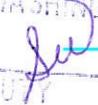


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DIVISION II

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STATE OF WASHINGTON

BY  \_\_\_\_\_  
DEPUTY

Cause No. 49631-3-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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JOSHUA BILLINGS

Appellant,

v.

TOWN OF STEILACOOM, ET AL

Respondents.

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REPLY BRIEF OF APPELLANTS

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



**ORIGINAL**

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## I. INTRODUCTION

Mr. Billings' (hereinafter "Billings" or "Employee") lawsuit asserts he was wrongfully terminated from his position of Public Safety Sergeant by his employer the Town of Steilacoom and the Public Safety Director, Ron Schaub and Town Administrator, Paul Loveless (hereinafter collectively referred to as "Employers," "Steilacoom" or "Town") in violation of public policy and his rights to be free from discrimination, retaliation and deprivation of his constitutional rights. Applying collateral estoppel effect to a labor arbitrator's decision that was generated without a verbatim transcript, deferred retaliation claims to other forums and was not subject to any type of appellate judicial review the trial court granted Employers summary judgment. Billings takes substantial issues with the arbitrator's findings and asserts that a non-reviewable labor arbitration decision is not of sufficient judicial character to support application of claim preclusion doctrines.

Steilacoom evades addressing the central issue on appeal: "May collateral estoppel be applied against a Union Employee based upon a labor arbitration handled by the Union Employee's union?"

Rather, the Employer devotes the bulk of its brief to advancing substantive arguments for summary judgment alleging insufficiency of

evidence supporting Plaintiff's claims and treating the Arbitrator's findings as established facts and conclusions of law. Steilacoom painted the issues at summary judgment as strictly dealing with the application of collateral estoppel. (CP 23). Steilacoom's brief only addresses the controlling case of *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) in passing and then advances California and Washington cases involving administrative hearings subject to full appellate judicial review, as opposed to, final and binding labor arbitrations which have no verbatim transcript, left claims of retaliation to other forums and was not subject to appellate review. The Employer wrongly asserts that the labor arbitration is of sufficient judicial character that it is the legal equivalent of an administrative proceeding to which collateral estoppel may be applied. The Employers' invitation to engage in weighing the parties' competing factual recitations properly left to the trier of fact should be rejected.

The Employer parses out its analysis of the collateral estoppel doctrine in various parts of its brief wrongly concluding the Arbitrator's findings render the Employee's complaint dead on arrival.

## II. LEGAL DISCUSSION AND ARGUMENT

### A. Collateral Estoppel Should Not Be Applied to An Unreviewable, Labor Arbitration Decision.

*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*”) is controlling. No case relied upon by the Employer distinguishes this holding and all except one do not even cite to *W. Branch*. In *W. Branch*, the United States Supreme Court held that the limited forum presented by a Collective Bargaining Agreement labor arbitration is inappropriate to bar a 42 U.S.C. §1983 civil right claims under application of collateral estoppel. *W. Branch, at*, 466 U.S. 284, 285–93, 104 S. Ct. 1799, 1800–04, 80 L. Ed. 2d 302 (1984).

It is evident from the Arbitrator’s award that Billings’ union was not permitted to build a record upon which the claims in this lawsuit rely. To the contrary, the Arbitrator stated Billings’ retaliation claims should be pursued in a separate forum. Billings ¶ 67, Ex. 4. (CP 1657, 1691).

Employers’ Motion for Summary Judgment asserted the following central issue: “Where Plaintiff has fully and fairly litigated the basis for his termination, and an arbitrator ruled that the Town proved by clear and convincing evidence that Plaintiff engaged in misconduct and that the Town had “just cause” to terminate his employment based on the misconduct, should Plaintiff’s discrimination and tort claims alleging wrongful termination be dismissed because he cannot establish the

required elements of his claims and therefore they are barred by the doctrines of *res judicata* and/or collateral estoppel?" (CR 23).

Employers' Summary Judgment Motion presented no affidavits or depositions supporting their claimed factual allegations that the Employee actually engaged in the misconduct alleged. Rather, the supporting declarations dealt exclusively with the establishment of the administrative record of exhibits and the arbitrator's decision. (Declaration of Freeman - CR 103 -111; Declaration of Loveless - CR 112-132; Declaration of Hoffman - CR 133 - 1461; Declaration of Freeman CR 1462-1501. In response to the Employee's Opposition to Summary Judgment the Defendant again failed to provide any substantive evidence supporting their motion but relied exclusively upon the Arbitrator's Arbitration Award and opposed the admissibility of some of the Employee's evidence. (Declaration of Freeman - CR 1763-64).

Rather than addressing the holding of *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) head on, the Respondent treats the Arbitration Award as verities. As such, if claim preclusion principles cannot be applied to Billings' union's unreviewable labor arbitration decision Employers' argument fails and analysis of the underlying claims is not required.

As in Billings' case, the arbitrator in *W. Branch* held that there was "just cause" to terminate the police officer. *Id.* 466 U.S. at 286, 104 S. Ct. at 1801. Here the Town of Steilacoom argues, as did the Town of West Branch, that the finding of just cause for the firing acted as collateral estoppel to preclude Billings' claims. However, the Town of Steilacoom is incorrect. Strong policy reasons exist not to apply collateral estoppel to an unreviewable arbitrator's award lacking a verbatim transcript.

The U.S. Supreme Court 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)(emphasis supplied). The nature of the arbitration proceeding in Billings' case is not of sufficient judicial character to warrant applying collateral estoppel or *res judicata*.

Collateral Estoppel should not be applied if it will work an injustice. The injustice factor recognizes the significant role of public policy. *State v. Williams*, 132 Wash.2d 248, 257, 937 P.2d 1052 (1997). Thus, the 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 would prevent review of important public issues of corruption (CP 1640-41,1648-50), discrimination (CP 1640,1647-48, 1649,1651, 1656-57) retaliation, cronyism (CP 1641-444,1646-48), waste of funds and matters of public concern (CP 1640-41, 1649-51, 1654) from being fully reviewed.

All of the cases relied upon by the Employer for applying collateral estoppel in this case may be distinguished<sup>1</sup>. The Employer's brief repeatedly uses "administrative decisions" as the legal equivalence of arbitrator's award. See eg. Brief of Respondents, pgs. 14, 16, 28, 41, 42. The cases Employers cited in which an arbitrator's decision was involved

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<sup>1</sup> *Robinson v. Hamed*, 62 Wash. App. 92, 813 P.2d 171 (1991), *rev. denied* is on point but was incorrectly decided (See Appellant's Brief pages 30-32.) and Respondent only makes a passing reference to *Robinson* in their brief. (Respondent's Brief page 21).

were supported by a verbatim transcript and were subjected to further proceedings, including judicial review. The one Federal District Court case cited from Washington, *Plancich v. Cty. of Skagit*, 147 F. Supp. 3d 1158, 1160–65 (J. Lasnik, W.D. Wash. 2015), did not apply the collateral estoppel doctrine to dismiss Deputy Plancich’s First Amendment claim or due process claims brought pursuant to 42 U.S.C. §1983, although it did apply the doctrine to dismiss Plancich’s other state law claims.

Pointedly, Judge Lasnik observed that “Plaintiffs concede that the arbitration was a final judgment on the merits and involved the same parties...” *Id. at 1163*. In this case Billings disputes that the arbitration award in the Union Arbitration is a final judgment and asserts that it does not involve the same parties as his union, the Steilacoom Police Officers Guild (“SPOG”) (CP 1607-1636) a very small union with just nine members, was the real party in interest. Billings Dec. ¶ 70. (CP 1658 ). *Plancich* does not even cite or analyze *W. Branch*.

The Employers cite two California cases that are not controlling or instructive for the proposition that collateral estoppel should be applied when a labor arbitrator has determined facts that will undermine the employee’s claims, *White v. City of Pasadena*, 671 F.3d 918, 921–31 (9th Cir. 2012) and *Eaton v. Siemens*, No. 2:07-CV-00315-MCE, 2012 WL 1669680 (E.D. Cal. 2012), *aff’d*, 571 F. App’x 620 (9th Cir. 2014).

*White and Eaton* are not instructive because they are not based upon an unappealable labor arbitration that arose from a collective bargaining agreement lacking any verbatim transcript of the proceedings. Rather both cases arose from the complicated administrative review procedures impacting public employees in California. Cal. Civ. Proc. Code § 1094.5. *White* notes: “Under the terms of the MOU, if an employee cannot resolve a grievance with the employee's immediate supervisor or department head, the employee is entitled to advisory arbitration” *White*, 671 F.3d at 923. The Court then went on to analyze the features of the labor arbitration that made it of sufficient “judicial character” to make it appropriate to use for collateral estoppel.

Reviewing the *Imen* factors, we conclude that the City's administrative proceeding did have such judicial character. White's grievance proceeding was conducted in a judicial-like adversarial hearing in front of an impartial arbiter. Both White and the City were able to call and subpoena witnesses and elicit their testimony under oath, and to present oral and written argument. A verbatim transcript of the proceedings was produced. The City Manager was bound to apply the provisions of the MOU to the facts developed at the proceeding, and the City Manager issued a written decision with factual findings and reasoned explanations for his decision. Judicial review was available under section 1094.5, and was pursued by White. Thus, the administrative proceeding possessed the majority of the indicia of “judicial character” identified in *Imen*, 247 Cal.Rptr. at 518 (internal quotation marks omitted). (Some citations omitted)

*White v. City of Pasadena*, 671 F.3d 918, 929 (9th Cir. 2012)

Unlike the procedures in *White*, Billings did not have a verbatim transcript of the proceeding. The Employer vigorously blocked any attempt to create a verbatim transcript and his union could not afford a court reporter. Billings Dec. ¶¶ 39, 40. (CP 1651) The Arbitration Award was full of inaccuracies. Billings Dec. ¶¶ 41-66. (CP 1651-1657).

More importantly, the arbitration proceeding did not afford Billings any opportunity for judicial review. Billings Dec. ¶69. (CP 1657) “[D]ecision shall be final and binding on both parties.” Wooster Dec. Ex. 2, pg. 11 Step 5 (CP 1617).

In *Eaton v. Siemens*, No. 2:07-CV-00315-MCE, 2012 WL 1669680, at \*1–7 (E.D. Cal. May 11, 2012), *aff’d*, 571 F. App’x 620 (9th Cir. 2014) a police officer was terminated, his termination was upheld by an advisory arbitrator’s ruling identical to the procedures used in *White* and implemented by the City manager. The officer appealed the decision through the judicial review procedures available but abandoned the process before any decision was rendered and filed a federal lawsuit. The City moved to dismiss the federal case asserting the arbitration, city manager’s action upon the arbitrator’s recommendation and the aborted judicial review at the state level barred the claim under *res judicata*. *Id.*

at pg. \*2. The court initially denied the motion but that decision was reconsidered in view of the *White* decision. The court observed:

Indeed, the administrative proceeding in *White* was almost identical to the proceedings in this case. As was the case here, *White's* grievance proceeding was conducted in a judicial-like adversarial hearing in front of an impartial arbiter. Both *White* and the City were able to call and subpoena witnesses and elicit their testimony under oath, and to present oral and written argument. A verbatim transcript of the proceedings was produced. The City Manager was bound to apply the provisions of the MOU to the facts developed at the proceeding, and the City Manager issued a written decision with factual findings and reasoned explanations for his decision. Judicial review was available under section 1094.5.

*Eaton v. Siemens*, No. 2:07-CV-00315-MCE, 2012 WL 1669680, at \*5

What was significant was that a verbatim transcript was created and *White* and *Eatons'* decisions were subject to judicial review. The fact that *Eaton* chose to abandon his right of judicial review had no impact, what was important was that the availability of judicial review gave the proceeding sufficient judicial character qualifying it for applying claim preclusion doctrines. In this case, *Billings* had no verbatim transcript and no right of judicial review. The labor arbitration conducted by *Billings'* union simply lacks sufficient judicial character to entitle the Employer to rely upon it for collateral estoppel or *res judicata* purposes.

Employers rely upon *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 745 P.2d 858 (1987) extrapolating from a civil service hearing prosecuted by the employee's own attorney, in a public forum, with a verbatim transcript and available judicial review to the support the Employers' assertion adverse findings in the private collective bargaining agreement, from an arbitration brought by a union, with no appeal rights and no verbatim transcript is identical to a civil service administrative hearing. *Shoemaker* is easily distinguished. *Shoemaker* was represented by his own attorney, not a union attorney, it was a public hearing, with a full record and the right to full court review pursuant to RCW 41.12.090. Billings had to rely upon the attorney chosen by his union, the union was in exclusive control and it was poorly funded (CP 1651, 1657-58), at the arbitration the Employers vigorously prevented the development of a reviewable record of the proceedings (CP 1651) and Billings had no right of appeal. (CP 1657). The arbitrator refused to consider or develop a record on retaliation claims leaving them for a separate forum. (CP 1691).

The Employer also relies upon *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wash. 2d 299, 302-32, 96 P.3d 957, 959-74 (2004) a case providing no support because the underlying proceeding was an administrative proceeding before the Public Employment Relations

Commission (PERC) in which the hearing examiner made an initial determination, which was administratively appealed, PERC affirmed the hearing examiner and the Union did not appeal on behalf of the employee to superior court, although the statutes afforded that right. WAC 391-45-350 and RCW 34.05.070. *City of Pasco v. Pub. Employment Relations Comm'n*, 119 Wash. 2d 504, 506–07, 833 P.2d 381, 382 (1992).

Christensen filed a state court action after PERC had decided against him on his unfair labor practice charge. The Defendant moved to dismiss relying upon the determination in the PERC proceeding and the motion was granted. The court of appeals reversed and the supreme court affirmed the trial court holding collateral estoppel applied to the PERC determination to cut off the subsequent separate superior court proceeding.

The court noted: “Three additional factors must be considered under Washington law before collateral estoppel may be applied to agency findings: (1) whether the agency acted within its competence, (2) the differences between procedures in the administrative proceeding and court procedures, and (3) public policy considerations. *Reninger*, 134 Wash.2d at 450, 951 P.2d 782; *Shoemaker*, 109 Wash.2d at 508, 745 P.2d 858; *State v. Dupard*, 93 Wash.2d 268, 275, 609 P.2d 961 (1980).” *Christensen* at 307. Christensen did not dispute the final judgment, privity or identical issue elements of the doctrine. In Billings’ case the

procedures are not sufficient to make it of sufficient judicial character and no judicial review was available to him. The public policy behind Billings' First Amendment, violation of public policy and discrimination claims also dictate that the court should tread cautiously when applying claim preclusion doctrines to a labor arbitration decision.

Steilacoom also relies upon *Carver v. State*, 147 Wn. App. 567, 197 P.3d 678 (2008) for the application of a collateral estoppel using an administrative proceeding. There the underlying proceeding was an appeal before the Personnel Appeals Board (PAB) subject to judicial review<sup>2</sup>. The decision notes that Ms. Carver did not seek judicial review of the PAD decision establishing that appeal rights which Billings did not have were available to Ms. Carver. Ultimately, the court declined to provide preclusive effect to the PAB decision because Ms. Carver had proceeded *pro se* while she suffering from a mental disorder.

Steilacoom cites *Brownfield v. City of Yakima*, 178 Wn. App. 850, 316 P.2d 520 (2014). In *Brownfield* the collateral estoppel relied upon a prior litigation in federal court. His federal claims were dismissed and he filed a state court action. The City relied upon factual findings made against him in the federal case and his state claims were dismissed on

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<sup>2</sup> Former RCW 41.64.130, since repealed provided for judicial review.

summary judgment applying the federal findings to bar his state claims. However, *Brownfield* was not based off of an untranscribed, unappealable labor arbitration run by Brownfield's union but a federal district court decision in an action brought by Brownfield that was subject to the full panoply of appellate review.

Disregarding *W. Branch* by extending collateral estoppel effect to a labor arbitration award with no right of judicial review or other attributes of judicial character was error. Especially where the Arbitrator's findings are hotly disputed and the Employer seeking to apply the claim preclusion doctrines actively prevented the creation of a verbatim transcript which could be reviewed. The trial court should be reversed and the case remanded.

**B. Respondent Ignores the Record Asserting Alternative Facts To Misdirect the Court.**

**1. Plaintiff Properly Supported His Public Policy Claim With Evidence of Anti-Union Animus.**

Billings' initial Complaint alleged discrimination and retaliation for Billings' lawful union activities establishing a claim of wrongful termination in violation of public policy. (CP 1-5) In Plaintiff's First Amended Complaint pg. 3 "Causes of Action" (CP 1560-64, 1832). Plaintiff stated that he had a role and was active as a union representative and in that capacity he opposed actions and policies of Defendants. *Id.*

He specifically alleged claims of discrimination under the Washington Law Against Discrimination and retaliation for lawful union activity and wrongful termination in violation of public policy. *Id.*

Billings' concerns about unfair hiring, payment of wages, unfair labor practices, cronyism, misuse of law enforcement equipment and discriminatory conduct all implicate claims of wrongful termination in violation of public policy. Those claims should not have been dismissed.

Plaintiff opposed the application of collateral estoppel as a bar to his wrongful termination claims and the implicit suggestion by Respondent that Billings alleged no facts supporting his claim of wrongful termination in violation of public policy ignores the record. (CP 1639-1705).

Employers' summary judgment motion did not place this issue squarely before the trial court (CP 23). It is improper to now assert those facts were not fully developed. Employers asserted only that "Plaintiff's complaint failed to articulate any actionable "public policy" on which this [wrongful termination in violation of public policy] claim is based. Thus, it should be dismissed." Def. Mot. For S.J. pg. 17 (CP 30). Yet the Defendants provided no analysis of the public policy claim beyond reasserting their collateral estoppel claim. (CP 25-30).

Sufficient evidence in the record supports this claim. Billings' Declaration points out numerous Union concerns he raised for which he

asserts he claims retaliation and each issue implicates the public policy:

(1) Failure to follow promotional procedures established by law. Billings Dec. ¶4 (CP 1640); (2) Creating a new position of Fire Operations Chief as an improper procedure and unnecessary expense. Billings Dec. ¶¶5, 8. (CP 1640,-41) (3) Threats and abuse by Chief Schaub and Fire Operations Chief McVay to Billings and others. Billings Dec. ¶¶ 7, 14, 53, 68, Ex. 5. (CP 1641, 1642-43, 1655, 1657, 1692-1700) (4) Billings opposed splitting the function of Public Safety Officers into two separate positions of law enforcement and fire fighters as an unnecessary and unwarranted expense undertaken without taxpayer input. Billings Dec. ¶ 31, 36. (CP 1649-50). Fire Operations Chief McVay was a friend of Public Safety Chief Schaub (CP 1641) who was hired into a newly created and expensive position which the Union and Sgt. Billings had vigorously opposed (CP 1640-41). Prior to completion of the hiring process, Fire Operations Chief McVay was boasting that he already had the position. (CP 1640) More qualified candidates were told they could not apply. (CP 1641). Fire Operations Chief McVay engaged in discriminatory actions toward applicants for work in the Public Safety Office. (CP 1647-48).

*Smith v. Bates Technical College*, 139 Wash.2d 793, 991 P.2d 1135 (2000) recognized that an employee protected by a collective bargaining agreement may bring a common law claim for wrongful termination based

on the public policy provisions of chapter 41.56 RCW notwithstanding the administrative remedies available through Public Employment Relations Commission “(PERC”).

*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. Billings has properly pled wrongful termination in violation of public policy.

Employers note that the Employee is no longer pursuing statutory claims pursuant to RCW 41.56, but when opposing summary judgment, the Employee made it clear that he was still pursuing the public policy claims upon the policy enunciated in RCW 41.56 *et seq.* (CP 1588).

Billings claim of wrongful termination in violation of public policy and those claims should not have been dismissed.

**2. Plaintiff Properly Supported His First Amendment Claims With Articulation of Matters of Public Concern.**

To the extent that the Defendants' argue that they would have made the same decision even without Billings' protected conduct, that argument is an affirmative defense upon which Defendants bear the burden of proof. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285–87, 97 S. Ct. 568, 575–76, 50 L. Ed. 2d 471 (1977). The Defendants did not plead this affirmative defense in the Answer to Plaintiff's Complaint and Affirmative Defenses. CP 10-11 and this court should disregard that argument because it was not properly advanced by the Defendant as it was waived by Defendant. *Brower v. Pierce Cty.*, 96 Wn.App. 559,567, 984 P.2d 1036, 1040 (1999). Respondents' in footnote 19 that this argument was advanced is not supported by a review of portions of the record cited and the affirmative defense was not pled.

In addition to Fire Operations Chief McVay being allowed to operate a law enforcement vehicle in violation of law (CP 1643-46, 1670—89); Fire Operations Chief McVay was a friend of Public Safety Chief Schaub (CP 1641) who was hired into a newly created and expensive position which the Union and Sgt. Billings had vigorously opposed (CP 1640-41). Prior to completion of the hiring process, Fire Operations Chief McVay was boasting that he already had the position. (CP 1640) More qualified candidates were told they could not apply. (CP 1641). Fire Operations Chief McVay engaged in discriminatory actions

toward applicants for work in the Public Safety Office. (CP 1647-48).  
McVay at Straub's direction changed Sgt. Billings' badge number from 2 to 66, a move that created confusion at emergency scenes and obscured Sgt. Billings' status as second in command of the fire operation which created a potential danger. (CP 1648-49)

Both McVay and Chief Straub pushed for splitting the law enforcement functions of the Public Safety Department into two separate departments, one for law enforcement and one for firefighting and emergency response. (CP 1649-51) Sgt. Billings actively opposed this matter of important public concern because it posed a huge expense for the Town of Steilacoom that was being proposed without citizen input or vote. (CP 1649-51).

Sgt. Billings filed a complaint that Chief Straub had lied. (CP 1649-50) When the Pierce County Sheriff's Office contacted Paul Loveless to investigate the allegations, Paul Loveless falsely stated that the matter was already under investigation by Steilacoom in order to prevent any investigation. (CP 1650).

Billings has provided a time line showing many of the issues of public concern that he has raised and the corresponding response from the Town of Steilacoom and its agents. (CP 1640, 1661-65).

The alleged basis for the termination are set out by Defendant Schaub in a termination letter dated September 25, 2016. (CP 1293-1309). Chief Straub had departed from established process of having disciplinary investigations carried out by independent third parties and conducted the investigations himself and acted as the decision maker on his own investigation. (CP 1642).

The technical aspects of Billing's First Amendment claims were never addressed by the Parties below in either the Motion for Summary Judgment (CP 14-35); the Plaintiff's Memorandum in Opposition to Summary Judgment (CP 1567-1590) beyond the observation that a Plaintiff had filed a motion to amend the complaint to clarify his claims included First Amendment Claims pursuant to 42 U.S.C. § 1983 (CP 1570 & 1576. This issue was not addressed in the Defendants' Summary Judgment Reply Memorandum. (CP 1716-27) beyond the Defendant's reassertion that the 42 U.S.C. § 1983 claim was also barred by summary judgment. (CP 1725-1727). Again, arguments not raised below cannot be asserted for the first time on appeal. *Brower v. Pierce Cty.*, 96 Wn.App. 559,567, 984 P.2d 1036, 1040 (1999).

A three-step test is applied to determine whether the public employer violated an employee's right to free speech. *Gillette v. Delmore*, 886 F.2d 1194, 1197 (9th Cir. 1989)(citing *Mt. Healthy City School Dist.*

*Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977)). The reviewing court must determine:

1) whether [the plaintiff's] speech is entitled to constitutional protection, *see Pickering v. Board of Education*, 391 U.S. 563, 569-72, 88 S.Ct. 1731, 1735-3, 20 L.Ed.2d 811 (1968); 2) whether, if protected, the speech was a substantial or a motivating factor in the action taken against Gillette [the plaintiff], *see Mt. Healthy*, 429 U.S. at 285-87, 97 S.Ct. at 575-76; and 3) whether the [employer] demonstrated that the same action would have been taken in the absence of the protected activity, *see Allen v. Scribner*, 812 F.2d 426, 433-36 (9th Cir. 1987), *amended*, 828 F.2d 1445 (9th Cir. 1987).

*Gillette*, 886 F.2d at 1197.

The landscape of Public Employee First Amendment Rights was altered by *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 1957, 164 L.Ed.2d 689 (2006) (“The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.”) In *Garcetti*, the Court restricted a public employee's speech protections when they are speaking in the capacity of their specific employment duties, “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline”. For example, if a public

employee were engaged as a public information officer for an agency and their duties were to present the message of the agency, they could not claim First Amendment protection for their off message comments generated during the course of a press conference for the employing agency.

In *Lane v. Franks*, 134 S. Ct. 2369, 2372–84, 189 L. Ed. 2d 312 (2014), the court retreated from the harsh bright line seemingly imposed by *Garcetti*.

But *Garcetti* said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment. The *Garcetti* Court made explicit that its holding did not turn on the fact that the memo at issue “concerned the subject matter of [the prosecutor’s] employment,” because “[t]he First Amendment protects some expressions related to the speaker’s job.” *Id.*, at 421, 126 S.Ct. 1951.

In other words, the mere fact that a citizen’s speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.

*Lane v. Franks*, 134 S. Ct. 2369, 2379, 189 L. Ed. 2d 312 (2014).

The 9<sup>th</sup> Circuit has specifically found that conduct such as the Billings’ presenting matters of public concern to the highest person in their agency is protected when it is not part of that person’s duties to carry

the issue that high. In *Freitag v. Ayers*, 468 F.3d 528, 542 -548 (2006), the court held that post *Garcetti* an employee who complained to her Agency Head, State Representatives and Inspectors is protected:

[Freitag's] right to complain both to an elected public official and to an independent state agency is guaranteed to any citizen in a democratic society regardless of his status as a public employee. *See Pickering*, 391 U.S. at 568, 88 S.Ct. 1731. Indeed, these particular communications undoubtedly "bore similarities to letters submitted by numerous citizens every day." *Ceballos*, 126 S.Ct. at 1960 (citing *Pickering* ). Under *Ceballos*, Freitag does not lose her right to speak as a citizen simply because she initiated the communications while at work or because they concerned the subject matter of her employment. *Id.* at 1959...it was Freitag's responsibility *as a citizen* to expose such official malfeasance to broader scrutiny. Accordingly, in these instances, for purposes of the First Amendment she spoke as a citizen.

*Freitag* held the Defendant had to prove it was part of Freitag's official duties to bring misconduct all the way up the chain of command to the Director of the California Department of Corrections. *Id.* at 546.

Billings was not responsible for separating the Public Safety Office of Steilacoom into separate police and fire divisions; disciplining Chief Straub for false statement, unfair labor practices, cronyism or generally engaging in discriminatory conduct or wasting tax payer resources. In addition to Fire Operations Chief McVay being allowed to operate a law enforcement vehicle in violation of law (CP 1643-46, 1670—89); Fire Operations Chief McVay was a friend of Public Safety Chief Schaub (CP

1641) who was hired into a newly created and expensive position which the Union and Sgt. Billings had vigorously opposed (CP 1640-41). Prior to completion of the hiring process, Fire Operations Chief McVay was boasting that he already had the position. (CP 1640) More qualified candidates were told they could not apply. (CP 1641). Fire Operations Chief McVay engaged in discriminatory actions toward applicants for work in the Public Safety Office. (CP 1647-48).

**3. Plaintiff Properly Supported His Disability Discrimination Claim With Evidence of Hostility Toward His Hand Injury and Prompt Dismissal Upon Return To Work.**

Sgt. Billings was injured during an assault in the line of duty and was off work from May 2012 until September 2012. (CP 1649). When Sgt. Billings was released by his physician 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 Sgt. Billings was fit for duty, Sgt. Billings was immediately fired upon his return to work. (CP 1651). The fact finder must determine that the City's animosity regarding Sgt. Billings attempt to return to work and prompt firing thereafter was motivated by the City's belief that he was unfit for duty

V. CONCLUSION

The trial court erred because it was improper to apply claim preclusion doctrines to a labor arbitration decision that was unsupported by a verbatim transcript, directed Billings to pursue retaliation claims in a separate forum and was not subject to any judicial review. Such a proceeding is not of sufficient judicial character to invoke claim preclusion doctrines.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of February 2017.

  
Richard H. Wooster, WSBA #13752  
Attorney for Appellant

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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

JOSHUA BILLINGS	)	Cause No. <b>49631-3-II</b>
Appellants	)	
	)	DECLARATION OF
vs.	)	SERVICE
	)	
TOWN OF STEILACOOM, ET AL	)	
	)	
	)	
_____ Respondents	)	

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 8th day of February, 2017, I delivered via ABC Legal Messenger and via email a copy of the following documents:

1. Declaration of Service;
2. Reply Brief of Appellant's;

properly addressed to the following person:

