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Supreme Court No. 95468-2
Court of Appeals No. 49631-3-II

SUPREME COURT OF THE STATE OF WASHINGTON

JOSHUA BILLINGS, individually,

Petitioner

vs.

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

Respondents

RESPONDENTS' ANSWER TO BRIEF OF AMICUS CURIAE WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION (WELA) IN SUPPORT OF PETITION FOR REVIEW

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I. STATEMENT OF CASE RELATED TO ANSWER

In *Billings v. Town of Steilacoom*, 2 Wn.App.2d 1, 408 P.3d 1123 (2017), Division Two of the Court of Appeals summarized the arbitrator's findings at p. 1:

> The arbitrator concluded……just cause supported Billings' termination based on unsatisfactory performance, insubordination, departures from the truth, failure to perform, unbecoming conduct, unsatisfactory performance, and leaving his duty post.

Thereafter, in the body of the opinion, the court used the shorthand "just cause" to describe the arbitrator's ultimate conclusions in her 40+ page ruling. The Court noted Appellant Billings failed to provide clear, substantive argument regarding his public policy (or §1983) claims, but the court decided to briefly address them anyway. *Id*. at 21. This does not suggest the record did not otherwise support the result.

WELA's brief ignores the evidentiary record in this case, which included an arbitrator's detailed factual findings that Officer Billings did engage in misconduct that violated Town and Department policies, was contrary to the interests of the Town, and was the reason he was terminated. However, she also found Billings unwilling to change his conduct, and that the Town demonstrated the negative impact his conduct had on the

Department. CP 1398-1454 (*Arb. Award, attached as Appendix A*).[1]

She further ruled Billings demonstrated a "destructive" attitude that greatly harmed his performance and relationships with his superiors, that he "lost sight of the fact that he worked for the Town[,]" and the evidence supported Chief Schaub's conclusion that "Billings had grown into… [a] self-serving manipulator of the system and disrespectful and resistant to all who dare to suggest change to the system in place." CP 1449.[2] The arbitrator concluded "termination is the just and appropriate result" *because* the evidence showed that, if he remained employed, "he could do damage to the department as a PSO who would continue to challenge the directions." CP 1451.

The only evidence Billings submitted in opposition to the Town's summary judgment motion was his own conclusory declaration (CP 1639-1658) expressing his disagreement with the arbitrator's factual findings. CP 1769-1779. It lacked any evidence indicating he did not fully and fairly litigate issues and evidence related to the conduct for which he was terminated. Nor did Billings submit any additional evidence demonstrating

[1] Billings violated specific Department policies related to poor officer safety tactics (CP 1433-1434), insubordination (CP 1435-1437), lying (CP 1437-1439), failure to perform job duties (CP 1439-1440), unbecoming conduct (CP 1440-1441), unsatisfactory performance (CP 1441-1443), and leaving his duty post (CP 1445).

[2] "[Billings'] disdain for both Schaub and McVay was demonstrated by his testimony at the hearing… Billings clearly does not see the impact of his attitude." CP 1448-1449.

the Town's termination decision was instead (or also) "substantially motivated" by an intent to discriminate against him because of a disability or in retaliation for union activity.[3]

Billings obtained a continuance of the summary judgment hearing partially on the basis that he wanted more time to conduct discovery regarding the arbitration proceeding and potentially the "improper motives of the Defendants in terminating Plaintiff's employment." CP 1872. *See generally*, CP 1511-1514, 1869-1874. He never sought any additional discovery or produced additional evidence. Simply put, Billings' evidence in this case consisted of nothing more than his conclusory assertions, which the Court evaluated and dismissed for failing to overcome a CR 56 motion.

II. ARGUMENT

A. To the Extent WELA Raises Issues For the First Time Not Raised by Petitioner, the Court Should Not Consider Them.

The court need not consider issues raised for the first time by amici curiae. *Madison v. State,* 161 Wash. 2d 85, 104, 163 P.3d 757, 769 (2007). Petitioner never argued the Court of Appeals erred by (1) failing to apply the *Scrivener* standard (the court did), or (2) that the opinion conflicts with *Rose v. Anderson Hay & Grain* by applying the four-part *Perritt* framework.

[3] Billings declaration is void of any examples of additional evidence he would have offered in the arbitration proceedings that was rejected or excluded, of procedural irregularities, or that would change the outcome of the summary judgment analysis applied by the Court of Appeals. CP 1639-1658.

(*Amici*, p. 7). Thus, the court should not grant review on these issues.

B. WELA Fails to Demonstrate How the *Billings* Opinion Conflicts With Decisions from Washington Supreme Court Based on the Record in This Case and is Therefore Not Helpful To the Court.

Issues articulated by WELA in support of the Petition for Review here do not demonstrate that the Court of Appeals Opinion conflicts with decisions from the Washington Supreme Court and therefore do not support review of the Opinion. RAP 13.4(b).

1. WELA Fails to Identify a Conflict with the Supreme Court Decision in *Scrivner*; Division Two Properly Applied the *Scrivner* Standard and Found Billings Failed to Carry His Burden to Produce Evidence of Unlawful Discrimination.

WELA argues the court's Opinion conflicts with *Scrivner v. Clark College*, 181 Wn.2d 439, 334 P.3d 541 (2014) by applying the wrong standard to Billings' RCW 49.60 "disparate treatment" disability discrimination claim because the court found no evidence of "pretext" for discrimination but did not *also* expressly state whether discrimination was a "substantial motivating factor." *Amici*, p. 5-6. To the contrary, the Court cited and relied on the standard announced in *Scrivner*, quoting extensively from the case to articulate the standard it applied, including that Billings could withstand summary judgment only if he could produce evidence of pretext or "substantial motivating factor" as urged by Amici. *Billings*, at 24. He simply did neither.

Recently, in *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.*, 189

Wash. 2d 516, 527–28, 446-447, 404 P.3d 464, 470–71 (2017), this court confirmed the same *McDonnell Douglas* framework should still be used to evaluate RCW 49.60 claims on summary judgment.[4] Nonetheless, Washington courts have never diminished the role of actual admissible evidence as opposed to mere conclusory allegations to meet the plaintiff's burden on this last phase of a CR 56 summary judgment analysis. *See, Mikkeleson*, at 536 (age discrimination claim dismissed because plaintiff presented "almost no" evidence of age-related animus); *Simmons v. Microsoft Corp*., 194 Wash. App. 1049 (Div. I), *rev. den*., 186 Wash. 2d 1031, 385 P.3d 121 (2016) (discrimination claims dismissed absent production of evidence of pretext *or* that her race was a substantial factor in termination); *see also, Opinion*, at 24 ("But an employee's speculation or subjective belief on her performance is irrelevant").

Billings failed to offer evidence that the Town's reasons for the termination were not true *or* were a cover up for discrimination. He *also* failed to offer evidence in the trial court creating a question of fact as to whether unlawful discrimination was "nevertheless a substantial factor

[4]Nor does *Scrivner* suggest collateral estoppel should not apply. *Carver v. State*, 147 Wash. App. 567, 574, 197 P.3d 678, 681 (2008) ("[T]he Legislature knows how to bar issue preclusion when it wants to do so. It has not chosen to do so in the WLAD").

motivating" the Town's otherwise legitimate decision to terminate him.[5]

2. WELA Fails to Demonstrate *Billings* Conflicts with *Sprague; Sprague* Does Not Hold that Collateral Estoppel Cannot Ever Apply to a Public Policy Wrongful Discharge Claim, Nor Does *Billings* Hold that a "Just Cause" Finding Will Always Collaterally Estop Wrongful Discharge Claims.

Unlike *Sprague v. Spokane Valley Fire Dept., 409 P.3d 160 (2018),* which resolved a significant *legal* issue of *constitutional* interpretation—and which also exceeded the Commission's jurisdictional authority—this case involves employment claims based on a factual evidentiary record applied to an already well-established legal framework.[6] The specific *factual findings* made by the arbitrator are the very facts Billings wants to re-litigate to a different judge here. *Sprague* did not overrule *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987), applying collateral estoppel to preclude re-litigation of *factual* issues in a public policy and discrimination lawsuit. *Id*. At 184.[7]

Further, the "disparity of relief" referenced in *Sprague* is not present here. The arbitrator was not limited to the remedy of reinstatement, but was

[5] Amici's reference to "discrimination because of union activities" (p. 6) is a confusing misrepresentation of Washington law; "union status" is not a protected class under WLAD. RCW 49.60.030.

[6] "…Sprague's underlying claim is a Constitutional one for which we grant the Commission no deference. As a result, we decline to apply collateral estoppel to Sprague' case ...." 409 P.3d at 184.

[7] *See also, Piel* v. *City of Federal Way, 177 Wn.2d 604,* 615-616, 306 P.3d 879 (2013); *Reninger v. Department of Corr.*, 134 Wash.2d 437, 951 P.2d 782 (1998); *Christensen v. Grant County Hosp. Dist. No. 1,* 152 Wash.2d 299, 96 P.3d 957 (2004).

also authorized to award back pay and other benefits to Billings. *Id*., at 185.[8] Finally, this court determined that public policy considerations in *Sprague* weighed against applying collateral estoppel because it involved litigation of an "important public question" of both Federal and State law: "the extent to which an employer may restrict an employee's speech, especially when that speech is religious." *Id.* at 185-186.[9] The parties agreed it was a constitutional question of law that needed to be decided by the Court.

3. WELA Fails to Demonstrate How *Billings* Conflicts With *Rose* By Concluding Billings Failed to Produce Evidence That The Employer's Termination was Motivated by an Unlawful Intent to Retaliate for Protected Conduct Furthering Public Policy.

WELA argues that, because Billings asserted that he was fired for "exercising a legal right" (union activity), the 4-part *Perritt* framework does not apply. *Amici*, p. 7. However, Amici fails to explain how the Opinion actually conflicts with *Rose v. Anderson Hay & Grain Co.*, 184 Wash. 2d 268, 286–87, 358 P.3d 1139, 1147 (2015), or a standard the court should have applied that would command a different result.

In *Rose*, the court reaffirmed the use of a "burden-shifting framework track[ing] the same burden-shifting analytical framework used

[8] WELA's suggestion that the commission in *Sprague* could award backpay is contrary to the court's ruling, *See, Sprague*, 409 P.3d at 185.

[9] *See, also, Sprague v. Spokane Valley Fire Dept.*, 196 Wn.App. 21, 49-50, 381 P.3d 1259 (2016) (dissent) (employee there was terminated for violating a directive or policy that was in and of itself unconstitutional and, thus, operated more like a "prior restraint" of First Amendment rights).

for other employment discrimination claims." *Id*. at 276. Once the employee meets his burden of "demonstrating that his discharge *may have been* motivated by reasons that contravene a clear mandate of public policy, the burden shifts to the employer to prove that the dismissal was for reasons other than those alleged by the employee" *Id.* (noting "the common law already contained clarity and jeopardy elements") (emphasis added).

The Court of Appeals properly ruled that "Billings must prove his protected union activity was a substantial factor in Steilacoom's decision to discharge him to succeed on his wrongful discharge claim" (causation element). *Billings*, at 29. He simply did not produce such evidence.

4. WELA Fails to Demonstrate How *Billings* Conflicts With *Rickman* By Concluding The Evidence Established the Town Had Established an Overriding Justification For Termination When Balanced Against Public Policies Billings Claimed he Was Supporting.

WELA cites to the unpublished Div. I opinion, *Rickman v. Premera Blue Cross*, 2016 WL 2869083 (appeal after remand from 184 Wn.2d 300 (2015)), to suggest Washington precedent requiring that an employer affirmatively agree the employee engaged in "public policy-related conduct" and that the employer fired him because of it before raising the "overriding justification" defense or obtaining a ruling on summary judgment. *Amici*, p. 8. Regardless of where the burden to establish "overriding justification" is placed, the evidentiary record in this case

establishes that the threshold was met. Requiring a defendant employer to agree with disputed legal allegations of an employee before being allowed to demonstrate the employee cannot prevail on the claim regardless of a disputed fact on one element is contrary to well-settled summary judgment principles. *See, e.g., Mikkelson, supra* (employee must still establish a question of fact as to essential element of her claim).

The Opinion concluded: "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 exists an overriding justification for his dismissal even if he could prove the other elements." *Billings*, at 29. The record provided the detailed evidentiary basis for this conclusion. *See, Appendix A.*

Here, Billings *does* allege that much of the same conduct for which he was terminated (*i.e.*, insubordination, failing to follow directives and policies because he disagreed with them, etc.) was part and parcel of his "protected activity". *See, e.g. Appellant's Brief*, pp. 9-12; CP 1414-1416, 1418-1427, 1435-1443 (Billings argued his repeated disagreement with the hiring of a Fire Operations Chief, and refusal to follow directives related to Chief McVay was protected "union" advocacy and a "matter of public concern"). *See also*, CP 14-102, 1716-1727, 1780-1790. *Even assuming* Billings' conduct was considered "protected" activity furthering important

public policy interests, the Court of Appeals balanced the justification established by the Town (and the arbitrator's specific factual findings) to establish as a matter of law that the Town was justified in firing Billings because of the proven detrimental impact his conduct had on the interests of the Town. Petitioner and WELA agree this balancing of such interests is a question of law.

DATED this 23rd day of April, 2018.

Respectfully submitted,

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SUPREME COURT OF THE STATE OF WASHINGTON
OF THE STATE OF WASHINGTON

JOSHUA BILLINGS, individually, Plaintiff, v. TOWN OF STEILACOOM, a municipal corporation, RONALD SCHAUB, individually, and PAUL LOVELESS, individually, Defendants.	Supreme Court No. 95468-2 DECLARATION OF SERVICE

I, LaHoma Walker, declare that I am over the age of 18 and am a legal assistant at the law office of Keating, Bucklin & McCormack, Inc. P.S. I further declare that on April 23, 2018, a true and correct copy of the **RESPONDENTS' ANSWER TO BRIEF OF AMICUS CURIAE WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION (WELA) IN SUPPORT OF PETITION FOR REVIEW** was sent to the following parties of record **via email**:

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DATED this 23rd day of April, 2018, at Seattle, Washington

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