

No. 93800-8

In the
Supreme Court
of
Washington

RECEIVED
MAY 01 2017
WASHINGTON STATE
SUPREME COURT

JONATHAN J. SPRAGUE,
Petitioner,

v.

SPOKANE VALLEY FIRE DEPARTMENT,
MIKE THOMPSON and LINDA THOMPSON,
Respondents.

FILED E
MAY 10 2017
WASHINGTON STATE
SUPREME COURT h/h

**BRIEF OF *AMICUS CURIAE* PACIFIC JUSTICE INSTITUTE
IN SUPPORT OF PETITIONER JONATHAN J. SPRAGUE**

MATTHEW B. MCREYNOLDS
CA Bar No. 234797
PACIFIC JUSTICE INSTITUTE
P.O. Box 276600
Sacramento, California 95827
(916) 857-6900 Telephone
mmcreynolds@pji.org

CONRAD REYNOLDSON
WSBA No. 48187
WASHINGTON CIVIL & DISABILITY
ADVOCATE
3513 NE 45th Street, Suite G
Seattle, Washington 98105
(206) 855-3134 Telephone
conrad.wacda@gmail.com

Attorneys for Amicus Curiae Pacific Justice Institute



COUNSEL PRESS · (800) 3-APPEAL

PRINTED ON RECYCLED PAPER



ORIGINAL

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF AMICUS ARGUMENT	1
STATEMENT OF THE CASE	2
ARGUMENT.....	3
A. The Third Circuit and other courts have recognized that civil service commissions should not have the final say on questions of constitutional law.....	3
B. Public employers do not have a license to practice viewpoint discrimination	8
C. The nature of the firehouse deserves more, not less, speech protection	12
CONCLUSION	13
CERTIFICATE OF SERVICE.....	15

TABLE OF AUTHORITIES

CASES	Page
<i>Berry v. Dept. of Social Svcs.</i> , 447 F.3d 642 (9th Cir. 2006)	9
<i>City of San Diego v. Roe</i> , 543 U.S. 77 (2004)	11
<i>Connick v. Myers</i> , 461 U.S. 138 (1982)	5, 10, 11
<i>Davis v. Passman</i> , 442 U.S. 228 (1979)	4
<i>Edmundson v. Borough of Kennett Square</i> , 4 F.3d 186 (3d Cir. 1993)	4, 5, 6
<i>Eilrich v. Remas</i> , 839 F.2d 630 (9th Cir. 1988)	5
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976)	3
<i>Firefighters Assn. v. Barry</i> , 742 F. Supp. 1182 (D.D.C. 1990).....	13
<i>Garcetti v. Ceballos</i> , 547 U.S. 410 (2005)	11
<i>Gilbrook v. City of Westminster</i> , 177 F.3d 839 (9th Cir. 1999)	13
<i>Gjellum v. City of Birmingham</i> , 829 F.2d 1056 (11th Cir. 1987)	5
<i>Greer v. Spock</i> , 424 U.S. 828 (1976)	12
<i>Hitt v. Connell</i> , 301 F.3d 240 (5th Cir. 2002)	6
<i>Johnson v. City of Loma Linda</i> , 99 Cal Rptr. 316 (Cal. 2000)	7
<i>Johnson v. County of Los Angeles Fire Dept.</i> , 865 F. Supp. 1430 (C.D. Cal. 1994).....	13

<i>Johnson v. Lincoln Univ. of Commonwealth Sys. of Higher Educ.</i> , 776 F.2d 443 (3d Cir. 1985)	5
<i>Levich v. Liberty Cent. Sch. Dist.</i> , 361 F. Supp. 2d 151 (S.D.N.Y. 2004)	6
<i>Los Angeles Teachers Union v. Los Angeles City Bd. Of Educ.</i> , 71 Cal.2d 551 (1969)	8, 9
<i>Marbury v. Madison</i> , 5 U.S. 137 (1803)	4
<i>Maylon v. Pierce County</i> , 131 Wn. 2d 779 (1997)	10
<i>McCulloch v. Maryland</i> , 17 U.S. 316 (1819)	4
<i>Miller v. County of Santa Cruz</i> , 39 F.3d 1030 (9th Cir. 1994)	6
<i>N.Y. Times Co. v. U.S.</i> , 403 U.S. 713 (1971)	3
<i>Peery v. Brakke</i> , 826 F.2d 740 (8th Cir. 1987)	5
<i>Perry Educ. Assn. v. Perry Local Educators' Assn.</i> , 460 U.S. 37 (1983)	11, 12
<i>Pickering Bd. Of Educ.</i> , 391 U.S. 563 (1968)	1, 3, 5, 10
<i>Plano v. Baker</i> , 504 F.2d 595 (2d Cir. 1974)	5
<i>Prison Legal News v. Lehman</i> , 397 F.3d 692 (9th Cir. 2005)	12
<i>R.A.V. v. St. Paul</i> , 505 U.S. 377 (1992)	11
<i>Rankin v. McPherson</i> , 483 U.S. 378 (1987)	10
<i>Rosenberger v. Rector and Visitors of the Univ. of Va.</i> , 515 U.S. 819 (1995)	2, 11, 12

<i>Seibert v. City of San Jose</i> , 247 Cal. App. 4th 1027 (Cal. App. 6th Dist. 2016).....	13
<i>Sitka v. Swanner</i> , 649 P.2d 940 (Alaska 1982)	12
<i>Sprague v. Spokane Valley Fire Dept.</i> , 196 Wn. App. 21 (2016).....	1, 3, 4, 7, 9
<i>Strinni v. Mehlville Fire Protection Dist.</i> , 681 F. Supp. 2d 1052 (E.D. Mo. 2010)	13
<i>Swartzendruber v. City of San Diego</i> , 3 Cal. App. 4th 896 (1992).....	7
<i>Tinker. Des Moines Indep. Cmty. Schs.</i> , 393 U.S. 503 (1969)	8
<i>Tucker v. Cal Dept. of Educ.</i> , 97 F.3d 1204 (9th Cir. 1996).....	9
<i>Univ. of Tenn. v. Elliott</i> , 478 U.S. 788 (1986)	6
 STATUTES	
42 U.S.C. § 1983	5

INTEREST OF *AMICUS CURIAE*

The Pacific Justice Institute (“PJI”) is a non-profit legal organization organized under Section 501(c)(3) of the Internal Revenue Code. PJI focuses primarily on issues of religious freedom. Since its founding in 1997, PJI has advised and represented thousands of individuals, employers, religious institutions, and governmental entities, particularly in the realm of the First Amendment. PJI has a strong interest in the development of the law in this area.

INTRODUCTION AND SUMMARY OF AMICUS ARGUMENT

This case affords the Washington Supreme Court an opportunity to clarify the law in two often perplexing areas involving freedom of speech for public employees: First, the degree to which findings by non-judicial administrative bodies may have preclusive effect on constitutional issues; and second, the degree to which public employees may be restricted in expressing viewpoints in response to the employer’s introduction of social topics. Amicus will argue that preclusive effect should be limited when local administrative bodies opine on weighty constitutional issues. Amicus will further argue that the viewpoint discrimination squarely presented in this Petition cannot be waved off by relying on forum analysis. Instead, the Court should consider public employee speech rights under the rubric of *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and viewpoint

discrimination as condemned in such decisions as *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

STATEMENT OF THE CASE

Amicus adopts Plaintiff's statement of the case to the extent relevant to this brief. *Amicus* will cite to the facts as set forth in the majority, concurring, and dissenting opinions below, reported at *Sprague v. Spokane Valley Fire Dept.*, 196 Wn. App. 21 (2016).

ARGUMENT

A. The Third Circuit and other courts have recognized that civil service commissions should not have the final say on questions of constitutional law.

It is no accident that freedom of speech is housed in the First Amendment—it is one of Americans’ foremost rights. Since at least *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), the Supreme Court has expressly recognized that public employees do not shed their constitutional rights by virtue of their public employment. There are even stronger reasons in this case than in the typical public employee speech case for protecting speech in that the firehouse serves as both workplace and part-time residence for first responders like Jonathan Sprague (“Sprague”).

As a practical matter, many public employees find themselves in administrative processes, with the dubious choice between delaying their day in court, or having key factual findings cemented against them. The harm from such delay is particularly salient when core constitutional liberties are shackled. Indeed, the loss of First Amendment freedoms for even minimal periods of times constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) [citing *N.Y. Times Co. v. U.S.*, 403 U.S. 713 (1971)]. But the lead opinion below does not even address the significant First Amendment rights of public employees, due to its belief that collateral estoppel precluded it from reaching the claims. *Sprague*, 196 Wn. App. at

30-32. In so doing, the majority failed to cite or discuss a number of authorities, from the Supreme Court as well as federal appellate courts, which speak directly to this issue and provide much-needed perspective. Yet the majority also omitted key authorities on the preclusion issue.

The dissent identified authorities from the Second Circuit, Fifth Circuit, Florida District Court of Appeals and California Court of Appeal that rebut the majority's position. *Sprague*, 196 Wn. App. at 49 (Fearing, J., dissenting). Rather than repeating these worthy points, amicus will focus on additional authorities of which this Court should be cognizant.

In the absence of “textually demonstrable” commitment of the enforcement of a constitutional right to a “coordinate political department,” it is presumed that the courts are the primary enforcers of such rights. *Davis v. Passman*, 442 U.S. 228, 241-42 (1979) [citing *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819), and *Marbury v. Madison*, 5 U.S. 137, 163 (1803)].

One of the clearest explanations of the preclusive effect that should be given to bodies such as civil service commissions comes from the Third Circuit. In *Edmondson v. Borough of Kennett Square*, 4 F.3d 186 (3d Cir. 1993), a police officer was disciplined and ultimately terminated after publicly criticizing the police chief. The police department claimed his termination was for insubordination. The officer appealed to the local civil service commission and initially to state court before abandoning that suit

and instead filing suit in federal court under 42 U.S.C. § 1983. On appeal, the Third Circuit found itself agreeing with the Eighth and Eleventh Circuits, and disagreeing with the Ninth Circuit, as to the preclusive effect that should be accorded the civil service commission's decision. *Edmundson*, 4 F.3d at 193 [citing *Peery v. Brakke*, 826 F.2d 740, 746 (8th Cir. 1987), *Gjellum v. City of Birmingham*, 829 F.2d 1056, 1064-65 & n. 21 (11th Cir. 1987), and *Eilrich v. Remas*, 839 F.2d 630, 634 n. 2 (9th Cir. 1988)]. After carefully surveying the state of the law, the Third Circuit was willing to give preclusive effect to the commission's factual findings, but not to its constitutional decisions. The court explained:

We see a profound difference in the ability of a Commission composed of lay citizens to resolve matters of credibility and fact — e.g., whether plaintiff actually made the statements in the circumstances alleged despite his denials — and the ability to determine the more complex question of whether the statements are constitutionally protected in accordance with the considerations articulated in *Connick v. Myers*, 461 U.S. 138, 142, 103 S.Ct. 1684, 1687, 75 L.Ed.2d 708 (1983), and *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811(1968). See *Johnson v. Lincoln Univ. of Commonwealth Sys. of Higher Educ.*, 776 F.2d 443, 452-54 (3d Cir. 1985). We intimate no disrespect for the Commission in stating that constitutional adjudication is not within its competence so as to bar a federal court from re-examining that legal issue. The Commission simply does not have the background or experience to finally decide issues that give pause even to federal courts despite their familiarity with that area of the law. See *Plano v. Baker*, 504 F.2d 595, 599 (2d Cir. 1974).

Edmundson, 4 F.3d at 192-93.

The Third Circuit's approach in *Edmundson* was followed in *Levich v. Liberty Cent. Sch. Dist.*, 361 F. Supp. 2d 151 (S.D.N.Y. 2004), where the district court did not accord collateral estoppel to the unreviewed constitutional determination of a hearing officer against a teacher and instead conducted its own First Amendment analysis. The approach has also been followed by at least one federal district court in the Fifth Circuit, as noted in *Hitt v. Connell*, 301 F.3d 240 (5th Cir. 2002) [affirming rulings in favor of terminated public employee but vacating and reducing amount of jury award on other grounds]. In this case, where the city itself had vacillated as to the authority and role of its civil service commission, the trial court did not give the commission's findings preclusive effect, and that determination was not one of the issues appealed.

The Ninth Circuit went a different direction in *Miller v. County of Santa Cruz*, 39 F.3d 1030 (9th Cir. 1994), pointedly disagreeing with *Edmundson*. *Id.* at 1036-37. To the Ninth Circuit, it mattered not at all whether an administrative decision-maker had any legal training; the proper inquiry was whether it acted in a judicial capacity and the party had a fair opportunity to litigate before it.

These decisions have invariably pointed back to *Univ. of Tenn. v. Elliott*, 478 U.S. 788 (1986). Since *Elliott* specifically addressed the preclusive effect of administrative fact-finding, courts like the Third Circuit

see an important distinction between fact-finding and legal conclusions, while the Ninth Circuit sees no meaningful difference for purposes of preclusion. Amicus submits that the reasoning of the Third Circuit is the better, sounder view. Moreover, one of the cases most relied upon by the Ninth Circuit for its understanding of California law, *Swartzendruber v. City of San Diego*, 3 Cal. App. 4th 896 (1992), was disapproved in *Johnson v. City of Loma Linda*, 99 Cal. Rptr. 316 (Cal. 2000).

Remarkably, the majority below did not recognize the crucial differences between giving preclusive effect to true fact-finding versus legal conclusions – or, for that matter, the need to distinguish preclusive effect on tort claims, federal statutes, and constitutional provisions. The majority’s decision could therefore be read as going beyond even the Ninth Circuit’s position. Affirming this truncated approach would needlessly place this Court even more at odds with the Third Circuit’s reasoning. This is not to say the civil service commission’s role is irrelevant—all courts appear to give preclusive effect to determinations that are truly factual. Here, for instance, the established fact that no other employee was disciplined under the ostensibly neutral policy which ensnared Sprague did not need to be re-litigated. *Sprague*, 196 Wn. App. at 58-59 (Fearing, C.J., dissenting).

But the commission should not be permitted to resolve weighty constitutional issues like the limits of public employees’ free speech by

simply relabeling them as factual determinations. Where the record contains abundant evidence that SVFD was concerned with the religious nature of Sprague's speech, the implications of those expressed sentiments should not be so easily brushed aside.

B. Public employers do not have a license to practice viewpoint discrimination.

On the substantive issue, the viewpoint discrimination is striking. The SVFD introduced topics of general interest touching on social ills like gambling, suicide, and family conflict, then demanded that Sprague receive its viewpoint in silence. In this, the SVFD expected that its employees be closed-circuit recipients of its message. The Supreme Court long ago condemned such an approach by school officials seeking to control the expression of students. *Tinker v. Des Moines Indep. Cmty. Schs.*, 393 U.S. 503 (1969). Much more, one-way communication on matters of public interest should be regarded skeptically in a workplace of mature adults. This was aptly expressed in *Los Angeles Teachers Union v. Los Angeles City Bd. of Educ.*, 71 Cal.2d 551, 561 (1969) (hereinafter *Teachers Union*). In *Teachers Union*, the California Supreme Court stated, "It cannot seriously be argued that school officials may demand a teaching faculty composed either of unthinking 'yes men' who will uniformly adhere to a designated side of any controversial issue or of thinking individuals sworn

never to share their ideas with one another for fear they may disagree and, like children, extend their disagreement to the level of general hostility and uncooperativeness.” *Id.*

Among regional public employee speech cases, the most instructive is *Tucker v. Cal. Dept. of Educ.*, 97 F.3d 1204 (9th Cir. 1996). There, the Ninth Circuit invalidated restrictions on public employees that sought to confine their expression to their cubicles. The principle of equal treatment seemed straightforward to the appellate court. The Ninth Circuit’s decision a decade later in *Berry v. Dept. of Social Svcs.*, 447 F.3d 642 (9th Cir. 2006) provides a contrast that is useful here. In *Berry*, the court considered office decorations and use of a conference room. As to the former, the Ninth Circuit upheld a restriction on a county employee’s display of a Bible on his desk and a “Happy Birthday Jesus” banner during the Christmas season. The court reasoned that members of the public coming into Berry’s office to request government assistance might feel the need to affirm his beliefs as part of their request. But SVFD’s purported concerns about religious expression are attenuated here, whereas like *Tucker* and unlike *Berry*, the SVFD fired Sprague for communicating with his co-workers, not the general public. *Sprague*, 196 Wn. App. at 59. Sprague was permitted some religious discussion with co-workers, but not via the online bulletin board or responses to e-mailed newsletters. *Id.* at 38 (Fearing, C.J., dissenting).

The majority made no attempt to reconcile SVFD's contradictory rationales for permitting some of Sprague's religious speech while claiming other expression might cause SVFD to incur liability. Of course, first responders typically have chaplaincy services, setting them apart from other types of government agencies and further undermining SVFD's claimed need to censor Sprague. *See, e.g., Malyon v. Pierce County* 131 Wn. 2d 779 (1997).

SVFD's approach is out of step with the Supreme Court's consistent application of public employee speech doctrine since *Pickering*. In an extreme example, *Rankin v. McPherson*, 483 U.S. 378 (1987), a clerical employee in the office of a county Constable was fired after she was overheard expressing disappointment that the attempt on President Reagan's life by John Hinckley, Jr. had not been successful. *Id.* at 381. The Supreme Court held that McPherson's speech was a matter of public concern. *Id.* at 386. Even though what could be interpreted as a threat on the life of the President is highly controversial, corollary statements criticizing public policy and the implementation of it must be protected. *Id.* at 387.

Where the Court has sided with the public employer, it has tended either to find that the employee was speaking to a matter of private concern, not public concern, or in rare instances that the ensuing disruption outweighed the employee's rights. *See, e.g., Connick v. Myers*, 461 U.S.

138 (1982); *City of San Diego v. Roe*, 543 U.S. 77 (2004); *Garcetti v. Ceballos*, 547 U.S. 410 (2005). The SVFD's professed concerns about avoiding an Establishment Clause violation or workplace disruption were specious at best. Any disruption was self-inflicted when SVFD restricted and then fired Sprague.

The school speech cases, from which the public employee speech cases draw, expound on common themes of viewpoint discrimination, disruption, and avoiding Establishment Clause violations. On viewpoint, *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 831-32 (1995) is one of the clearest voices:

When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. *See R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992). Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. *See Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983). These principles provide the framework forbidding the State to exercise viewpoint discrimination, even when the limited public forum is one of its own creation.

The SVFD's conception of virtually nonexistent employee speech rights would turn the firehouse into the equivalent of a prison or a military installation. In light of their special characteristics, good reasons for directives and one-way communication exist in prison, though even that has

its limits. See, e.g., *Prison Legal News v. Lehman*, 397 F.3d 692 (9th Cir. 2005). Military necessity also requires a degree of control not found in other work environments. *Greer v. Spock*, 424 U.S. 828 (1976). But first responders are not inmates or enlisted men. They are much like most other Americans, albeit deserving special appreciation and approbation. *Sitka v. Swanner*, 649 P.2d 940 (Alaska 1982) [police captain was not like military officer for First Amendment purposes and should not have been fired for signing letter critical of departmental policies].

The majority and concurrence below focus on the fire department as a nonpublic forum, including its online bulletin board. Reliance is placed on *Perry Educ. Assn.*, which concerned a school's internal mail system. Completely missing from the equation, as pointed out above in *Rosenberger*, is that viewpoint discrimination is still impermissible. The employer's express focus on the religious nature of Sprague's communication—on social topics like suicide raised in the employer's own communication—is unmistakable viewpoint discrimination that should not be condoned here.

C. The nature of the firehouse deserves more, not less, speech protection.

Firefighters should be afforded more, not less, First Amendment protection due to the fact that the firehouse serves as their part-time

residence. For instance, in *Johnson v. County of Los Angeles Fire Dept.*, 865 F. Supp. 1430 (C.D. Cal. 1994), the federal court struck down a policy that prohibited firefighters from reading and sharing *Playboy* magazine during off-duty hours at the fire station. See also *Strinni v. Mehlville Fire Protection Dist.*, 681 F. Supp. 2d 1052 (E.D. Mo. 2010) [firefighters engaged in protected speech]; *Firefighters Assn. v. Barry*, 742 F. Supp. 1182 (D.D.C. 1990) [actions taken against firefighters violated their First Amendment rights]; *Gilbrook v. City of Westminster*, 177 F.3d 839 (9th Cir. 1999).

This Court need not go as far as did the California Court of Appeal's Sixth District, which recently sided with a firefighter who had been terminated for exchanging suggestive and inappropriate messages with a teenage girl after she visited the fire station. *Seibert v. City of San Jose*, 247 Cal. App. 4th 1027 (Cal. App. 6th Dist. 2016). But it behooves the Court to take account of the firehouse as not just a workplace, but a unique environment that incorporates aspects of home life requiring greater freedom.

CONCLUSION

This case presents an opportunity to clarify that First Amendment values are important in two very practical ways. First, free speech claims by a firefighter cannot be knocked out by a civil service commission's

findings that disguise constitutional questions as factual questions. Second, viewpoint discrimination cannot be hidden in plain sight by calling it insubordination. Amicus thus respectfully asks the Court to reverse the appellate decision of the Court of Appeal.

Respectfully submitted this 28th day of April, 2017.

Conrad Reynoldson,
WSBA No. 48187
WASHINGTON CIVIL & DISABILITY
ADVOCATE
3513 NE 45th Street, Suite G
Seattle, WA 98105
Telephone: 206.855.3134
conrad.wacda@gmail.com



Matthew B. McReynolds,
CA Bar No. 234797
PACIFIC JUSTICE INSTITUTE
P.O. Box 276600
Sacramento, CA 95827
Telephone: 916.857.6900
Facsimile: 916.857.6902
mmcreynolds@pji.org

Attorneys for *Amicus Curiae*

CERTIFICATE OF SERVICE

I, Stephen Moore, declare that I am not a party to the action, am over eighteen years of age and my business address is 631 South Olive Street, Suite 600, Los Angeles, California 90014.

On April 28, 2017, declarant served the within Brief of *Amicus Curiae* Pacific Justice Institute in Support of Plaintiff Jonathan J. Sprague on the following via FedEx Overnight Delivery:

Matthew C. Albrecht/David K. DeWolf
ALBRECHT LAW PLLC
421 West Riverside Avenue, Suite 614
Spokane, Washington 99201
(509) 495-1246 Telephone
Counsel for Petitioner

George M. Ahrend
AHREND LAW FIRM, PLLC
100 East Broadway Avenue
Moses Lake, Washington 98837
Counsel for Petitioner

Michael McMahon/Jeffrey R. Galloway/Linda Thompson
ETTER, McMAHON, LAMBERSON,
VAN WERT & ORESKOVICH, P.C.
618 West Riverside Avenue, Suite 210
Spokane, Washington 99201
Counsel for Respondents

I further declare that this same day one original and one copy have been filed by third party commercial carrier for next business day delivery to:

Office of the Clerk
SUPREME COURT OF WASHINGTON
415 12th Avenue SW
Olympia, Washington 98501-2314

I declare under penalty of perjury that the foregoing is true and correct.

Signed on April 28, 2017 at Los Angeles, California:



Stephen Moore
Senior Appellate Paralegal
COUNSEL PRESS INC.