, 62 Wash. App. 92, 813 P.2d 171 (1991), *rev. denied,* applying

collateral estoppel effect to an arbitration award. It is respectfully asserted that *Hamed* was wrongly decided and is contrary to the policy considerations of *W. Branch* and *Sprague*. *Hamed* discusses both *W. Branch* and *Alexander v. Gardner–Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974) (Title VII claim discrimination claim) ("*Gardner-Denver*") but dismisses those decisions without any analysis noting that: "The [U.S.] Supreme Court has since made this position [that decisions were limited to certain federal claims] clear, and has retracted its apparent mistrust of the arbitral process. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)" Hamed, 62 Wash. App. at 98. *Hamed*'s reliance on *Gilmer* is misplaced. *Gilmer* simply indicated that the parties might agree to arbitrate claims of age discrimination. Private arbitration agreements do not translate to accepting CBA arbitration awards as collateral estoppel blocking constitutional or public policy claims of the highest priority. *W. Branch* is still good law, both *Hamed* and the Opinion erred in ignoring it.

Other jurisdictions reviewing this issue have concluded collateral estoppel should not be applied using a finding of "just cause" to block a state claim. *Taylor v. Lockheed Martin Corp.*, 113 Cal. App. 4th 380, 385–86, 6 Cal. Rptr. 3d 358, 361–62 (2003); *Miller v. Pond*, 171 Ohio App. 3d 347, 347–53, 870 N.E.2d 787, 787–91 (2007); *Andrews v. May*

Dep't Stores, 96 Or. App. 305, 305–13, 773 P.2d 1324, 1324–28 (1989); *Genovese v. Gallo Wine Merchants, Inc.*, 226 Conn. 475, 475–97, 628 A.2d 946, 946–56 (1993); *Miller v. Cty. of Glacier*, 257 Mont. 422, 422–28, 851 P.2d 401, 401–04 (1993).

This court should align itself with those decisions, *W. Branch* and extend the holding in *Sprague* from Civil Service Appeals to Labor Arbitrations and remand this matter for a full trial on Defendants' motivation behind Billings' firing.

2. Applying Collateral Estoppel in this Case Works an Injustice.

The injustice factor in collateral estoppel analysis recognizes the significant role of public policy. *State v. Williams,* 132 Wash.2d 248, 257, 937 P.2d 1052 (1997). 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." *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 508, 745 P.2d 858 (1987). Court may reject collateral estoppel when its application would contravene public policy. *State v. Dupard,* 93 Wash.2d 268, 275-76, 609 P.2d 961 (1980).

Applying collateral estoppel in this case prevented judicial review of important public policy issues of corruption (CP 1640-41,1648-50), WLAD discrimination (CP 1640,1647-48, 1649,1651, 1656-57) retaliation for asserting First Amendment rights, engaging in lawful union activities, opposing WLAD discrimination and cronyism (CP 1641-444,1646-48) and waste of funds; (CP 1640-41, 1649-51, 1654) all matters of public concern.

The Arbitration was not even like the civil service hearing in *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 745 P.2d 858 (1987) where the plaintiff had his own attorney, a public hearing, with a full record and available judicial review. Applying collateral estoppel works an injustice here, the Union controlled the case. Constitutional and public policy clams of retaliation went unexamined by the Arbitrator who specifically left those issues for a different forum.

Piel v. City of Fed. Way, 177 Wash. 2d 604, 612–13, 306 P.3d 879, 882 (2013) reinforced that a police officer can pursue a claim of termination in violation of public policy for his union activities, notwithstanding that he had viable claims he could pursue before PERC. "[S]tatutory remedies available to public employees through PERC are inadequate—and a wrongful discharge tort claim is therefore necessary—

to vindicate the important public policy recognized in chapter 41.56 RCW" *Id.* at 177 Wash. 2d, 617–18, 306 P.3d, 884–85.

Sprague v. Spokane Valley Fire Department, et al, Wa. Supreme Ct. Decision No. 93800-8, _____Wn.2d _____, _____ P.3d ____, 2017 WL 6987827 (2018) notes where the underlying claim is a constitutional one, no deference is given to a Civil Service Commission. The Civil Service review was statutorily limited, just as Billings' review was to determine if under the CBA he was terminated for "just cause." The Commission lacked authority to decide free speech at issue under RCW 41.08.090. The Commission lacks judicial competence to evaluate free speech issues and, in fact, never actually analyzed the free speech issues raised by the conduct at issue. Applying collateral estoppel is unjust because of the disparity of relief available before the Commission and in court. The application of collateral estoppel "creates a negative incentive for terminated public employees to forgo their administrative remedies before the Commission out of fear they will be unable to receive other remedies available from the court." *Id.* at pg. 40. The same negative incentives also come into play from applying collateral estoppel to a labor arbitrator's decision.

Billings' concerns about retaliation, unfair hiring, unfair labor practices, WLAD violations and waste of public funds all implicate his

Free Speech rights and wrongful termination in violation of public policy. Only reversal for trial will vindicate those unexamined rights.

D. The Opinion's Finding of Overriding Justification for the Termination is Not Applicable to This Case.

The Opinion found at page 21 that from the Arbitrator's finding of "just cause there existed an overriding justification for [Billlings'] dismissal..." That affirmative defense is not applicable where the employer does not admit the firing was related to the public policy conduct at issue. Under both the business necessity and overriding justification doctrines, the employer concedes that it acted because of a legally prohibited reason but asserts that under the circumstances it was justified in doing so. *See Rickman v. Premera,* 2016 WL 2869083 (2016) (unpublished) ("The 'absence of justification' or 'overriding justification' . . . inquiry presupposes that an employee was fired for public policy-linked conduct; in other words, it applies only when the causation element is not in dispute" (internal quotation omitted)). ("[u]nlike the employer in *Gardner* [*v. Loomis Armored Inc.*, 128 Wn.2d 931, 913 P.2d 377 (1996)], Premera does not concede that it terminated Rickman for any public policy linked-conduct" so the overriding justification doesn't apply") *Id.* See *Martin v. Gonzaga* 300 Wn.App. 332, 402 P.3d 294 (2017) indicating the court's differences on how this issue overriding justification should be analyzed.

E. Sufficient Argument Supported Billings' Fee Request.

The Opinion held Billings was not entitled to fees because no fee argument was presented. Billings argued, "RCW 49.60.030(2), the remedial provision of RCW Ch. 49.60, provides the cost of suit including a reasonable attorney's fees. *Xieng v. Peoples Nat. Bank of Washington*, 120 Wash. 2d 512, 526-27, 844 P.2d 389, 396-97 (1993). Attorney fees may be awarded in 42 U.S.C. § 1983 actions as set forth in 42 U.S.C. § 1988. *Washington State Republican Party v. Washington State Pub. Disclosure Comm'n*, 141 Wash. 2d 245, 287–91, 4 P.3d 808, 830–32 (2000). Pursuant to RAP 18.1 Billings requests that attorneys' fees be awarded for this appeal." While the issue is moot if Billings is not the prevailing party, guidance regarding the extent to which argument supporting attorneys' fees must be presented where attorneys, as "private attorney generals," litigate matters of important public concern vindicating wrongful terminated employees is important going forward.

VI. CONCLUSION

It is respectfully requested that this Court grant discretionary review of the Court of Appeals decision.

RESPECTFULLY SUBMITTED this 31st day of January, 2017.

Richard H. Wooster, WSBA 13752
Attorney for Petitioner

APPENDIX 1

Filed
Washington State
Court of Appeals
Division Two

January 17, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOSHUA BILLINGS, individually, Appellant, v. TOWN OF STEILACOOM, a municipal corporation, RONALD SCHAUB, individually, and PAUL LOVELESS, individually, Respondents.	No. 49631-3-II ORDER GRANTING MOTIONS TO PUBLISH

Appellant, Joshua Billings, moves to publish the court's September 26, 2017 opinion. Non-party, MultiCare health System, Inc., also moves to publish the court's opinion. Respondents, Town of Steilacoom, Paul Loveless, and Ron Schaub, responded to both motions. The court has determined that the opinion in this matter satisfies the criteria for publication. It is now

ORDERED that the motion to publish is granted and the opinion's final paragraph reading:

> A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

is deleted. It is further

ORDERED that this opinion is published.

PANEL: Jj. Bjorgen, Melnick, Sutton.

FOR THE COURT:

Melnick J.

Melnick, J.

Filed
Washington State
Court of Appeals
Division Two

September 26, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOSHUA BILLINGS, individually, Appellant, v. TOWN OF STEILACOOM, a municipal corporation, RONALD SCHAUP, individually, and PAUL LOVELESS, individually, Respondents.	No. 49631-3-II UNPUBLISHED OPINION

MELNICK, J. — Joshua Billings appeals the trial court's order granting summary judgment to the Town of Steilacoom, Police Chief Ronald Schaub, and Town Administrator Paul Loveless, and striking a declaration. We conclude that the trial court did not err. We affirm.

FACTS

I. BACKGROUND

From December 10, 2001 to September 25, 2012, Billings worked for the Town of Steilacoom Public Safety Department. On May 8, 2012, Steilacoom demoted Billings from the rank of Sergeant to Public Safety Officer (PSO). PSOs served dual roles as police officers and firefighters under the supervision of the Director of Public Safety (DPS), known as the "Police Chief." Clerk's Papers (CP) at 113. From October 18, 2010 until November 5, 2015, Schaub served as Police Chief. He reported to Loveless.

Following several internal affairs investigations, Schaub concluded Billings violated numerous policies and demonstrated a pattern of poor performance. Schaub recommended terminating Billings. Mayor Ron Lucas and Loveless agreed.

At the time the investigation concluded, Billings was off work due to a hand injury. Steilacoom waited until Billings's doctor released him to return to duty before moving forward with the termination. On September 25, 2012, Steilacoom terminated Billings's employment.

On October 2, Billings, assisted by the Steilacoom Officers' Association (SOA), filed a grievance opposing his demotion and termination. After Steilacoom denied the grievance, the SOA requested arbitration pursuant to the applicable Collective Bargaining Agreement (CBA). The CBA provided: "Employees shall be disciplined for just cause with the exception of employees during their initial trial period, in which case a demonstration of cause is not required. Disciplinary action may include written reprimand, suspension without pay, reduction in rank, or discharge." CP at 149.

II. ARBITRATION PROCEEDINGS

The parties proceeded to arbitration. After ten days of presenting evidence and arguing the case, the arbitrator issued her final decision. It included findings of fact and conclusions of law. The arbitrator concluded that just cause did not support Billings's demotion, but just cause supported Billings's termination based on unsatisfactory performance, insubordination, departures from the truth, failure to perform, unbecoming conduct, unsatisfactory performance, and leaving his duty post.

The CBA provided that the arbitrator's decisions would be "final and binding on both parties." CP at 153.

III. SUPERIOR COURT PROCEEDINGS

On November 25, 2015, Billings filed a complaint against Steilacoom, and Schaub and Loveless as employees of Steilacoom, alleging (1) discrimination and retaliation because of Billings's disability, lawful union activities, and/or medical leave; (2) negligence and/or intentional infliction of emotional distress; (3) violation of title 41 and/or 49 RCW; (4) negligent retention and supervision of those who retaliated against Billings; and (5) wrongful termination in violation of established public policy. Billings alleged damages including loss of earnings, compensation, and benefits, mental and emotional trauma, pain and suffering, loss of reputation, and other damages. Billings also requested costs and attorney fees.

Steilacoom, Loveless, and Schaub denied Billings's allegations. They also asserted affirmative defenses including improper service of process, res judicata, collateral estoppel, exhaustion of administrative remedies, intentional conduct, comparative fault, discretionary immunity, statute of limitations, failure to state a claim, good faith immunity, mitigation of damages, setoff, privilege, and failure to comply with chapter 4.96 RCW. They requested that the complaint be dismissed with prejudice. They also requested costs and attorney fees.

A. MOTION FOR SUMMARY JUDGMENT

Steilacoom, Loveless, and Schaub filed a motion for summary judgment dismissal of all of Billings's claims pursuant to CR 56. They argued there existed no genuine issue of material fact and summary judgment was appropriate. Steilacoom, Loveless, and Schaub argued that any claims prior to Billings's September 2012 termination were barred by the statute of limitations.[1] In addition, they argued that collateral estoppel barred Billings from relitigating whether they had a legitimate basis to terminate his employment, because the essential elements of Billings's claims

[1] Billings conceded this point.

had been fully litigated and determined in the arbitrator's ruling. They further argued that collateral estoppel also precluded Billings from proceeding on his public policy wrongful termination claims and his chapter 49.60 RCW discrimination claims under the test set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). They argued that collateral estoppel precluded Billings from proceeding on retaliation claims.

Steilacoom, Loveless, and Schaub argued that if the claims were not barred by collateral estoppel, the negligence claims should be dismissed because employers do not have a duty to avoid emotional distress and the employees acted within the scope of their employment. Finally, Steilacoom, Loveless, and Schaub argue that the intentional infliction of emotional distress claim should be dismissed because Billings's termination did not rise to the level of outrage. As support for the motion for summary judgment, Steilacoom, Schaub, and Loveless included exhibits from the arbitration, and the arbitration award.

Billings opposed the motion for summary judgment and argued that collateral estoppel should not preclude any of his claims because it would cause an injustice. He also argued that his claim for wrongful termination in violation of public policy remained viable. Billings submitted a declaration opposing the motion, listing numerous alleged factual inaccuracies in the arbitration award.

Billings also included a declaration of Glen Carpenter, a sergeant and defensive tactics instructor with the Pierce County Sheriff's Office. Carpenter stated that Schaub told him about an internal affairs investigation of Billings. Carpenter gave Schaub his opinion as to whether Billings would have been justified to use deadly force during a certain stop. Carpenter stated that although Billings would have been justified to use deadly force, Billings did not utilize the best tactical

approach or technique that would be commonly trained. Carpenter concluded that Billings's stop did not constitute an unlawful use of force.

Steilacoom, Schaub, and Loveless filed a motion to strike Carpenter's declaration. They argued that it was irrelevant, duplicative, and inadmissible. They further argued that Carpenter's declaration did not create an issue of material fact because the arbitrator did not conclude that Billings violated the department's policy against unsatisfactory performance based on tactics used, nor was Billings terminated for using excessive force. However, the arbitrator found that Billings violated the department's policy for his using unsafe tactics in the stop, not for the use of force. The trial court granted the motion to strike Carpenter's declaration.

Billings filed a motion to amend his complaint to add a cause of action for First Amendment violations under 42 U.S.C. § 1983. The court granted the motion.

The trial court granted Steilacoom, Schaub, and Loveless's motion for summary judgment and dismissal of all the claims. Billings appeals.

ANALYSIS

I. SUMMARY JUDGMENT

Billings argues that the trial court erred by granting Steilacoom, Schaub, and Loveless's motion for summary judgment because his claims were not barred by collateral estoppel. He also argues that collateral estoppel should not be applied to an unreviewable, labor arbitration decision.

We disagree with Billings and conclude that collateral estoppel bars all of Billings's state law claims. We need not decide whether his 42 U.S.C. § 1983 claim is precluded by collateral estoppel. Because there exists no genuine issue of material fact, the court properly granted summary judgment.

A. LEGAL PRINCIPLES

Summary judgment is appropriate where there are no genuine issues of material facts, and the moving party is entitled to judgment as a matter of law. CR 56(c); *McGowan v. State*, 148 Wn.2d 278, 289, 60 P.3d 67 (2002). The appellate court engages in the same inquiry as the trial court, with questions of law reviewed de novo and the facts and all reasonable inferences from the facts viewed in the light most favorable to the nonmoving party. *Williamson, Inc. v. Calibre Homes, Inc.*, 147 Wn.2d 394, 398, 54 P.3d 1186 (2002).

We conduct de novo review on whether collateral estoppel applies to bar relitigation of an issue. *State v. Vasquez*, 109 Wn. App. 310, 314, 34 P.3d 1255 (2001).

"'The doctrine of collateral estoppel is well known to Washington law as a means of preventing the endless relitigation of issues already actually litigated by the parties and decided by a competent tribunal. Collateral estoppel promotes judicial economy and prevents inconvenience, and even harassment, of parties.'" *Hadley v. Maxwell*, 144 Wn.2d 306, 311, 27 P.3d 600 (2001) (quoting *Reninger v. Dep't of Corr.*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998)). It is distinguished from claim preclusion, or res judicata, "'in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of *issues* between the parties, even though a different claim or cause of action is asserted.'" *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983) (emphasis added) (quoting *Seattle-First Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 225-26, 588 P.2d 725 (1978)). Res judicata "is intended to prevent relitigation of an entire cause of action and collateral estoppel is intended to prevent retrial of one or more of the crucial issues or determinative facts determined in previous litigation." *Luisi Truck Lines, Inc. v. Wash. Utils. & Transp. Comm'n*, 72 Wn.2d 887, 894, 435 P.2d 654 (1967). Yet, "collateral estoppel is not a technical defense to prevent a fair and full hearing on the merits of the issues to

be tried." *Hadley*, 144 Wn.2d at 311. "'Washington courts focus on whether the parties to the earlier proceeding had a full and fair hearing on the issue.'" *Hadley*, 144 Wn.2d at 311 (quoting *Neff v. Allstate Ins. Co.*, 70 Wn. App. 796, 801, 855 P.2d 1223 (1993)).

Washington courts have developed a four-part test to analyze whether a previous litigation should have a collateral estoppel effect on a subsequent 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, 144 Wn.2d at 311-12 (internal quotation marks omitted) (quoting *Southcenter Joint Venture v. Nat'l Democratic Policy Comm'n*, 113 Wn.2d 413, 418, 780 P.2d 1282 (1989)).

> [A]pplication of collateral estoppel is limited to situations where the issue presented in the second proceeding is *identical in all respects* to an issue decided in the prior proceeding, and "where the controlling facts and applicable legal rules remain unchanged." Further, issue preclusion is appropriate only if the issue raised in the second case "involves substantially the same bundle of legal principles that contributed to the rendering of the first judgment," even if the facts and the issue are identical.

LeMond v. Dep't of Licensing, 143 Wn. App. 797, 805, 180 P.3d 829 (2008) (citations omitted) (emphasis added) (quoting *Standlee v. Smith*, 83 Wn.2d 405, 408, 518 P.2d 721 (1974)).

B. FINAL JUDGMENT ON THE MERITS

Billings argues that the arbitration award is not a final judgment on the merits because the arbitrator's decision was "never reduced to a judgment" and it constitutes "hearsay." Br. of Appellant at 22-23. We disagree.

"Washington courts have repeatedly expressed judicial approval of the policy underlying arbitration of disputes." *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 891, 16 P.3d 617 (2001). "We afford great deference to the decisions of a labor arbitrator." *Yakima County v. Yakima County Law Enf't Officers Guild*, 157 Wn. App. 304, 317, 237 P.3d 316 (2010). "Public

policy here in Washington strongly favors the finality of arbitration awards." *Yakima County*, 157 Wn. App. at 317. The "arbitrator is the final judge of both the facts and the law." *Yakima County*, 157 Wn. App. at 318. "'Arbitration is attractive because it is a more expeditious and final alternative to litigation.'" *Godfrey*, 142 Wn.2d at 892 (quoting *Boyd v. Davis*, 127 Wn.2d 256, 262, 897 P.2d 1239 (1995)).

"Courts will review an arbitration decision only in certain limited circumstances, such as when an arbitrator has exceeded his or her legal authority." *Int'l Union of Operating Eng'rs, Local 286 v. Port of Seattle*, 176 Wn.2d 712, 720, 295 P.3d 736 (2013) (*Int'l Union, Local 286*). "To do otherwise would call into question the finality of arbitration decisions and undermine alternative dispute resolution." *Int'l Union, Local 286*, 176 Wn.2d at 720. "However, like any contract, an arbitration decision arising out of a collective bargaining agreement can be vacated if it violates public policy." *Int'l Union, Local 286*, 176 Wn.2d at 721. Arbitrators are confined to the interpretation and application of the CBA. *Yakima County*, 157 Wn. App. at 333.

The general rule is that "collateral estoppel does apply to issues resolved in arbitration, if the award is not challenged as a final judgment on the merits." *State Farm Mut. Auto. Ins. Co. v. Avery*, 114 Wn. App. 299, 308, 57 P.3d 300 (2002); *see also Robinson v. Hamed*, 62 Wn. App. 92, 96-97, 813 P.2d 171 (1991).

Billings cites to *Channel v. Mills*, 61 Wn. App. 295, 299, 810 P.2d 67 (1991), to support his argument that an arbitration award is not a final judgment. In *Channel*, we expressed our disagreement with Division I, and held that collateral estoppel did not preclude an issue because "an arbitration award is not the same thing as a final judgment of a court." 61 Wn. App. at 299. Part of the reasoning was "Washington's statutory scheme for arbitration, RCW 7.04, provides a rather elaborate process for the confirmation, vacation, correction or modification of an arbitration

award in court and for the entry of a judgment which conforms with the court's final determination." 61 Wn. App. at 299. Because of the language of the statute, *Channel* concluded that from a plain reading, "the Legislature did not consider an award in arbitration to be equivalent to a final judgment of a court. If it had it would have been unnecessary to provide a process to reduce the award to judgment." *Channel*, 61 Wn. App. at 300. The court analogized an arbitration award to that of a jury verdict. *Channel*, 61 Wn. App. at 300; *see also Larsen v. Farmers Ins. Co.*, 80 Wn. App. 259, 266, 909 P.2d 935 (1996).

However, the statutes relied on in *Channel* were repealed and codified under Washington's arbitration act. Title 7.04A RCW. This chapter governs the arbitration process and enforcement of arbitration awards. Title 7.04A RCW. Generally, the law remains unchanged in that upon receipt of an arbitration award, a party may move to modify, correct, vacate, or confirm the award. RCW 7.04A.220. A party may file a motion for an order confirming the award. RCW 7.04A.220. When the superior court enters an order confirming the arbitration award, the court must enter a judgment on the award. RCW 7.04A.250(1).

Yet, the reasoning in *Channel* does not apply to Billings's case. RCW 7.04A.030(4) very clearly states: "This chapter does not apply to any arbitration agreement between employers and employees or between employers and associations of employees." Accordingly, *Channel*'s reasoning would not apply to this case because the statute does not apply to the CBA. The parties agreed in the CBA that if the grievance was not resolved by the parties, the SOA could appeal the decision to a neutral arbitrator. The CBA also provided that the arbitrator's written decision would

be "final and binding." CP at 153. Under the CBA then, the parties agreed that the arbitration award would constitute a final judgment.[2]

C. PARTIES

Billings argues that the parties are not identical. We disagree.

In a labor arbitration proceeding, a union represents a plaintiff-employee. When an employee's interest is represented by his union, he is in privity with the union. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 308 n.5, 96 P.3d 957 (2004).

Here, Billings's union represented his interest in the arbitration proceedings, and thus, he was in privity with the union. Because Billings was in privity with the union, the parties are identical.

D. WORKING AN INJUSTICE

Billings argues that the application of collateral estoppel to bar his claims would work an injustice against him because he would be denied a right to a trial by jury on his claims. He argues that he was not provided notice that an arbitration decision would have a preclusive effect on his right to privately pursue his claims outside the CBA. Billings also argues that he was not informed that the arbitration could have a preclusive effect, he was not allowed to raise issues of discriminatory hiring and waste, and the union was poorly funded.

"The injustice component is generally concerned with procedural, not substantive irregularity." *Christensen*, 152 Wn.2d at 309. "This is consistent with the requirement that the

[2] In addition, three unpublished cases from this court explicitly state that an arbitration award is a final judgment on the merits. We find their reasoning persuasive. *Leibsohn Prop. Advisors Inc. v. Colliers Int'l Realty Advisors (USA), Inc.*, No. 69445-6-I (Wash. Ct. App. Oct. 28, 2013) (unpublished), https://www.courts.wa.gov/opinions/pdf/694456.pdf; *Gear Athletics LLC v. Engstrom Properties LLC*, noted at 163 Wn. App. 1017 (2011); *Scheer–Erickson v. Haines*, noted at 120 Wn. App. 1042 (2004) (citing RCW 7.04.210 (repealed); Dunlap v. Wild, 22 Wn. App. 583, 591, 591 P.2d 834 (1979)).

party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the first forum." *Christensen*, 152 Wn.2d at 309. It may be improper for collateral estoppel to preclude an issue where the issue is first determined after an informal, expedited hearing with relaxed evidentiary standards. *Christensen*, 152 Wn.2d at 309. "In addition, disparity of relief may be so great that a party would be unlikely to have vigorously litigated the crucial issues in the first forum and so it would be unfair to preclude relitigation of the issues in a second forum." *Christensen*, 152 Wn.2d at 309.

However, in determining procedural deficiencies, courts have concluded that "an administrative decision may have preclusive effect on a subsequent civil action where the parties had ample incentive to litigate issues even though the remedies available in the two arenas were not identical." *Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 796, 982 P.2d 601 (1999). *Thompson* noted, "the unfairness of permitting an adjudication in an informal administrative setting, for example, to bar later criminal prosecutions." 138 Wn.2d at 796. We also compare to see if there are differences in the burden of proof in the respective proceedings. *Thompson*, 138 Wn.2d at 796.

Here, the SOA and Billings had the opportunity to and did fully litigate the issues of his termination before the arbitrator. The hearing included ten days of testimony. Billings testified on his own behalf. On his behalf, the SOA submitted briefing to support its arguments. Additionally, the clear and convincing burden of proof before the arbitrator was higher than the preponderance of the evidence burden in a civil proceeding. *Dep't of Labor & Indus. v. Rowley*, 185 Wn.2d 186, 208, 378 P.3d 139 (2016).

In addition, Billings's claim that he would be denied a right to a jury trial if collateral estoppel precludes the claims is without merit because the parties agreed to binding arbitration in

the CBA. Further, we note that Billings failed to file a jury demand in his civil case before the deadline.

Finally, because the crucial issue in determining the injustice element is whether Billings had a full and fair opportunity to litigate the issue in the arbitration, we consider whether the other arguments Billings raised involve procedural defects. *Christensen*, 152 Wn.2d at 309. Billings alleged the SOA's lack of funding, his lack of knowledge that the arbitration could have a preclusive effect, and his inability to raise issues of discriminatory hiring and waste are all distinguishable from other examples of procedural defects discussed above.

None of the arguments Billings raised constitutes a procedural defect. Billings's arguments do not support his claim that he did not have a full and fair opportunity to litigate the issues. The SOA hired an attorney to represent his interests in the arbitration, despite Billings's claim that it was poorly funded. Billings also testified at the hearing. In addition, whether the SOA failed to advise Billings about collateral estoppel does not preclude the application of collateral estoppel.[3] Finally, Billings would have been unable to testify about issues of discriminatory hiring and waste because it was irrelevant to the issues at arbitration: whether just cause existed for his demotion and termination.

[3] Billings does not cite to any legal authority to support his contention that it should preclude the application of collateral estoppel. RAP 10.3(a)(6) directs each party to supply in its brief, "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." We do "not consider conclusory arguments that are unsupported by citation to authority." *Brownfield v. City of Yakima*, 178 Wn. App. 850, 876, 316 P.3d 520 (2013). "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Brownfield*, 178 Wn. App. at 876. Accordingly, we need not consider this argument.

Accordingly, we conclude that applying collateral estoppel in this case would not cause an injustice against Billings because he had a full and fair opportunity to litigate the issues Steilacoom, Schaub, and Loveless argue are precluded.

E. IDENTICAL ISSUES

Billings argues that the issues are not identical, but he does not provide clear, substantive argument why they are not identical.

Steilacoom, Schaub, and Loveless argue that all of the issues are identical because the arbitrator found just cause to terminate Billings, and each of the claims asserted by Billings require a determination of whether just cause existed. In addition, they argue that because the arbitrator found just cause, each of the claims asserted by Billings fails as a matter of law. Finally, they argue that Billings failed to respond to the substance of application of collateral estoppel or provide support for his claims related to his public policy wrongful discharge claim or his First Amendment claim and thus, we should not consider those claims.

As previously stated, RAP 10.3(a)(6) directs each party to supply, in its brief, "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." Failure to provide argument and citation to authority in support of an assignment of error precludes appellate consideration under RAP 10.3(a)(6). *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). "[P]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) (quoting *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998)). Although Billings failed to provide clear, substantive argument for his argument that his public policy discharge claim or his § 1983 claim are not identical to the issues determined by the arbitrator, we address them.

1. Washington Law Against Discrimination (WLAD), Chapter 49.60 RCW

Billings argues that the issues presented in a WLAD claim are not identical to those determined by the arbitrator because the action filed in superior court involves application of a different legal standard. Billings argues that he properly supported his public policy claims of discrimination and retaliation based on his union activities. He also argues that WLAD protects a union employee's rights to pursue both arbitration and his WLAD claims.

Billings alleged a disability discrimination and retaliation claim that Steilacoom terminated him because he injured his hand and took medical leave during his pending investigations.

i. Election of Remedies

The election of remedies provision of WLAD does not prohibit the application of collateral estoppel. RCW 49.60.020 provides:

> The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this chapter shall be deemed to repeal any of the provisions of any other law of this state relating to discrimination because of race, color, creed, national origin, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability, other than a law which purports to require or permit doing any act which is an unfair practice under this chapter. Nor shall anything herein contained be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights.

RCW 49.60.030(2) provides the basis for the suit:

> Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments Act of 1988 (42 U.S.C. Sec. 3601 et seq.).

Yet, cases have established that the "existence of a common law or statutory basis for filing a civil action does not itself mean that the doctrine of collateral estoppel may not be applied in the

civil case." *Carver v. State*, 147 Wn. App. 567, 573, 197 P.3d 678 (2008). "'Simply because the tort action rests on public policy does not mean that public policy dictates that collateral estoppel should never be applied.'" *Carver*, 147 Wn. App. at 573 (quoting *Christensen*, 152 Wn.2d at 313). The legislature has not chosen to bar issue preclusion in the WLAD. Chapter 49.60 RCW. Accordingly, "collateral estoppel may be applicable to an action brought under our antidiscrimination laws." *Carver*, 147 Wn. App. at 574.

ii. Discrimination

We next consider whether the issues raised in a claim under chapter 49.60 RCW are identical to the issues upon which the arbitrator ruled.

RCW 49.60.180(2) makes it unlawful for employers "[t]o discharge or bar any person from employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability."

To establish a prima facie case of discrimination by disparate treatment, a plaintiff must show that (1) he belongs to a protected class, (2) he was treated less favorably in the terms or conditions of his employment (3) than a similarly situated, nonprotected employee, and (4) he and the nonprotected employee were doing substantially the same work; if the employer then proffers a legitimate, nondiscriminatory reason for its action, then (5) the plaintiff must produce evidence indicating that the employer's reason is pretextual. *Johnson v. Dep't of Soc. & Health Servs.*, 80 Wn. App. 212, 226-27, 907 P.2d 1223 (1996); *see also Crownover v. Dep't of Transp.*, 165 Wn. App. 131, 147, 265 P.3d 971 (2011).

"The employee shows pretext if the proffered justifications have no basis in fact, are unreasonable grounds upon which to base the termination, or were not motivating factors in

employment decisions for other similarly-situated employees." *Griffith v. Schnitzer Steel Indus., Inc.*, 128 Wn. App. 438, 447, 115 P.3d 1065 (2005). "An employee may satisfy the pretext prong by offering sufficient evidence to create a genuine issue of material fact either (1) that the defendant's reason is pretextual or (2) that although the employer's stated reason is legitimate, discrimination nevertheless was a substantial factor motivating the employer." *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 446-47, 334 P.3d 541 (2014). An employee need not produce direct evidence to show pretext; circumstantial and inferential evidence can be sufficient. *Griffith*, 128 Wn. App. at 447. "An employer may be motivated by multiple purposes, both legitimate and illegitimate, when making employment decisions and still be liable under the WLAD." *Scrivener*, 181 Wn.2d at 447. But an employee's speculation or subjective belief on her performance is irrelevant. *Griffith*, 128 Wn. App. at 447.

We consider whether the issues in the arbitration were identical to those in a WLAD claim based on the burden-shifting framework in *McDonnell Douglas Corp.*, 411 U.S. 792. The court in *Dumont v. City of Seattle*, summarized the test:

> Under this burden-shifting framework, "[t]he plaintiff bears the first intermediate burden, namely, that of setting forth a prima facie case of unlawful discrimination." "If a prima facie case is established, a legally mandatory, rebuttable presumption' of discrimination temporarily takes hold and the evidentiary burden shifts to the defendant to produce admissible evidence of a legitimate, nondiscriminatory explanation for the adverse employment action sufficient to 'raise[ ] a genuine issue of fact as to whether [the defendant] discriminated against the plaintiff." Finally, "[o]nce the presumption is removed, the burden of proof shifts back to the plaintiff, who must then be afforded a fair opportunity to show that [defendant's] stated reason for [the adverse action] was in fact pretext." Only if the plaintiff proves incapable of making this showing does "the defendant become[ ] entitled to judgment as a matter of law."

148 Wn. App. 850, 862, 200 P.3d 764 (2009) (alternations in original) (citations omitted) (quoting *Hill v. BCTI Income Fund–I*, 144 Wn.2d 172, 181, 182, 23 P.3d 440 (2001), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006)).

The arbitrator concluded that just cause existed for Billings's termination. Therefore, a "legitimate, nondiscriminatory explanation" for his termination has already been litigated. This issue is identical to an issue that is the crux of this cause of action. But even if we assume that Billings met his initial burden of proving a prima facie case of discrimination, he failed to produce evidence indicating that Steilacoom, Schaub, and Loveless's reason for discharging him was merely a pretext. Billings did not present any evidence that the numerous reasons for his dismissal were unworthy of belief. Billings presented no evidence at summary judgment showing a pretext for his discharge. Billing only submitted a declaration in which he discussed his perception of events. Further, he does not argue anything about a pretext in his briefing on appeal.

Accordingly, we conclude that summary judgment on this issue was appropriate because the issues were identical, precluding the issues under collateral estoppel, and based on the arbitrator's findings and conclusions, Billings's WLAD claim would fail as a matter of law.

iii. Retaliation

Billings seems to argue that Steilacoom, Schaub, and Loveless retaliated against him for his union activities, apart from his § 1983 claim.[4]

The arbitrator stated that she would not make a legal conclusion, because:

> The Public Employment Relations Commission prohibits discrimination due to union activities by public employers against their employees. A different legal standard is used in those cases than the standards used to evaluate just cause cases. If Billings believes that he was discriminated against because of his union activities, he should bring that claim in a different forum.

CP at 1450.

[4] Billings also focuses on the portion of the arbitrator's decision were she declined to rule on the ultimate issue of whether Steilacoom retaliated against him for union activities.

Although the arbitrator chose not to issue an ultimate legal conclusion regarding a "union retaliation" claim, the issues she did make legal conclusions on act as a bar to that claim at summary judgment. The same analysis from the WLAD section above also applies to the retaliation claim alleged by Billings.

"An employer may not retaliate against an employee for opposing the employer's discriminatory practices or for filing a discrimination claim against the employer." *Milligan v. Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418 (2002); RCW 49.60.210. "The burden-shifting scheme is the same as for discrimination claims." *Milligan*, 110 Wn. App. at 638.

To establish a prima case of retaliation, a plaintiff must show that (1) he engaged in a statutorily protected activity, (2) the employer took an adverse employment action against him, and (3) there is a causal connection between his activity and the employer's adverse action. *Milligan*, 110 Wn. App. at 638. "[W]hen the employee's evidence of pretext is weak or the employer's nonretaliatory evidence is strong, summary judgment is appropriate." *Milligan*, 110 Wn. App. at 638-39.

Even if we assume that Billings could establish a prima facie case of retaliation, he failed to show that Steilacoom, Schaub, and Loveless used their justifications for his termination as a pretext to cover retaliation. He did not provide any evidence at summary judgment that could link his discharge with his union activities. The arbitrator concluded that multiple bases existed as just cause to support Billings's termination including: unsatisfactory performance, insubordination, departures from the truth, failure to perform, unbecoming conduct, unsatisfactory performance, and leaving his duty post.

Because Billings's employer's nonretaliatory evidence is strong, and he failed to present evidence of pretext, we conclude that summary judgment was appropriate. Therefore, we conclude

that the trial court did not err by granting summary judgment because no issue of material fact remained and Billings's retaliation claim could not succeed as a matter of law.

2. Public Policy Wrongful Discharge[5]

Billings argues that the trial court erred by granting summary judgment on his public policy wrongful discharge claim because he pled a viable claim. He seems to argue that the related public policy concerns were his role in the union opposing unlawful activity, waste of taxpayer money, and his concerns about the town that violated WLAD.

"One narrow exception to the general at-will employment rule [in Washington] prohibits an employer from discharging an employee 'when the termination would frustrate a clear manifestation of public policy.'" *Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC*, 171 Wn.2d 736, 755, 257 P.3d 586 (2011) (quoting *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 153, 43 P.3d 1223 (2002)). "The tort action is a 'narrow public policy exception' to the at-will employment doctrine that balances the employee's interest in job security and the employer's interest in making personnel decisions without fear of liability." *Roe*, 171 Wn.2d at 755 (quoting *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984)). A public policy wrongful discharge action may arise when:

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

[5] Billings treats this claim as if it was dismissed pursuant to CR 12(b)(6) and cites the law related to that rule. Regardless, a CR 12(b)(6) motion to dismiss for failure to state a claim is treated as a motion for summary judgment when matters outside the pleadings are presented to and not excluded by the court. *Sea-Pac Co. v. United Food & Commercial Workers Local Union 44*, 103 Wn.2d 800, 802, 699 P.2d 217 (1985). "The motion must be denied unless it appears beyond doubt that plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Sea-Pac*, 103 Wn.2d at 802.

Roe, 171 Wn.2d at 755 (quoting *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 936, 913 P.2d 377 (1996)).

Wrongful discharge in violation of public policy requires four elements:

> "(1) The plaintiffs must prove the existence of a clear public policy (the *clarity* element).
> (2) The plaintiffs must prove that discouraging the conduct in which they engaged would jeopardize the public policy (the *jeopardy* element).
> (3) The plaintiffs must prove that the public-policy-linked conduct caused the dismissal (the *causation* element).
> (4) The defendant must not be able to offer an overriding justification for the dismissal (the *absence of justification* element)."

Roe, 171 Wn.2d at 756 (quoting *Gardner*, 128 Wn.2d at 941).

In *Brownfield v. City of Yakima*, 178 Wn. App. 850, 869-70, 316 P.2d 520 (2013), the court held that a police officer was unable to establish the third element, causation, when a prior summary judgment ruling determined the officer was terminated for insubordination, or just cause. Here, the arbitrator determined this issue and ruled that Billings was terminated for just cause. Because Billings must prove that his protected union activity was a substantial factor in Steilacoom's decision to discharge him to succeed on his wrongful discharge claim, the issues are identical. *Christensen*, 152 Wn.2d at 308, n.5. Accordingly, we conclude that the issues are identical.

Further, for the same reasons he cannot establish the third element, Billings is also unable to prove the fourth element. Again, the arbitrator found that Billings was terminated for just cause; there existed an overriding justification for his dismissal even if he could prove the other elements. Thus, we conclude that the trial court did not err by granting summary judgment because Billings's claim fails as a matter of law.

3. First Amendment Retaliation Claim—42 U.S.C. § 1983

Billings argues that the issues in his First Amendment claim are not identical to the issues determined by the arbitrator. He argues that arbitration rulings cannot be applied under the doctrine of collateral estoppel to 42 U.S.C. § 1983 claims. Billings further argues that he properly supported his First Amendment claim with an articulation of matters of public concern.

In Washington, it remains unresolved as to whether an arbitration decision can preclude a § 1983 suit on the basis of collateral estoppel.[6] We need not decide whether the arbitration decision precludes the § 1983 action because, based on the undisputed material facts, Billings presented insufficient evidence to establish a prima facie case under § 1983. Because Billings failed to present a prima facie case under § 1983, the trial court properly granted summary judgment on this issue.

42 U.S.C. § 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

"Thus, in order to proceed in a § 1983 action, a plaintiff must show that some person deprived plaintiff of a federal constitutional or statutory right, and that person must have been acting under color of state law." *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 117, 829 P.2d 746 (1992).

[6] Our courts have clearly established that they may apply collateral estoppel to determinations in administrative hearings. *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 512, 745 P.2d 858 (1987) (while the commission could not have decided the § 1983 civil rights claim, it may have decided a fact common to the administrative claim for reinstatement and the § 1983 claim); *see also White v. City of Pasadena*, 671 F.3d 918 (9th Cir. 2012).

The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend I.

Billings seemingly argues that his First Amendment right to free speech was violated because Steilacoom, Schaub, and Loveless fired him in retaliation for raising "issues of public concern." Br. of Appellant at 12.

To support a § 1983 claim, Billings must have showed that he spoke on a matter of public concern as a public citizen while acting outside the scope of his official duties. *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1068 (9th Cir. 2012). Whether an employee's speech addresses a matter of public concern is a pure question of law that must be determined "by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-48, 148 n.7, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). "[S]peech that deals with 'individual personnel disputes and grievances' and that would be of 'no relevance to the public's evaluation of the performance of governmental agencies' is generally not of 'public concern.'" *Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir. 2003) (quoting *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983)). By contrast, "[s]peech involves a matter of public concern when it can fairly be considered to relate to 'any matter of political, social, or other concern to the community.'" *Johnson v. Multnomah County*, 48 F.3d 420, 422 (9th Cir. 1995) (quoting *Connick*, 461 U.S. at 146).

If the Billings met the initial burden, he would be required to prove that his filing of grievances against his superiors and his union activities was a "substantial factor" or a "motivating factor" in his dismissal. *Shoemaker*, 109 Wn.2d at 512. Then the burden would shift to the

government to establish that it had "legitimate administrative interests [that] outweigh[ed] the employee's First Amendment rights; or . . . [that it] would have taken the adverse employment action even absent the protected speech." *Karl*, 678 F.3d at 1068.

Because we sit in the same position as the trial court, we review the evidence presented at summary judgment. Billings seemed to argue that the complaints he made against Schaub constituted protected speech. He made complaints about hiring decisions and employment. Billings claimed that Schaub yelled profanities at him in front of peers, and subordinates. He filed a complaint alleging improper governmental action by Schaub. After his demotion, Billings filed a formal complaint against Schaub alleging retaliation. Finally, he filed three other grievances alleging Schaub was violating policies.

Billings did not support his argument that his actions constituted protected speech with evidence. Complaints over internal affairs are not necessarily of public concern or protected speech. *Connick*, 461 U.S. at 149. Billings failed to present evidence to meet the initial burden for a prima facie case under § 1983. Billings has not specified what protected speech he alleges from the basis of his claim. Because Billings did not produce evidence to raise a genuine issue of fact on whether the basis for this claim rested on protected speech, he failed to present evidence for a prima facie § 1983 claim.

Therefore, we conclude that the trial court did not err by granting summary judgment on the § 1983 claim. Billings failed to establish the elements of the claim.

We conclude that collateral estoppel barred Billings's state law claims, and the trial court did not err by granting the motion for summary judgment dismissal of the lawsuit.

II. MOTION TO STRIKE CARPENTER DECLARATION

Billings assigned error to the trial court's granting Steilacoom, Schaub, and Loveless's motion to strike Carpenter's declaration.

As previously stated, RAP 10.3(a)(6) directs each party to supply, in its brief, "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." Billings failed to cite to authority or provide substantive argument as to why the trial court erred by striking Carpenter's declaration. However, we choose to address the issue.

We review the trial court's ruling on a motion to strike for an abuse of discretion. *Hanson Indus. Inc. v. Kutschkau*, 158 Wn. App. 278, 287, 239 P.3d 367 (2010). A court cannot consider inadmissible evidence when ruling on a summary judgment motion. *Kenco Enters. Nw., LLC v. Wiese*, 172 Wn. App. 607, 615, 291 P.3d 261 (2013).

ER 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Here, Carpenter's declaration did not present relevant evidence. In the declaration, Carpenter discussed a traffic stop in which he determined Billings did not violate a certain policy. Whether Billings violated that specific policy in that incident was not relevant to the arguments at summary judgment. In addition, Steilacoom did not terminate Billings because of his use of excessive force. Rather, the arbitrator found that Billings violated the department policy against unsatisfactory performance for his use of unsafe tactics in the stop, not for the use of force. Accordingly, the declaration presented irrelevant evidence and the trial court did not abuse its discretion by granting the motion to strike Carpenter's declaration.

III. ATTORNEY FEES

Billings requests an award of attorney fees pursuant to RCW 49.60.030(2), 42 U.S.C. §1988, and RAP 18.1.

RAP 18.1(a) provides that if "applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses." A request for appellate attorney fees requires a party to include a separate section in her or his brief devoted to the request. RAP 18.1(b). "Argument and citation to authority are required under the rule to advise the court of the appropriate grounds for an award of attorney fees as costs." *Stiles v. Kearney*, 168 Wn. App. 250, 267, 277 P.3d 9 (2012). Because Billings's request for fees is unsupported by argument, we deny his request.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

Melnick, J.

We concur:

Bjorgen, C.J.

Bjorgen, C.J.

Sutton, J.

Sutton, J.

APPENDIX 2

466 U.S. 284, 80 L.Ed.2d 302

Gary McDONALD, Petitioner,

v.

CITY OF WEST BRANCH, MICHIGAN, et al.

No. 83-219.

Argued Feb. 27, 1984.
Decided April 18, 1984.

Discharged city police officer instituted arbitration proceeding under collective-bargaining agreement. The arbitrator ruled against the officer and officer did not seek judicial review but, rather, instituted federal Civil Rights Act suit. The United States District Court for the Eastern District of Michigan rendered judgment against the chief of police. In an unpublished opinion, the Court of Appeals for the Sixth Circuit, 709 F.2d 1505, reversed and remanded. Certiorari was granted. The Supreme Court, Justice Brennan, held that: (1) federal full faith and credit statute did not require that preclusive effect be given the arbitration award, and (2) the court found no need to judicially create a rule that preclusive effect be given labor arbitration awards in civil rights suit.

Judgment of Court of Appeals reversed and case remanded.

1. Judgment ⇐828(3.1)

Federal full faith and credit statute obliges federal courts to give the same preclusive effect to a state court judgment as would the courts of the state rendering the judgments. 28 U.S.C.A. § 1738.

2. Judgment ⇐828(3.2)

Labor arbitration is not a "judicial proceeding" within meaning of federal full faith and credit statute and, hence, in actions under Civil Rights Act of 1871, federal courts are not required to give preclusive effect to unappealed labor arbitration awards. 28 U.S.C.A. § 1738; 42 U.S.C.A. § 1983.

See publication Words and Phrases for other judicial constructions and definitions.

3. Judgment ⇐828(3.1)

Federal full faith and credit statute applies to acts of state legislatures and records of state courts. 28 U.S.C.A. § 1738.

4. Labor Relations ⇐433

When rights guaranteed by Civil Rights Act of 1871 conflict with provisions of the collective-bargaining agreement, the arbitrator must enforce the agreement. 42 U.S.C.A. § 1983.

5. Judgment ⇐828(1)

In an action under Civil Rights Act of 1871, a federal court should not afford res judicata or collateral estoppel effect to an unappealed arbitration proceeding brought pursuant to terms of a collective-bargaining agreement. 42 U.S.C.A. § 1983.

6. Labor Relations ⇐464

An arbitrator's decision pursuant to arbitration under collective-bargaining agreement may be admitted as evidence in a Civil Rights Act suit. 42 U.S.C.A. § 1983.

Syllabus *

When petitioner was discharged from respondent city's police force, he filed a grievance pursuant to the collective-bargaining agreement between the city and a labor union, contending that there was "no proper cause" for his discharge. The grievance was ultimately taken to arbitration, and the arbitrator ruled against petitioner, finding that there was just cause for his discharge. Petitioner did not appeal this decision, but filed an action in Federal District Court under 42 U.S.C. § 1983

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

against the city and certain of its officials, including the Chief of Police, alleging that he was discharged for exercising his First Amendment rights of freedom of speech, freedom of association, and freedom to petition the government for redress of grievances. The jury returned a verdict against the Chief of Police but in favor of the other defendants. The Court of Appeals reversed the judgment against the Chief of Police, holding that petitioner's First Amendment claims were barred by res judicata and collateral estoppel.

Held: In a § 1983 action, a federal court should not afford res judicata or collateral estoppel effect to an award in an arbitration proceeding brought pursuant to the terms of a collective-bargaining agreement, and hence petitioner's § 1983 action was not barred by the arbitration award. Pp. 1801–1804.

(a) Title 28 U.S.C. § 1738—which provides that the "judicial proceedings" of any court of any State shall have the same full faith and credit in every court within the United States as they have by law or usage in the courts of such State from which they are taken—does not require that preclusive effect be given to the arbitration award in question. Arbitration is not a "judicial proceeding" and, therefore, § 1738 does not apply to arbitration awards. Pp. 1801–1802.

(b) Although arbitration is well suited to resolving contractual disputes, it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard. As a result, according preclusive effect to an arbitration award in a subsequent § 1983 action would undermine that statute's efficacy in protecting federal rights. This conclusion is supported by the facts that an arbitrator may not have the expertise to resolve the complex legal questions that arise in § 1983 actions or the authority to [1285] enforce § 1983; that a union's usual exclusive control over grievance procedures may result in an employee's loss of an opportunity to be compensated for a constitutional deprivation merely because it was not in the union's interest to press his grievance vigorously; and that arbitral factfinding is generally not equivalent to judicial factfinding. Pp. 1802–1804.

709 F.2d 1505 (6th Cir. 1983), reversed and remanded.

David J. Achtenberg, Kansas City, Mo., for petitioner.

Richard G. Smith, Bay City, Mich., for respondents.

Justice BRENNAN delivered the opinion of the Court.

The question presented in this § 1983 action is whether a federal court may accord preclusive effect to an unappealed arbitration award in a case brought under that statute.[1] In an unpublished opinion, the Court of Appeals for the Sixth Circuit held that such awards have preclusive effect. We granted certiorari, 464 U.S. 813, 104 S.Ct. 66, 78 L.Ed.2d 81 (1983), and now reverse.

I

On November 26, 1976, petitioner Gary McDonald, then a West Branch, Mich., police officer, was discharged. McDonald [1286] filed a grievance pursuant to the collective-bargaining agreement then in force between West Branch and the United Steelworkers of America (the Union), contending that there was "no proper cause" for his discharge, and that, as a result, the discharge violated the collective-bargaining

1. Title 42 U.S.C. § 1983 provides in pertinent part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

agreement.[2] After the preliminary steps in the contractual grievance procedure had been exhausted, the grievance was taken to arbitration. The arbitrator ruled against McDonald, however, finding that there was just cause for his discharge.

McDonald did not appeal the arbitrator's decision. Subsequently, however, he filed this § 1983 action against the city of West Branch and certain of its officials, including its Chief of Police, Paul Longstreet.[3] In his complaint, McDonald alleged that he was discharged for exercising his First Amendment rights of freedom of speech, freedom of association, and freedom to petition the government for redress of grievances.[4] The case was tried to a jury which returned a verdict against Longstreet, but in favor of the remaining defendants.

On appeal, the Court of Appeals for the Sixth Circuit reversed the judgment against Longstreet. 709 F.2d 1505 (1983). The court reasoned that the parties had agreed to settle their disputes through the arbitration process and [1287]that the arbitrator had considered the reasons for McDonald's discharge. Finding that the arbitration process had not been abused, the Court of Appeals concluded that McDonald's First Amendment claims were barred by res judicata and collateral estoppel.[5]

II

A

At the outset, we must consider whether federal courts are obligated by statute to accord res judicata or collateral-estoppel effect to the arbitrator's decision. Respondents contend that the Federal Full Faith and Credit Statute, 28 U.S.C. § 1738, requires that we give preclusive effect to the arbitration award.

[1-3] Our cases establish that § 1738 obliges federal courts to give the same preclusive effect to a state-court judgment as would the courts of the State rendering the judgment. See, *e.g.*, *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 81, 104 S.Ct. 892, 896, 79 L.Ed.2d 56 (1984); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466, 102 S.Ct. 1883, 1889, 72 L.Ed.2d 262 (1982). As we explained in *Kremer*, however, "[a]rbitration decisions ... are not subject to the mandate of § 1738." *Id.*, at 477, 102 S.Ct., at 1894. This conclusion follows from the plain language of § 1738 which provides in pertinent part that the "*judicial proceedings* [of any court [1288]of any State] shall

2. Section 3.0 of Article III of the collective-bargaining agreement between the city of West Branch and the Union provided in pertinent part:

"Among the powers, rights, authority, duties and responsibilities which shall continue to be vested in the City of West Branch, but not intended as a wholly inclusive list of them, shall be: The right to ... suspend or discharge employees for proper cause."

3. In addition to Longstreet, the complaint named the following city officials as defendants: Acting City Manager Bernard Olson, City Attorney Charles Jennings, and City Attorney Demetre Ellias. McDonald also named the Union as a defendant, claiming that it had breached its state-law duty to represent him fairly. The District Court declined to exercise pendent jurisdiction over this claim.

4. In addition, McDonald alleged that his discharge deprived him of property without due process of law. The jury, however, rejected this claim.

5. Earlier this Term, we noted that various phrases have been used to describe the preclusive effects of former judgments. *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984). Because the Court of Appeals used the terms "res judicata" and "collateral estoppel," we find it convenient to use these terms in this opinion. Thus, in this case, we utilize the term "res judicata" to refer to the effect of a judgment on the merits in barring a subsequent suit between the same parties or their privies that is based on the same claim. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, n. 5, 99 S.Ct. 645, 649, n. 5, 58 L.Ed.2d 552 (1979). By contrast, "[u]nder collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980).

have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State ... from which they are taken." (Emphasis added.)[6] Arbitration is not a "judicial proceeding" and, therefore, § 1738 does not apply to arbitration awards.[7]

B

Because federal courts are not required by statute to give res judicata or collateral-estoppel effect to an unappealed arbitration award, any rule of preclusion would necessarily be judicially fashioned. We therefore consider the question whether it was appropriate for the Court of Appeals to fashion such a rule.

On two previous occasions this Court has considered the contention that an award in an arbitration proceeding brought pursuant to a collective-bargaining agreement should preclude a subsequent suit in federal court. In both instances we rejected the claim.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), was an action under Title VII of the Civil Rights Act of 1964 [1289] brought by an employee who had unsuccessfully claimed in an arbitration proceeding that his discharge was racially motivated. Although Alexander protested the same discharge in the Title VII action, we held that his Title VII claim was not foreclosed by the arbitral decision against him.[8] In addition, we declined to adopt a rule that would have required federal courts to defer to an arbitrator's decision on a discrimination claim when "(i) the claim was before the arbitrator; (ii) the collective-bargaining agreement prohibited the form of discrimination charged in the suit under Title VII; and (iii) the arbitrator has authority to rule on the claim and to fashion a remedy." *Id.*, at 55–56, 94 S.Ct., at 1023.

Similarly, in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981), Barrentine and a fellow employee had unsuccessfully submitted wage claims to arbitration. Nevertheless, we rejected the contention that the arbitration award precluded a subsequent suit based on the same underlying facts alleging a violation of the minimum wage provisions of the Fair Labor Standards Act. *Id.*, at 745–746, 101 S.Ct., at 1447.

Our rejection of a rule of preclusion in *Barrentine* and our rejection of a rule of deferral in *Gardner-Denver* were based in large part on our conclusion that Congress intended the statutes at issue in those cases to be judicially enforceable and that arbitration could not provide an adequate substitute for judicial proceedings in adjudicating claims under those statutes. 450 U.S., at 740–746, 101 S.Ct., at 1444–1447; 415 U.S., at 56–60, 94 S.Ct., at 1023–25. These considerations similarly require that

6. The complete text of § 1738 provides:

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

"The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

7. The statute also applies to Acts of state legislatures and records of state courts. See n. 6, *supra*. Arbitration obviously falls into neither of these categories.

8. The Court of Appeals in *Gardner-Denver* had concluded that the Title VII suit was barred by the doctrines of election of remedies and waiver, and by "the federal policy favoring arbitration of labor disputes." 415 U.S., at 46, 94 S.Ct., at 1018. In addition to holding that none of these doctrines justified a rule of preclusion, we noted that "[t]he policy reasons for rejecting the doctrines of election of remedies and waiver in the context of Title VII are equally applicable to the doctrines of *res judicata* and collateral estoppel." *Id.*, at 49, n. 10, 94 S.Ct., at 1020, n. 10.

we find the doctrines of res judicata and collateral estoppel inapplicable in this § 1983 action.

[290]Because § 1983 creates a cause of action, there is, of course, no question that Congress intended it to be judicially enforceable. Indeed, as we explained in *Mitchum v. Foster*, 407 U.S. 225, 242, 92 S.Ct. 2151, 2162, 32 L.Ed.2d 705 (1972), "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law." See also *Patsy v. Florida Board of Regents*, 457 U.S. 496, 503, 102 S.Ct. 2557, 2561, 73 L.Ed.2d 172 (1982). And, although arbitration is well suited to resolving contractual disputes, our decisions in *Barrentine* and *Gardner-Denver* compel the conclusion that it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard. As a result, according preclusive effect to an arbitration award in a subsequent § 1983 action would undermine that statute's efficacy in protecting federal rights. We need only briefly reiterate the considerations that support this conclusion.

First, an arbitrator's expertise "pertains primarily to the law of the shop, not the law of the land." *Gardner-Denver, supra*, 415 U.S., at 57, 94 S.Ct., at 1024. An arbitrator may not, therefore, have the expertise required to resolve the complex legal questions that arise in § 1983 actions.[9]

[4] Second, because an arbitrator's authority derives solely from the contract, *Barrentine, supra*, 450 U.S., at 744, 101 S.Ct., at 1446, an arbitrator may not have the authority to enforce § 1983. As we explained in *Gardner-Denver*: "The arbitrator ... has no general authority to invoke public laws that conflict with the bargain between the parties.... If an arbitral decision is based 'solely upon the arbitrator's view of the requirements [291]of enacted legislation,' rather than on an interpretation of the collective-bargaining agreement, the arbitrator has 'exceeded the scope of the submission,' and the award will not be enforced." 415 U.S., at 53, 94 S.Ct., at 1022, quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960). Indeed, when the rights guaranteed by § 1983 conflict with provisions of the collective-bargaining agreement, the arbitrator must enforce the agreement. *Gardner-Denver*, 415 U.S., at 43, 94 S.Ct., at 1017.

Third, when, as is usually the case,[10] the union has exclusive control over the "manner and extent to which an individual grievance is presented," *Gardner-Denver, supra*, at 58, n. 19, 94 S.Ct., at 1024 n. 19, there is an additional reason why arbitration is an inadequate substitute for judicial proceedings. The union's interests and those of the individual employee are not always identical or even compatible. As a result, the union may present the employee's grievance less vigorously, or make different strategic choices, than would the employee. See *Gardner-Denver, supra*, at 58, n. 19, 94 S.Ct., at 1024, n. 19; *Barrentine, supra*, 450 U.S., at 742, 101 S.Ct., at 1445. Thus, were an arbitration award accorded preclusive effect, an employee's opportunity to be compensated for a constitutional deprivation might be lost merely because it was not in the union's interest to press his claim vigorously.

Finally, arbitral factfinding is generally not equivalent to judicial factfinding. As we explained in *Gardner-Denver*, "[t]he record of the arbitration proceedings is not

9. Indeed, many arbitrators are not lawyers. See *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 743, 101 S.Ct. 1437, 1446, 67 L.Ed.2d 641 (1981); *Gardner-Denver*, 415 U.S., at 57, n. 18, 94 S.Ct., at 1024, n. 18. In addition, *amici* AFL–CIO and the United Steelworkers of America note that "[t]he union's case in a labor arbitration is commonly prepared and presented by non-lawyers." Brief as *Amici Curiae* 10.

10. *Amici* AFL–CIO and the United Steelworkers of America inform us that under most collective-bargaining agreements the union "controls access to the arbitrator, the strategy and tactics of how to present the case, the nature of the relief sought, and the actual presentation of the case." *Id.*, at 7.

as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable." 415 U.S., at 57–58, 94 S.Ct., at 1024.

[5, 6] [2][92]It is apparent, therefore, that in a § 1983 action, an arbitration proceeding cannot provide an adequate substitute for a judicial trial.[11] Consequently, according preclusive effect to arbitration awards in § 1983 actions would severely undermine the protection of federal rights that the statute is designed to provide.[12] We therefore hold that in a § 1983 action, a federal court should not afford res judicata or collateral-estoppel to effect an award in an arbitration proceeding brought pursuant to the terms of a collective-bargaining agreement.[13]

[2][93]The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

11. In addition to diminishing the protection of federal rights, a rule of preclusion might have a detrimental effect on the arbitral process. Were such a rule adopted, employees who were aware of this rule and who believed that arbitration would not protect their § 1983 rights as effectively as an action in a court might bypass arbitration. See *Gardner-Denver, supra,* at 59, 94 S.Ct., at 1025.

12. The Court of Appeals justified its application of res judicata and collateral estoppel in part by stating that "[t]he parties have agreed to settle this dispute through the private means of arbitration." In both *Gardner-Denver* and *Barrentine,* however, we rejected similar contentions. See *Gardner-Denver, supra,* at 51–52, 94 S.Ct., at 1021; *Barrentine, supra,* 450 U.S., at 736–746, 101 S.Ct., at 1442–47. For example, in *Gardner-Denver* we considered the argument that the arbitration provision of the collective-bargaining agreement waived the employee's right to bring a Title VII action. We found this contention unpersuasive, however, concluding that "[t]he rights conferred [by Title VII] can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII." *Gardner-Denver, supra,* 415 U.S., at 51, 94 S.Ct., at 1021. Similarly, because preclusion of a judicial action would gravely undermine the effectiveness of § 1983, we must reject the Court of Appeals' reliance on and deference to the provisions of the collective-bargaining agreement.

13. Consistent with our decisions in *Barrentine* and *Gardner-Denver,* an arbitral decision may be admitted as evidence in a § 1983 action. As in those cases:

"We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with [the statute or constitution], the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue [in the judicial proceeding], and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's [statutory or constitutional] rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress ... thought it necessary to provide a judicial forum for the ultimate resolution of [these] claims. It is the duty of courts to assure the full availability of this forum." *Gardner-Denver,* 415 U.S., at 60, n. 21, 94 S.Ct., at 1025 n. 21.

See also *Barrentine,* 450 U.S., at 743–744, n. 22, 101 S.Ct., at 1446 n. 22.

95468-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOSHUA BILLINGS Appellant vs. TOWN OF STEILACOOM, ET AL Respondents	Supreme Court No. COA No. 49631-3-II DECLARATION OF SERVICE

KNOW ALL PERSONS BY THESE PRESENTS: That I, Connie DeChaux, the undersigned, of Bonney Lake, in the County of Pierce and State of Washington, have declared and do hereby declare:

That I am not a party to the above-entitled action, am over the age required and competent to be a witness;

That on the 1st day of February, 2018, I delivered via ABC Legal Messenger and via email a copy of the following documents:

1. Declaration of Service;
2. Petition for Review.

properly addressed to the following person:

Jayne Lyn Freeman
Attorney at Law

800 5th Ave Ste 4141
Seattle WA 98104
JFreeman@kbmlawyers.com
LWalker@kbmlawyers.com

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

Signed at Tacoma, Pierce County, Washington this 1st day of February, 2018.

Connie DeChaux

Connie DeChaux

Kram & Wooster, Attorneys at Law
1901 South I Street
Tacoma WA 98405
(253) 572-4161
(253) 572-4167 fax