

NO. 37178-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
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CAROLE JORDAN,

Appellant,

v.

STATE OF WASHINGTON d/b/a LOWER COLUMBIA  
COMMUNITY COLLEGE,

Respondent.

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REPLY BRIEF ON BEHALF OF APPELLANT, CAROLE JORDAN

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**I. PERC’s “Factual Findings” Do Not Bar Ms. Jordan’s Discrimination Claims Because They Are Not Factual Findings**

In its brief, Respondent argues that the doctrine of collateral estoppel prevents retrial of “determinative facts,” citing *Christensen v. Grant County Hospital District*, 152 Wn.2d 299, 96 P.3d 957 (2004). Accordingly, it continues, collateral estoppel applies where “an administrative agency has acted in a judicial capacity and resolved disputed issues of fact,” citing *Astoria Fed. Savings & Loan v. Solimino*, 501 U.S. 104, 107-108, 111 S.Ct. 2166 (1991).<sup>1</sup> These cases provide no support for Respondent’s argument that collateral estoppel should be applied to Ms. Jordan’s case because the PERC findings of fact are really conclusions of law.

PERC Findings of Fact Numbers 4 – 12 all turn on the legal conclusion that the Respondent’s acts were not “unlawful.” CP 86-87. For example, in Number 4, the PERC Examiner did not find that Respondent “on 12 occasions [had not given Ms. Jordan] incomplete information on jobs, short deadlines on jobs, or withheld jobs.” CP 86. Rather, he found that these acts were not unlawful under RCW 41.56. Similarly, in Number 12, he found no discrimination because of union activity by virtue of

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<sup>1</sup> The *Solimino* case is discussed *infra* at p. 3.

Respondent's "cancel[ing] meetings with Jordan and her union business agent." CP 87.

The PERC Examiner did not find that these events had not occurred – indeed the occurrence of most of these events had not been disputed. Rather, he found that such actions as the Respondent's failure to use the job information form, and thus to provide Jordan with complete job details, did not constitute an unfair labor practice. CP 72. So too, with respect to Number 12, he did not dispute the facts as alleged, but rather concluded that "Jordan failed to show that there was a plan to discriminate against Jordan for her union activity." CP 84.

The operative word in each of the PERC "Findings" is "unlawfully." *Id.* Whether certain acts of an employer are "unlawful" is a conclusion of law, not a finding of fact. As such, the PERC Examiner's conclusions cannot be used to impose collateral estoppel with respect to a civil case that does not allege discrimination because of union activity prohibited by RCW 41.56, but rather age discrimination prohibited by RCW 49.60. This distinction was specially emphasized in *Christensen's* requirement that the administrative agency be acting "within its competence." The Public Employment Relations Commission and its examiners have neither expertise nor competence to adjudicate what acts constitute unlawful age discrimination. Their expertise is limited to unfair

labor practices committed to interfere with employee's rights to union representation.

In *Solimino, supra*, a state agency with jurisdiction over age discrimination matters had entered a determination on the merits adverse to the plaintiff's age discrimination claim. Despite the state agency's competency to address discrimination claims, the U.S. Supreme Court determined that a state administrative agency's findings on a state law discrimination claim had no preclusive effect on a federal age discrimination case. The *Solimino* court stated that in order for collateral estoppel to apply, the administrative decision must have addressed "an issue identical in substance to the one [the litigant] subsequently seeks to raise. . ." 501 U.S. at 108. Before PERC, Ms. Jordan raised an unfair labor practice based upon her union rights; before the Superior Court she raised an unfair employment practice based upon her civil rights. These are not "identical issues," and thus no preclusive effect should be imposed.<sup>2</sup> See: *Colindres v. Quietflex Mfg.*, 235 F.R.D. 347, 361-62 (S.D. Texas 206), *discussed at length in Ms. Jordan's Opening Brief at pp. 15 – 16.*

The *Jacobson* case cited by Respondent is also inapposite.<sup>3</sup> In that case, Mr. Jacobson was fired for alleged credit card abuse. He appealed

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<sup>2</sup> In addition, as noted by the *Solimino* court, issue preclusion does not adhere where, as here, the enacting legislative body has made clear that civil rights victims have a right to adjudication of such rights in court. *Id. See discussion infra at pp.5 -6.*

<sup>3</sup> *Jacobson v. WSU*, 2007 WL 26765 (Appendix F to Respondent's brief).

his discharge to the Personnel Appeals Board, where he argued that he “was discharged in retaliation for his lawsuit against WSU and his subsequent attempt to enforce the settlement agreement.” The PAB, which had broad jurisdiction to consider any reason for his discharge, granted Jacobson relief, changing termination to demotion. Applying collateral estoppel to Jacobson’s federal retaliation case, the federal court found that Jacobson presented his retaliation claim to the PAB and made it a central issue of the PAB appeal, and that the alleged disparate treatment was a necessary element of his retaliation claim, which had been adjudicated and rejected by the PAB.

Here, unlike the PAB, PERC had no jurisdiction over retaliation for any prior age discrimination; it had limited jurisdiction only to consider unfair labor practices defined by RCW 41.56. Ms. Jordan did not adjudicate her age discrimination claim before PERC, and it granted her no relief based upon such claim. Moreover, unlike the PAB, PERC did not conclude that there had been no disparate treatment. For all these reasons, *Jacobson* is distinguishable.<sup>4</sup>

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<sup>4</sup> Respondent’s claim that a “factual finding that the plaintiff has completely failed to produce evidence that a discriminatory action occurred must, necessarily have collateral estoppel effect on subsequent proceedings” is pure cant. As argued in Ms. Jordan’s briefing, discrimination for union activity and discrimination based on age are two completely different things, violating two separate and distinct public policies. Age discrimination was never introduced in the PERC proceedings, PERC had neither jurisdiction nor expertise to consider it, and PERC could not and did not provide relief for the age discrimination that Ms. Jordan experienced.

## II. WAC 162-08-061(1) Does Not Preclude This Action

After acknowledging that the Washington Law Against Discrimination expressly guarantees victims discrimination based on age, sex, race, etc., broad rights to pursue their civil remedies,<sup>5</sup> Respondent disingenuously claims that one of the regulations promulgated by the Washington Human Rights Commission disavows that legislative mandate, citing WAC 162-08-062:

No complainant or aggrieved person may secure relief from more than one governmental agency, instrumentality or tribunal for the same harm or injury.

It is obvious that the regulation seeks only to prevent double recovery – hence the use of the word “relief.” The Commission has made clear that WLAD preserves the rights of aggrieved persons to access to various tribunals: “Except as otherwise provided by RCW 49.60.340,<sup>[6]</sup> the law against discrimination preserves the right of a complainant or aggrieved person to simultaneously pursue other available civil or criminal remedies for an alleged violation of the law in addition to, or in lieu of, filing an administrative complaint of discrimination with the commission...”

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<sup>5</sup> 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. . . . 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.”

<sup>6</sup> RCW 49.60.340 governs civil proceedings with respect to discrimination in real estate transactions.

Nothing in the WLAD regulations suggests that the Commission intended, or indeed would be legally empowered, to contravene the clear mandate of the statute. *State v. Miles*, 5 Wn.2d 322, 326, 105 P.2d 51 (1940); *Seattle High School Chapter No. 200 v. Sharples*, 159 Wash. 424, 293 Pac. 994 (1930).<sup>7</sup> Moreover, as noted above, Ms. Jordan did not “secure relief” nor did she allege the “same harm or injury” before PERC that she is pursuing in the courts. Accordingly, nothing in WAC 162-08-062, or in any other regulation in WAC Chapter 162 justifies extinguishing the rights guaranteed to Ms. Jordan by the WLAD to “pursue any civil . . . remedy based upon an alleged violation of . . . her civil rights. RCW 49.60.020.

### **III. Mixed Motive Case Are Applicable**

Without citation to a single case, Respondent argues that the mixed motive line of cases cited by Ms. Jordan is “irrelevant.” Seeking support for its unfounded argument, Respondent claims that “PERC found that the thirty-three things Ms. Jordan complained of either didn’t happen or were done for legitimate reasons.” Brief, p. 18. As shown above, PERC made no such findings. Rather, PERC based its entire decision on the Examiner’s conclusion that none of the thirty three things were motivated

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<sup>7</sup> The *Miles* court described its rationale: “The basis for the proposition is, of course, that rules and regulations which have the effect of extending, or which conflict in any manner with, the authority-granting statute, do not represent a valid exercise of authorized power, but, on the contrary, constitute an attempt by the administrative body to legislate. *Anheuser-Busch, Inc. v. Walton*, 135 Me. 57, 190 Atl. 297” (5 Wn.2d at 326).

by anti-union animus.<sup>8</sup> *See supra*, pp. 1 - 2. Accordingly, as Respondent concedes in its brief (at p. 19), these mixed motive cases are applicable. Since both state and federal courts acknowledge that where mixed motives exist, adjudication of one motive in an administrative tribunal does not preclude a victim of discrimination from adjudicating her age-motivated case in another tribunal. These cases require reversal of the decision of the court below.

#### **IV. Other Cases Cited By Respondent Are Distinguishable**

Respondent cites *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 745 P.2d 858, for the proposition that it is “irrelevant to the application of collateral estoppel that PERC lacked the authority to decide Ms. Jordan’s WLAD claims,” claiming that the case held that “collateral estoppel applied to bar a plaintiff’s federal civil rights action . . . despite argument that the commission was incompetent to decide civil rights claim” (Brief, p. 25). Like *Christensen* and *Jacobson*, *supra*, *Shoemaker* involved a determination by a civil service commission having broad jurisdiction to assess the reasons for discharge – in contrast to PERC’s limited jurisdiction to determine whether acts were motivated by anti-union animus. *Shoemaker* challenged his discharge before the

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<sup>8</sup> Similarly, Respondent later asserts that “the fifteen PERC findings of fact establish that nothing adverse happened to Ms. Jordan in the workplace” (Brief, p. 22). PERC concluded only that nothing adverse *based on union activity* happened; it did not and could not determine that nothing adverse happened to her for any other reason.

commission, claiming that it was discharged in bad faith and without just cause. Considering the breadth of the issues litigated before the civil service commission, the *Shoemaker* court stated:

The question the Commission decided was whether there was any retaliation at all; whether a bad faith motive played any substantial part in the demotion. Therefore, the issues before the Commission and the trial court -- whether retaliation was a substantial motive behind Shoemaker's demotion -- are identical, and collateral estoppel is appropriate.

Here, as previously noted, PERC has no such broad jurisdiction, and it made no broad determination that there was bad motive of any sort behind its acts. Its decision was limited to whether Respondent's actions had been motivated by anti-union animus. The *Shoemaker* case is distinguishable.

Next Respondent cites language from *Christensen* that "simply because a subject implicates public policy does not mean that application of collateral estoppel contravenes public policy. 152 Wn.2d at 316" (Brief p. 27). But what Respondent fails to state is that the *Christensen* Court's language addresses a context in which the original administrative decision-maker was charged with satisfying the same public policy:

. . . the public policy that Christensen seeks to vindicate is the same public policy that PERC is empowered to enforce--the fair and appropriate collective bargaining between public employees and their employers, untainted by discrimination against union activists. *See* RCW 41.58.020; RCW 41.56.140.

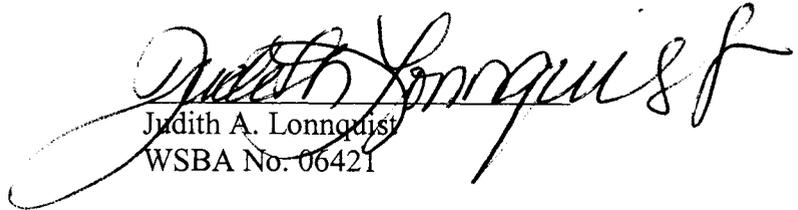
*Christensen* does not hold that where the public policy vindicated by PERC is distinctly different than the public policy vindicated by WLAD, to wit: the right to be free from discrimination because of race, etc., collateral estoppel should be applied. The express public policy mandate is to the contrary – collateral estoppel must not “be construed to deny the right of 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 49.60.020.

#### CONCLUSION

For the reasons set forth herein and in Ms. Jordan’s opening brief, we respectfully request that this Court reverse the decision of the trial court, remand the case for trial on the merits, and award Ms. Jordan her attorney’s fees and expenses on appeal.

Dated this 10<sup>th</sup> day of October, 2008.

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DIVISION TWO

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CAROLE JORDAN,  
Appellant

vs.

STATE OF WASHINGTON, d/b/a  
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STATE OF WASHINGTON  
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CERTIFICATE OF SERVICE

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I, Ann Holiday, declare under penalty of perjury that on October 13, 2008, I caused to be served upon the below-listed parties, via the method of service listed below, a true and correct copy of Reply Brief on Behalf of Appellant, Carole Jordan, and this document.

Catherine Hendricks *via legal messenger*  
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Dated this 13th day of October, 2008.

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