No. 333523

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

JONATHAN J. SPRAGUE, a married man,

Plaintiff-Appellant,

vs.

SPOKANE VALLEY FIRE DEPARTMENT, a fire district; et al.,

Defendants-Respondents,

REPLY BRIEF OF APPELLANT

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> Biladeau: They were -- if you're talking about his newsletter, they were driven to his belief as he sees his studies in Christ. That's not content neutral.
>
> Q: Okay. And they were offering tips often on the same exact topics as EAP newsletters?
>
> A: Only from his individual perspective of his interpretation of what he had read in the Bible.

Valerie Biladeau (SVFD designated representative), CP 354-55.

Respondent Spokane Valley Fire Department's brief ("SVFD") has clarified several important aspects of this appeal. Sprague agrees that the constitutionality of SVFD's policy must be decided regardless of any other ruling on collateral estoppel, and that speech by a public employee can only be restricted in a viewpoint neutral manner. Sprague disagrees that the SVFD policy is viewpoint neutral, and disagrees that the administrative findings of fact by the Civil Service Commission prohibit Sprague's employment claim. Thus, this brief will address both the points of agreement, and disagreement, as follows:

Points of Agreement

(1) Collateral estoppel does not apply to Sprague's claim that he is entitled to injunctive relief

(2) To pass constitutional muster, restrictions on employee speech imposed by SVFD must be viewpoint neutral.

Points of Disagreement

(1) The policy imposed by SVFD, as described by SVFD's designated representative and the Commission, was not viewpoint neutral because it focused directly on prohibiting religious viewpoints while allowing non-religious viewpoints on the same topics.

(2) The Civil Service Commission's findings of fact regarding SVFD's policy and reasons for Sprague's dismissal support rather than contradict Sprague's claims and do not collaterally estop those employment claims.

II. ARGUMENT IN REPLY AS TO AGREED POINTS

A. SVFD admits that collateral estoppel does not apply to Sprague's request for injunctive relief.

In dismissing Sprague's claims, the trial court relied first upon the principle of collateral estoppel, finding that Sprague's claims had been fully and fairly litigated in the Civil Service Commission proceeding, and that Sprague was barred from relitigating those claims in Superior Court. RP 49:19-50:6. The trial court only indirectly mentioned the legal conclusions reached by the Commission concerning the constitutionality of the policy itself.

In its opening brief, Sprague argued that, regardless of whether the decision of the Civil Service Commission could collaterally estop Sprague from asserting an employment law claim based upon his dismissal,

Sprague's right to seek injunctive relief from an unconstitutional policy was unimpaired by any action taken by the Civil Service Commission. Appellant's Opening Brief, at 29-31. SVFD has offered no opposition to this argument. In its brief SVFD only claims that the policy Sprague challenges was constitutional and that the request for relief was properly denied. Respondent's Brief, at 45.

Consequently, both this brief and the Court must first address the issue of the constitutionality of SVFD's policy before addressing collateral estoppel, since the former must be decided regardless of how the latter is decided. Moreover, some aspects of the collateral estoppel may resolve themselves once the constitutionality of the policy is determined.

B. SVFD admits that its policy is unconstitutional if it is not viewpoint neutral.

This case arose because SVFD claims it was either permitted or perhaps even required to restrict the expression of religious views by its employees. SVFD relies heavily upon a single case, *Berry v. Dep't of Soc. Servs*., 447 F.3d 642, 652 (9th Cir. 2006), to demonstrate that some restrictions on employee speech are constitutionally permissible. However, SVFD not only admits, but positively endorses, the controlling proposition that it may not restrict employee speech in a manner that is not viewpoint neutral: as Heading V-A-1 of SVFD's brief proclaims:

"SVFD's email system is a non-public forum, thus, SVFD's policy must be, and is, viewpoint neutral." Brief of Respondent, at 13.

As subsequent sections of this brief make clear, SVFD cannot sustain its claim that its policy *was* viewpoint neutral. But the important point of clarification at this juncture is SVFD's adoption of the same legal standard as that proposed by the plaintiff. This legal standard applies in two areas of this case: first, SVFD restricted religious expression on the electronic bulletin board that was made available to employees for a wide variety of personal uses; second, SVFD restricted religious expression in the use of its email system. As to both, SVFD admits that viewpoint neutrality was required.

III. ARGUMENT IN REPLY AS TO DISPUTED POINTS

A. SVFD's policy was not in fact viewpoint neutral.

As noted above, SVFD admits that its policy is unconstitutional if it is not viewpoint neutral. Thus, the decisive question on this appeal is whether the evidence presented to the trial court established that the policy was viewpoint neutral and thus constitutional, or instead discriminated on the basis of viewpoint and thus should have been found unconstitutional. As noted previously, SVFD restricted Sprague's speech in two venues: the first was the electronic bulletin board that employees used in a way

analogous to a traditional corkboard, and the second was in the use of the email system.

1. SVFD singled out religious speech for exclusion from an electronic bulletin board that was *intended* for a broad variety of personal communications by employees.

SVFD maintained an electronic bulletin board which was used just as a traditional corkboard would be used to post announcements of various kinds, and which was created specifically for personal use by SVFD employees. Permitted use of the electronic bulletin board included upcoming events (such as a birthday celebration or fundraiser for a charity which the employee supported), items for sale (from hay to bikes and motorcycles), and other personal uses. CP 356. There was no expectation that the electronic bulletin board (any more than a physical corkboard counterpart) would be restricted to work-related communication.

Although SVFD asserts in its brief that SVFD was entitled to (and did) restrict the use of SVFD resources to "SVFD business,"[1] it imposed no such restrictions on the use of the electronic bulletin board—except that it informed Sprague that he could not use the electronic bulletin board to post messages "that had a religious message." Respondent's brief at 23;

[1] See, for example, Respondent's Brief at 16-17.

CP 153. SVFD's restrictions on the use of the electronic bulletin were neither content neutral nor viewpoint neutral; its policy focused solely on prohibiting speech with religious viewpoints, namely Sprague's communication to other firefighters of the activities of the religious/professional fellowship of which he was a member. Thus the record bears out Sprague's contention in his opening brief that SVFD singled out religious speech for adverse treatment. Such actions completely contradict SVFD's claim that its policies were viewpoint neutral.[2]

2. SVFD admits that it practiced viewpoint discrimination in disciplining Sprague for expressing a religious viewpoint.

Many discrimination cases require the fact-finder to examine the facts and circumstances of the case to determine whether the employer's

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[2] First amendment law distinguishes between restrictions on speech in a *public forum* and restrictions concerning a *non-public forum*. *Knudsen v. Washington State Executive Ethics Bd.*, 156 Wn.App. 852, 235 P.3d 835 (Div. 3 2010). If a government agency opens up a *public forum*, such as a public park or a town hall, permissible restrictions must be content-neutral and may address only such aspects as time, place and manner. By contrast, when a government agency opens a *nonpublic forum*, it may make reasonable restrictions on content (based upon the purpose for opening the nonpublic forum), but the restrictions must still remain *viewpoint neutral*. *Id.* The parties are agreed that Sprague's speech was restricted in a *nonpublic forum*, and the parties agree that the restrictions must be *viewpoint neutral.* Although SVFD's CR 30(b)(6) representative, Valerie Biladeau, repeatedly referred to SVFD's policy as being "content neutral," the issue in this case is not whether the restrictions were content neutral, but whether they were viewpoint neutral. Of course, since the policy described specifically focused on the content of the communications, the policy would also fail the content neutrality test.

adverse action against the employee resulted from a legitimate purpose (as claimed by the employer) or instead resulted from a forbidden, discriminatory purpose (as claimed by the employee). In this case no such challenge presents itself. SVFD admits that it disciplined Sprague because he expressed religious views. Moreover, Valerie Biladeau, SVFD's CR 30(b)(6) representative, admitted that although Sprague's emails—the ones for which he was disciplined—addressed a topic that was related to SVFD business, they were subject to discipline because they expressed a viewpoint that she thought he was forbidden from expressing. Biladeau contrasted what she called a "content neutral" communication (by which she meant one that made no reference to religious views) with Sprague's communication, which was from his "perspective" (his viewpoint):

> Q: Under your view of the department's policy, the e-mails and newsletters that Jon sent specifically with his newsletters, were they in some way categorically different from the EAP newsletters?
>
> [Objection omitted]
>
> A: I think they were substantially different than the EAP newsletters
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> Q: (By Mr. Albrecht) Okay.
>
> A: -- in that they were not content neutral.
>
> Q: What was not content neutral about them?
>
> A: They were -- if you're talking about his newsletter, they were driven to his belief as he sees his studies in Christ. That's not content neutral.

Q: Okay. And they were offering tips often on the same exact topics as EAP newsletters?

A: Only from his individual perspective of his interpretation of what he had read in the Bible.

Q: Well, I appreciate that. But the topic that was being addressed, they would be similar topics to what the EAP newsletters would cover?

[Objection omitted]

A: The subject language was perhaps the same, but that was the extent of it.

CP 354-55. SVFD's disciplinary action toward Sprague was not based upon Sprague addressing a religious *topic* that was not germane to SVFD's business—he was addressing the *same topic* that had been raised by other employees (in one case the Chief) in email chains and official EAP newsletters distributed by SVFD. Instead, Sprague was disciplined because of the *viewpoint* (what Biladeau called the "perspective"[3]) reflected in his communication. SVFD objected not to the subject of Sprague's communications, but to a *viewpoint*—a "perspective"—that SVFD claimed it had the right to exclude.[4]

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[3] There is no difference in first amendment law between discriminating on the basis of "viewpoint" and discriminating on the basis of "perspective." The terms are used synonymously. For example, in *Bradburn v. North Cent. Regional Library Dist.*, 168 Wn.2d 789, 231 P.3d 166 (2010), the Supreme Court approved an internet filter as being viewpoint neutral: "It is viewpoint neutral because it makes no distinctions based on the perspective of the speaker." *Id.* at 817, 231 P.3d at 180.

[4] If there were any doubt concerning whether SVFD actually engaged in viewpoint discrimination, it would be resolved by the argument SVFD makes that it was *required* to censor Sprague's views for fear of offending the Establishment Clause. The lack of any

SVFD, as represented by Ms. Biladeau, believed that it was observing viewpoint neutrality because it was excluding *all* religious viewpoints, not just those it disagreed with. But the cases cited by SVFD do not support its claim that it is permitted (or required) to exclude religious viewpoints in order to preserve the separation of church and state.

A similar issue was posed in the case cited in Sprague's opening brief, *Good News Club v. Milford Central School*, 533 U.S. 98, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001). If it had chosen to do so, the school district (Milford) could have forbidden any after-school clubs, or it could have chosen to limit after-school clubs to a particular content—for example, to physics or woodworking. Had it done so, it could have constitutionally denied the Good News Club's request because it would have made a legitimate content-based restriction and would have practiced viewpoint neutrality. However, Milford could not avail itself of such a defense. It permitted after-school clubs that promoted discussion of moral and character development—thereby opening a limited public forum. In doing so it was required to remain viewpoint neutral, but it did not. It

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genuine Establishment Clause concern is addressed later in this brief; the point to recognize is that SVFD did indeed single out religious views for disparate treatment compared to the expression of other views.

believed that it was permitted—indeed, required by the Establishment Clause—to exclude clubs expressing a religious viewpoint, even if they were addressing the same topic or content (moral and character development) as other speakers. The Supreme Court held that Milford not only violated the principle of viewpoint neutrality,[5] but that it could not justify its policy by citing the Establishment Clause:

> Milford argues that, even if its restriction constitutes viewpoint discrimination, its interest in not violating the Establishment Clause outweighs the Club's interest in gaining equal access to the school's facilities. In other words, according to Milford, its restriction was required to avoid violating the Establishment Clause. We disagree.

Id., 533 U.S. at 112, 121 S.Ct. at 2103.

SVFD's argument that it is permissible to exclude *all* religious viewpoints from discussions on topics otherwise acceptable is as equally unconstitutional as would be exclusion of one specific religious viewpoint. The trial court seems to agree from the language of its decision that Sprague was indeed communicating on the same *topic* as others, but believed incorrectly that SVFD was permitted to exclude all religious viewpoints even if they were on the same topic already being discussed:

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[5] "[S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." 533 U.S. at 112, 121 S.Ct. at 2102.

> The fire department made a decision that rather than try to parse this out, or just have an open system which allowed for complete discussions of religious issues in connection with fire department issues, they chose not to have any of that type of religious discussion. They were not favoring one position or another. This was truly an "I do not want to go there" type of policy.

RP 48-49. The error in this reasoning is that excluding all religious viewpoints while allowing other viewpoints on the same topic *is* disfavoring one position—that of the speaker with a religious viewpoint. This same reasoning has already been tried and rejected by the Supreme Court:

> The dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech. Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas. **If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one.** It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.

Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 831-32, 115 S. Ct. 2510, 2518, 132 L.Ed.2d 700 (1995) (emphasis added).

Here, for example, the topics were suicide prevention, leadership, etc.,

which topics of discussion were most often initiated *by* SVFD, and to which Sprague simply added his own communications which were informed by his personal religious viewpoint.

SVFD made clear that Sprague was permitted to communicate with fellow employees about the *topic* that he was addressing. SVFD explicitly informed Sprague that he was free to address the topic under discussion, but he could not include his *viewpoint*. As SVFD quotes in their own brief, when Sprague used the email system to invite his fellow employees to attend the Spokane County Christian Firefighter Fellowship, he was not violating SVFD's policy. It was when he cited Scripture or included a religious sign in the email that he was alleged to have violated SVFD's policy:

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

Respondent's Brief at 26; CP 481. It is hard to imagine a more blatant example of viewpoint discrimination.

Despite SVFD's often repeated and confident assertion that its policy was viewpoint neutral, SVFD's brief does not (nor can it) seriously contest the undisputed record that it singled out religious expression for

adverse treatment. Instead, SVFD attempts to justify this discrimination on two grounds: first, it cites cases in which restriction on speech, even explicit restrictions on religious speech, have been approved. Second, it raises an independent argument (in stark contradiction to its earlier claim of viewpoint neutrality) that in expressing a religious viewpoint, Sprague himself violated the Establishment Clause (Brief of Respondent, at 27), and therefore SVFD was required to prohibit him from doing so. Neither argument is supported by the applicable law, and both undercut SVFD's claim that it never engaged in viewpoint discrimination.[6]

3. The case relied upon by SVFD does not excuse viewpoint discrimination.

The principal case upon which SVFD relies, *Berry*, 447 F.3d 642, approved of an employer's denying an employee the right to express his religious views. However, there are critical differences between that case and this. Berry was a state employee whose job was to conduct client interviews, including counseling, with unemployed and underemployed clients. Ninety percent of the interviews he conducted with clients occurred at his cubicle in the state office building. Berry claimed the right

[6] SVFD fails to explain this obvious inconsistency in its own briefing: if SVFD singled out religious expression because of a feared violation of the Establishment Clause, how can it continue to claim that its policy was viewpoint neutral?

to display religious symbols at his cubicle and to share his religious beliefs with *his clients*, including praying with them. In addition, he demanded the use of his employer's conference room to conduct prayer sessions with fellow employees. As to the latter, he did not claim (nor could he prove) that the use of the conference room was in connection with his official duties.

Berry claimed that because the employer permitted use of the conference room for birthday parties, he was entitled to use it for prayer meetings. Berry's argument failed for reasons completely inapposite to Sprague's situation: First, Berry's insistence on exclusive (albeit temporary) use of his employer's physical space is entirely different from posting communications to an electronic system that in no way limits the use of that same system for other purposes. Further, Berry failed to recognize that his employer was making a legitimate *content-based* restriction on the use of the conference room. The employer was entitled to permit the conference room to address only certain *topics*, and it remained *viewpoint neutral* in doing so. If Berry could have shown that his employer permitted a Kiwanis Club and a sports club to use the conference room, but denied Berry use of the conference room for prayer meetings, Berry could have succeeded in showing that his employer's restrictions were not viewpoint neutral.

As to Berry's claim that he was entitled to share his faith with clients, and to display religious symbols at the cubicle where he interviewed, the court made note of the fact that Berry was seeking to share his religious views *with members of the public* while conducting his official business. *Berry,* 447 F.3d at 651. As a result, "any discussion by Mr. Berry of his religion runs a real danger of entangling the Department with religion." *Id.* By contrast, the record in this case is clear that both the bulletin board and the email system Sprague used were available only to fellow SVFD employees. SVFD not only admits this fact, but justifies its conduct because of that fact. Brief of Respondent, at 14.

Moreover, Berry's supervisor made clear that "the prohibition on talking about religion only applied to clients." *Berry,* 447 F.3d at 646. More explicitly, the court found that the policy followed by Berry's employer "**does not prohibit Mr. Berry from talking about religion with his colleagues**." *Id.* (emphasis added). This is consistent with the decision in *Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204 (9th Cir. 1996), in which, as here, there was no "plausible fear" of an Establishment Clause violation. *Tucker* held that when the speech of a public employee is internal to the agency and could not cause a reasonable person to believe the state is endorsing a specific religious view, there is "no legitimate basis for…an order prohibiting all advocacy of religion in the

workplace on the ground that it is necessary to avoid the appearance that the state is favoring religion." *Id.* at 1213.

In the case at bar, by contrast to *Berry*, SVFD took the position that even when communicating by email to his fellow employees about topics that were work-related, Sprague was required to keep his communications "content neutral"—by which Biladeau explained meant the exclusion of any reference to his religious viewpoint: "I would hope I hadn't seen one [email] that mentioned religion of any kind." CP 353.[7]

In affirming the trial court's dismissal of Berry's claim, the 9th Circuit acknowledged that a public employer must navigate "between the Scylla of not respecting its employee's right to the free exercise of his religion and the Charybdis of violating the Establishment Clause of the First Amendment by appearing to endorse religion." *Berry*, 447 F.3d at 646. While SVFD would have been entitled to take reasonable steps to insure that Sprague did not create confusion as to whether he was speaking for SVFD or for himself, there is no evidence in the record that there ever was confusion or even a risk of confusion of this type. None of Sprague's

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[7] It would be one thing if Sprague attempted to engage his fellow employees in the *topic* of religion. But SVFD admits that Sprague was disciplined for email communications in which he addressed topics – such as suicide prevention and leadership – that were germane to SVFD business. It was the viewpoint he expressed, not the topic he raised, to which SVFD objected.

fellow employees ever complained that they were offended by his comments. CP 359-60. Thus, SVFD has failed to establish that the restrictions it imposed upon Sprague were parallel to the ones approved by the 9th Circuit in *Berry*, and by contrast SVFD's policy falls squarely into the category of unconstitutional policies prohibited by *Tucker*.

4. Sprague did not violate the Establishment Clause by expressing his religious views.

As noted previously, SVFD simultaneously argues that its restrictions were viewpoint neutral while maintaining that it had a legal duty to restrict religious views based upon the Establishment Clause. SVFD asserts, "SVFD was constitutionally obligated to curtail the speech of Mr. Sprague in order to prevent the appearance that SVFD, a governmental entity, was endorsing religion." Brief of Respondent, at 25-26. In making this argument, SVFD necessarily admits that it singled out Sprague's religious expression for adverse treatment, but seeks to justify doing so by claiming it was constitutionally obligated to do so. Just as a similar argument was rejected by the United States Supreme Court in *Good News Club*, *supra*, SVFD's assertion of the Establishment Clause as a defense should be rejected here. As noted previously in the discussion of the *Berry* case, the 9th Circuit recognized that employees are entitled to

share their religious beliefs with their co-workers, and by permitting such expression the employer does not endorse those views.[8]

B. Sprague's employment claim is not barred by collateral estoppel.

If SVFD imposed an unconstitutional restriction on Sprague's expression of his viewpoint, then Sprague is entitled to injunctive relief. In addition, the dismissal of Sprague's employment claim should be reversed, since it was based upon a misapplication of collateral estoppel. As pointed out in Appellant's opening brief, the principle of collateral estoppel applies only to issues of fact, and only when there has been a full and fair hearing before a competent tribunal and the non-moving party is attempting to get a "second bite of the apple."

Sprague's Opening Brief details many reasons for rejecting the application of collateral estoppel to bar his case. SVFD's brief highlights the fatal flaw in the trial court's reasoning: the Civil Service

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[8] In disciplining Sprague, SVFD claimed that Sprague violated Safety and Operations Policy #171, which prohibits "ethnic slurs, racial epithets, or disparagement of others based on race, national origin, sex, age, disability or religious beliefs. Communication that is in any way construed by others as disruptive, offensive, abusive or threatening is prohibited." CP 153. If Sprague's religious expression had violated this provision, he could have been disciplined in a way that was viewpoint neutral. But the record is clear that Sprague's employer never received a single complaint as to the *manner* of Sprague's communication. CP 359-60. Instead, it was the *viewpoint* being expressed that led to the adverse employment action.

Commission's lack of competence to decide the question of whether SVFD's policy was constitutional. Both the trial court and SVFD recognize this fact. "They [the Civil Service Commission] would not have the competence to make a legal conclusion about constitutionality." RP 50:7-8, quoted in Respondent's Brief, at 38.

SVFD attempts to avoid the implications of this admission by claiming that the Civil Service Commission "did not address the constitutionality of SVFD's policy, but rather, addressed the application of the policy, which is squarely within the competence of the Commission." Brief of Respondent, at 32-33. This is both factually in error as well as logically inconsistent.

SVFD's claim is factually false because the Civil Service Commission not only believed that it was obligated to decide whether or not SVFD's policy was constitutional; it actually did so.[9] And it would render the constitution meaningless to suggest that a government agency can adopt an unconstitutional policy but escape legal accountability if it applies an unconstitutional policy consistently.

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[9] "It should be noted that in arriving at its unanimous decision the Civil Service Commission is fully aware of its additional obligations to follow the law relating to the protections set forth within the First Amendment to the United States Constitution . . . " CP 103

SVFD's argument regarding the Commission's competence would be persuasive if Sprague had argued before the Commission that SVFD's policy was *applied* in an unconstitutional manner toward him –for example, by favoring some religious viewpoints and disfavoring others. In such a case, a Civil Service Commission finding that an employee's constitutional rights had not been violated would be entitled to deference. This would be consistent with the doctrine of collateral estoppel because it would be based on a factual finding. Here, by contrast, the question of whether SVFD's policy is facially unconstitutional is purely a conclusion of law; there was no factual as-applied dispute because Sprague never contested the charge that he violated SVFD's policy. Thus, the Commission's finding that he did so has no significance in the current litigation. By their own admission, the Commission's determination that the *policy* was constitutional is entitled to no deference, because the Commission had no competence to decide it and because it would substitute the Commission's judgment on a conclusion of law for this Court's judgment on constitutionality. In such a case, the principle of collateral estoppel does not apply.

IV. CONCLUSION

For the foregoing reasons, appellant Jonathan J. Sprague requests that the Court of Appeals (1) reverse the judgment below applying collateral estoppel to dismiss Sprague's employment claim; (2) reverse the judgment below dismissing Sprague's claim for injunctive relief; and (3) remand the case to the trial court with instructions to enter partial judgment that the policy adopted by SVFD violates both state and federal constitutions, along with further proceedings consistent therewith.

Submitted this 10th day of February, 2016.

ALBRECHT LAW PLLC

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On February 10, 2016, I served the document to which this is annexed pursuant to written stipulation between the parties as follows:

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Signed on February 10, 2016 at Spokane, Washington.

Melanie A. Evans