

Supreme Court No. 93800-8  
Court of Appeals File No. 333523

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SUPREME COURT OF THE STATE OF WASHINGTON

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JONATHAN J. SPRAGUE, a married man,

*Plaintiff-Petitioner,*

vs.

SPOKANE VALLEY FIRE DEPARTMENT, a fire district; MIKE  
THOMPSON and LINDA THOMPSON, husband and wife, and the  
marital community composed thereof,

*Defendants-Respondents.*

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PETITIONER SPRAGUE'S RESPONSE TO AMICUS CURIAE  
BRIEFS BY PACIFIC JUSTICE INSTITUTE AND WASHINGTON  
EMPLOMENT LAWYERS ASSOCIATION

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Matthew C. Albrecht, WSBA #36801  
David K. DeWolf, WSBA #10875  
ALBRECHT LAW PLLC  
421 W. Riverside Ave., STE 614  
(509) 495-1246

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## I. INTRODUCTION

Amici urge the Court to avoid disturbing two fundamental principles: (1) Pacific Justice Institute (PJI) argues that collateral estoppel should only be applied to issues of fact—not law; and (2) the Washington Employment Lawyers Association (WELA) argues that public employees should be protected by their employers from unlawful harassment and discriminatory workplaces. In urging this Court to reverse the Court of Appeals, Sprague asks for a ruling that reinforces the principles both Amici seek to protect.

With respect to the application of collateral estoppel, the Court of Appeals majority itself agreed that collateral estoppel should be limited to factual findings and does not extend to issues of law.<sup>1</sup> Its error consists not in a departure from that well-established Washington precedent, but rather in a misunderstanding of the legal conclusions that the Civil Service Commission, and in turn the trial court, mistakenly described as facts.

With respect to the law against religious discrimination and harassment, Sprague agrees that public employees are entitled to protection from unlawful discrimination and hostile workplaces. However, the public

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<sup>1</sup> “We agree with Mr. Sprague that the commission’s legal conclusions, such as its determination that its rulings complied with the First Amendment, [ ] are not subject to estoppel.” *Sprague v. Spokane Valley Fire Dep’t*, 196 Wn. App. 21, 30, 381 P.3d 1259 (2016) (footnote omitted). SVFD has not cross appealed.

employer's legal freedom to impose reasonable policies geared towards protection of employees' civil rights is bounded by the Constitution and requires careful balancing when protecting one set of employees means adversely impacting the rights of another set of employees. In the proper case, this analysis might require a careful balancing to determine whether a particular policy appropriately balanced these competing rights. But this is not that case. Sprague was not fired because he was alleged to have created a hostile work environment. Instead, SVFD admits Sprague was fired because he violated SVFD's policy that imposed a blanket prohibition on speech by all employees and supervisors which included any religious viewpoint, even while discussion of the same subject was otherwise openly permitted in the same forum from any other viewpoint.

WELA's argument addresses a hypothetical case that is not the case SVFD presented to the trial court or the Civil Service Commission. The principle WELA seeks to protect is one shared by Sprague. But the case before this court involves a supervisor (former Chief Thompson) permitting non-religious viewpoints while punishing an employee (Sprague) for expressing religious viewpoints on the same subjects already under discussion using the same forum. By declaring SVFD's policy to be unconstitutional, this Court would reinforce rather than weaken the state's commitment to religious diversity and an inclusive workplace.

## II. ARGUMENT

### A. Sprague agrees with Amicus Pacific Justice Institute that collateral estoppel should not be applied to issues of law.

Amicus Pacific Justice Institute urges this Court not to abandon the well-established rule in Washington that the preclusive effect of collateral estoppel applies only to factual findings, not to legal conclusions. Sprague, the Court of Appeals, and the trial court have all agreed with this principle.

#### 1. An administrative agency's findings have preclusive effect only with respect to findings of fact, not to legal conclusions.

Washington law recognizes that an administrative agency's factual findings may have preclusive effect on subsequent litigation raising the same issues. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 96 P.3d 957 (2004). However, that preclusive effect extends only to the factual findings rather than to legal conclusions. Factual findings may even include findings of "ultimate fact."<sup>2</sup> For example, the determination of an ultimate fact (such as contributory negligence in a tort case,<sup>3</sup> or intent in a murder case<sup>4</sup>) may have preclusive effect on a subsequent effort to litigate the same issue. Applied to this case, an ultimate finding of fact might be a

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<sup>2</sup> "Ultimate facts are the essential and determining facts upon which the conclusion rests and without which the judgment would lack support in an essential particular. They are the necessary and controlling facts which must be found in order for the court to apply the law to reach a decision." *Wold v. Wold*, 7 Wn. App. 872, 875, 503 P.2d 118, 121 (Div. 1 1972) (assignment of value to marital property).

<sup>3</sup> *Jarr v. Seeco Const. Co.*, 35 Wn. App. 324, 666 P.2d 392, (Div. 1 1983).

<sup>4</sup> *State v. Haq*, 166 Wn. App. 221, 268 P.3d 997 (Div. 1 2012).

determination that Sprague was not discriminated against in the application of a constitutionally permissible policy. However, as Sprague's Supplemental Brief demonstrates, he challenged the constitutionality of a policy whose existence and application were never in dispute. SVFD adopted a policy that required any employee communications to be "content neutral"<sup>5</sup>—that is, to refrain from expressing any religious viewpoint. It was his disobedience of this policy that resulted in his termination, and all parties are agreed on these facts. In addition, all parties, including the amici, as well as the trial court<sup>6</sup> and the Court of Appeals<sup>7</sup> agree that the Civil Service Commission lacked the competence to decide whether SVFD's policies were constitutional.<sup>8</sup> The reason the Court of Appeals affirmed the

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<sup>5</sup> CP 354. Of course, SVFD's policy was the exact opposite of a content-neutral policy; it singled out religious viewpoints for unfavorable treatment. It was the constitutionality of this policy that Sprague challenged both in the Civil Service Commission and in the action brought in Superior Court. Because the Civil Service Commission had no competence or statutory authority to decide the constitutionality of this policy, its rejection of Sprague's challenge has no collateral estoppel effect on his subsequent suit.

<sup>6</sup> RP 16-17

"[T]here is no dispute that there's no authority that's been cited that says that an administrative agency finding on an issue of law binds this court today. That does not fall within collateral estoppel, that has never been ruled in Washington state, there is no appellate case that would say that."

<sup>7</sup> "We agree with Mr. Sprague that the commission's legal conclusions, such as its determination that its rulings complied with the First Amendment, [ ] are not subject to estoppel." *Sprague*, 196 Wn. App. at 31, 381 P.3d at 1264 (footnote omitted).

<sup>8</sup> In their Supplemental Brief, Respondents claim that "[t]he 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." Supplemental Brief at 6. However, this misrepresents the record; instead, an entire page of the Civil Service Commission is devoted to assuring the reader that the Commission "is fully aware of its obligations to follow the law relating to the protections set forth within the First Amendment to the United States Constitution . . ." CP 103. It

trial court is its mistaken belief that the Civil Service Commission made a finding of fact that is being relitigated, when in fact it simply declined to reverse a decision by the SVFD Commissioners based on the Commissioners' misunderstanding of First Amendment jurisprudence.

**2. Collateral estoppel does not prevent a public employee from challenging an unconstitutional policy, even if initial resort is made to a Civil Service Commission.**

Amicus Pacific Legal Institute points out that some jurisdictions, such as California, extend the preclusive effect of administrative bodies to the legal conclusions of those bodies, not just their resolution of disputed factual issues.<sup>9</sup> Sprague agrees that California's approach, and the Ninth Circuit's approach in *Miller*, should be rejected in this case for several reasons.

When the U.S. Supreme Court decided *Univ. of Tenn. v. Elliot*, 478 U.S. 788, 106 S. Ct. 3220, 92 L. Ed. 2d 635 (1986), it laid down the principle that in civil rights cases, federal courts should give to previous administrative proceedings the same preclusive effect as would be given by a state court ruling on the same issue. In other words, it is a rule of deference, ensuring that federal treatment of a civil rights case will

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would be one thing if the Commission had confined itself to making findings with respect to disputed facts, but in Sprague's case there were no disputed facts, as the Commission itself noted. CP 99.

<sup>9</sup> For example, *Miller v. County of Santa Cruz*, 39 F.3d 1030 (9th Cir. 1994).

harmonize with the way that the same issue would be resolved if brought in state court.

Because federal courts defer to state courts in determining the scope of collateral estoppel, the only question in this case is whether Washington should depart from its long-standing rule limiting the preclusive effect of administrative proceedings to factual findings rather than legal conclusions. None of the parties have suggested that it should.

The rule of collateral estoppel is designed to prevent a litigant from getting a second bite of the apple.<sup>10</sup> A public employee who believes that he or she has been unfairly treated may bring a claim to the Civil Service Commission. With respect to disputed issues of fact, the Commission should have the ability to give the employee a “bite of the apple,” with the consequence that, as to such issues, both the employer and employee are estopped from collateral attacks on findings of disputed facts. On the other hand, if the employee appeals to the Civil Service Commission for relief, and the employee includes in the request a claim that a policy followed by the employer is unconstitutional, there is no good reason to consider this request a second “bite of the apple,” because an administrative agency typically lacks the competence and the subject matter jurisdiction to

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<sup>10</sup> *Reninger v. State Dept. of Corrections*, 134 Wn.2d 437, 454, 951 P.2d 702, 791 (1998).

determine constitutionality or award equitable relief from an unconstitutional policy.

There is agreement among the parties and the amici that collateral estoppel should be limited to those cases where the party against whom the estoppel is applied has already enjoyed a “full and fair opportunity to litigate.”<sup>11</sup> In order to give the litigant a full and fair opportunity, the tribunal must possess the competence to decide the issue and the authority to grant the remedy requested.<sup>12</sup> It is agreed on all hands that the Civil Service Commission lacked the competence and authority to decide issues of constitutionality. While the Court of Appeals attempted to frame the decision of the Commission as though it had ruled on how SVFD had *applied* a facially neutral policy regarding employees’ use of the email system, in fact the Commission focused on whether SVFD could lawfully promulgate and enforce a policy forbidding *any* expression of religious viewpoints, and whether Sprague had violated this policy. Consequently, Sprague’s challenge to the constitutionality of SVFD’s policy should not be collaterally estopped.

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<sup>11</sup> *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 317, 96 P.3d 957, 966 (2004).

<sup>12</sup> *Id.*, 152 Wn.2d at 319, 96 P.3d at 967.

**3. Sprague agrees that public employees do not forfeit their first amendment rights.**

Sprague agrees with Pacific Justice Institute that public employers are not permitted to infringe the first amendment rights of their employees simply because there is a need for discipline and order. To be sure, the public employer may limit employee speech when it addresses matters of private rather than public concern, or if it poses a serious danger of disruption in the workplace. Because neither of these concerns applies to Sprague or is supported by the record in this case, there is no basis for limiting the SVFD employees' First Amendment protections in this case.

**4. Collateral estoppel has no application to Sprague's suit for injunctive relief.**

Neither of the amici address the question of whether a claim for injunctive relief is barred by an adverse decision of an administrative agency. As noted in Sprague's supplemental brief, the Court of Appeals opinion neglected this issue entirely. For this reason alone the Court of Appeals decision should be reversed.

**B. WELA's proposed "anti-proselytizing" rule does not advance our state's commitment to a workplace free of religious discrimination or harassment.**

The amicus brief submitted by Washington Employment Lawyers Association (WELA) argues that SVFD's policy was justified by the need

to prevent religious discrimination and harassment in the workplace. Their brief concludes as follows:

The court of appeals' opinions focused on Captain Sprague's First Amendment rights. This Court's opinion should recognize the potentially profound consequences of this case for the rights of all employees to enjoy a work environment free from religious discrimination and harassment.<sup>13</sup>

Sprague agrees with the principle that public employees should be protected against unlawful discrimination and harassment, and in the appropriate case where any evidence was present to support that a policy (1) was implemented for this purpose and (2) had been violated, WELA's concerns might require a careful analysis of competing interests. But those concerns are not supported in this record.

**1. WELA's concerns were never the basis upon which SVFD justified Sprague's dismissal.**

Before addressing the merits of the policies advocated by WELA in its brief, Sprague wishes to emphasize that WELA makes an argument on behalf of SVFD that was never asserted in the proceedings below. SVFD never claimed that Sprague engaged in discriminatory or harassing conduct, or that the policy adopted by SVFD was necessary to prevent discrimination or harassment. The issue before this Court is whether to give preclusive effect to the findings of the Civil Service Commission. Because the issue

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<sup>13</sup> WELA brief at 20.

raised by WELA formed no basis for the Civil Service Commission decision, it should not serve as the basis for affirming the judgment below.

**2. WELA describes a policy SVFD *could* have—but *did not*—adopt.**

WELA expresses a fear that an overly broad opinion in this case could jeopardize the enforcement of policies designed to prevent workplace harassment and discrimination. In particular, WELA urges that a policy limiting proselytizing would be consistent with the Constitution. Sprague agrees that these concerns are legitimate, and thus the relief that Sprague requests is not a broad-ranging reformulation of workplace rules, but rather a ruling focused on the specific facts of this case: can an employer adopt a prohibition against *all* expression of religious viewpoints while allowing *any* other viewpoints on a topic in an otherwise open email discussion, regardless of the position held by the employee, and regardless of the context in which those views are expressed?

WELA urges this Court to leave room for a policy that would restrict those in a supervisory position from proselytizing in a way that constitutes religious discrimination or harassment. Sprague does not challenge the authority of a public employer to adopt such a policy. But that is *not* the policy at issue in this case. Any such policy would need to be crafted and enforced in a way that avoids the opposite risk—the suppression of views

that are constitutionally protected. As the Ninth Circuit put it in *Berry*,<sup>14</sup> any such policy 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.”<sup>15</sup>

The policy at issue in this case—established by the undisputed testimony of SVFD’s CR 30(b)(6) witness—was not a careful navigation. It was a complete ban on the expression by any employee—whether a supervisor or a subordinate—of any religious views. Such a policy cannot be justified as the only (or even as a reasonable) means to prevent religious discrimination or harassment. In fact, it mandates the very religious discrimination that Washington’s Law Against Discrimination seeks to avoid. Banning the expression of all religious viewpoints, or banning such expression by those in a supervisory position, would only invite further conflict over the definition of religion and which relationships would be “supervisory.” Instead, SVFD had the opportunity—but did not use it—to refine and enforce existing policies forbidding discrimination and harassment.

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<sup>14</sup> *Berry v. Dep 't of Soc. Servs.*, 447 F.3d 642 (9th Cir. 2006). The metaphor of navigating between Scylla and Charybdis was also the basis of the Judge Lawrence-Berrey’s concurring opinion finding that the SVFD policy was constitutional.

<sup>15</sup> *Id.* at 646.

It is undisputed in the record of this case that SVFD had policies prohibiting both the discriminatory<sup>16</sup> as well as the harassing<sup>17</sup> use of email or the electronic bulletin board. It is also undisputed in the record that Sprague had not violated these provisions.<sup>18</sup> Sprague does not challenge SVFD's discrimination or anti-harassment policies. If SVFD had adopted a policy that reflected the concerns identified by WELA, and had enforced them in a reasonable way, this case would never have arisen. Instead, SVFD chose to stand its ground on an unconstitutional policy, and forced Sprague to choose between compliance with an unconstitutional policy or being fired. This is a choice SVFD was not entitled to impose on its employees.

In summary, the concerns expressed by WELA can best be addressed by reversing the Court of Appeals in this case. Doing so would not jeopardize the right, indeed the duty, of employers to adopt policies that balance the rights of religious expression with the right of employees to be free of religious discrimination or harassment. Instead, it would reinstate constitutional protection for all employees.

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<sup>16</sup> "No employee will send offensive or discriminatory computer electronic or voice mail messages." CP 109.

<sup>17</sup> "E-mail, chat room, newsgroup and all other forms of communication using the internet, intranet, or other Department communications shall not contain 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 110.

<sup>18</sup> CP 360.

### III. CONCLUSION

Jonathan Sprague asks this Court to reverse the Court of Appeals decision in all respects, and remand the case for trial.

Respectfully submitted this 31<sup>st</sup> day of May, 2017.



Matthew C. Albrecht, WSBA #36801  
ALBRECHT LAW PLLC  
421 W. Riverside Ave., STE 614  
(509) 495-1246  
Attorneys for Petitioner

## CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington that on May 31, 2017, I served the document to which this is annexed as shown below:

By email pursuant to stipulation:

Michael McMahon  
Jeffrey R. Galloway  
Etter, McMahon, Lamberson, Van Wert & Oreskovich, P.C.  
618 West Riverside Avenue, Suite 210  
Spokane, WA 99201  
mjm13@ettermcmahon.com  
jgalloway@ettermcmahon.com  
KMiller@ettermcmahon.com  
diana@ettermcmahon.com

Signed on May 31, 2016 at Spokane, Washington.

  
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Melanie A. Evans