

Court of Appeals No. 33352-3-III

Supreme Court No. 93800-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JONATHAN J. SPRAGUE, a married man,

Plaintiff/Appellant,

v.

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

Defendants/Respondents.

RESPONDENTS' RESPONSE TO BRIEF OF AMICUS CURIAE
PACIFIC JUSTICE INSTITUTE

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I. INTRODUCTION

Respondents are Spokane Valley Fire Department and Mike and Linda Thompson (collectively “SVFD”). Respondents submit this brief in response to the Brief of Amicus Curiae, Pacific Justice Institute (hereinafter referred to as “PJI”). In addition to the arguments set forth below, SVFD directs this Court to its Supplemental Brief filed May 1, 2017, which discusses the issues before this Court in greater detail.

Well established law of both Washington State and the Ninth Circuit Court of Appeals dictates that the factual findings of the SVFD Civil Service Commission be given preclusive effect. *See Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 508-511, 745 P.2d 858 (1987); *Miller v. Cty. of Santa Cruz*, 39 F.3d 1030 (9th Cir. 1994). The Commission’s factual findings here are dispositive to Mr. Sprague’s claims.

If this Court were to accept the arguments set forth by Amicus PJI, then the administrative process, function, and integrity, specifically the Civil Service Commission, as embodied in RCW 41.08 *et seq.*, would be completely eroded. Moreover, Mr. Sprague would get an unfair opportunity to re-litigate his claims. Such an outcome is contrary to public policy. As this Court has previously found:

...a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To

hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution.

Christensen v. Grant Cnty. Hosp. Dist. No. 1, 152 Wn.2d 299, 308, 96 P.3d 957 (2004) (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-108 (1991)).

Notwithstanding that Mr. Sprague's claims are precluded, the SVFD restricted Mr. Sprague's speech, in accordance with its viewpoint neutral policy, because his speech was unrelated to official SVFD business; such a restriction is constitutional. *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 711 (9th Cir. 2010). Furthermore, as a public entity, SVFD is compelled by the Establishment Clause to restrict certain speech, as it did here.

II. ARGUMENT

A. The Civil Service Commission made factual findings not legal determinations.

The Civil Service Commission, in its adjudication of Mr. Sprague's complaints, did not make findings based on constitutional interpretation. Rather, the Commission made factual findings dispositive to Mr. Sprague's claims. Amicus PJI agrees that such factual determinations are appropriately granted preclusive effect. (Br. of Amicus Pacific Justice Institute in Supp. of Pet'r Jonathan J. Sprague at 6-7).

As recognized by Amicus PJI, and well established under the law of Washington, as well as the Ninth Circuit, the factual decisions of an administrative tribunal, such as the Civil Service Commission, are preclusive to subsequent litigation. *Id.*; *Shoemaker*, 109 Wn.2d at 508-511, 745 P.2d 858; *Miller*, 39 F.3d 1030. It is the factual determinations of the Civil Service Commission decision that preclude Mr. Sprague’s litigation. *Sprague v. Spokane Valley Fire Dep’t.*, 196 Wn. App. 21, 31, 381 P.3d 1259 (2016) (citing *Shoemaker*, 109 Wn.2d at 508, 745 P.2d 858).

In accordance with RCW 41.08.090, the Civil Service Commission found that “[t]he evidence from the investigation and hearing disclosed that Sprague was not terminated for religious reasons....” CP 54. Further, the Commission made the following factual determinations:

[t]here was not evidence presented at the investigation and hearing that the rules were applied unevenly and with discrimination based upon Sprague’s expression of his Christian views. No other department employees were allowed to express similar religious views using department property, or did so without receiving the same evenly applied discipline or punishment.

CP 55. It is these factual determinations (*i.e.*, Mr. Sprague was not terminated for religious reasons) to which collateral estoppel applies. *See Shoemaker* 109 Wn.2d at 508-511, 745 P.2d 858. As the Court of Appeals correctly noted:

[w]e 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. Courts, not administrative agencies, determine whether the constitution has been complied with. However, Shoemaker confirms that a civil service commission factual findings can be given preclusive effect.

Sprague, 196 Wn. App. at 31, 381 P.3d 1259 (emphasis added).

The Court of Appeals correctly affirmed the ruling of the trial court, which found Mr. Sprague to be collaterally estopped from relitigating his claims based on the factual findings of the Civil Service Commission. *See Christensen*, 152 Wn.2d 299, 96 P.3d 957; *Shoemaker*, 109 Wn.2d 504, 745 P.2d 858.

B. SVFD acted constitutionally in accordance with its viewpoint neutral policy.

SVFD's policy regarding use of its email and electronic bulletin board is viewpoint neutral. It requires use to be business related. An agency may restrict speech by limiting discussion on the email servers to official business. *Rodriguez*, 605 F.3d at 711. SVFD's restriction on Mr. Sprague's emails and postings was based solely on Mr. Sprague's personal use of the SVFD email system.

Contrary to the argument of Amicus PJI, SVFD did not opine on areas of general interest and expect Mr. Sprague to receive such opinions in silence. Rather, in compliance with its policy, SVFD provides

information and resources to employees for business purposes. For instance, the Employee Assistance Program (“EAP”) newsletters to which Amicus refers are part of the SVFD employee benefit package, of which Mr. Sprague was enrolled. The EAP newsletters are disseminated by SVFD to employees as plan beneficiaries; SVFD does not comment, opine, or otherwise provide any commentary on the topics covered by the newsletters. Further, SVFD did not invite or seek discussion on the topics covered by the EAP newsletters. Ms. Biladeau, the CR 30(b)(6) representative for SVFD, offered the following testimony at her deposition:

Q: [By Mr. Albrecht]: Okay. What’s EAP?

A: [By Ms. Biladeau]: Employee assistance program.

Q: Okay. And what exactly does that do? What does it accomplish?

A: If we have employees that need assistance with marital counseling, depression, drug issues, family issues, health issues, alcohol issues, a whole bunch of mental health issues, then they call – it’s part of their benefits package, and they call the 1 800 number, and they’re designated a specific counselor for whatever issue it is that they need[.]

...

Q: Are those work purposes when those emails are sent?

A: Yes, it’s part of the benefits plan.

CP 352 (emphasis added). SVFD forwarding the newsletter to plan beneficiaries is analogous to sending out an explanation of the employee

health care plan, a use which is clearly related to SVFD business and in compliance with S&O #171. CP 108. In contrast, Mr. Sprague's emails did not provide information on similar resources; his emails and posts expressed his personal opinions on dealing with mental health issues based upon his religious beliefs. CP 354-55. Mr. Sprague's emails were designed to promote his personal opinions, not advance the SVFD business. For example, Mr. Sprague sent the following email:

Napoleon Bonaparte once said, "I know men and I tell you, Jesus Christ is no mere man. Between him and every other person in the world there is no possible term of comparison. Alexander, Caesar, Charlemagne, and I have founded empires. But on what did we rest the creations of our genius? Upon force. Jesus Christ founded his empire upon love; and at this hour, millions would die for him."

The June newsletter examines the purpose of leadership's power and authority, which has been a topic of no small interest as of late. There are clearly some radical differences in the leadership style of Jesus, who, according to the Bible, was given all power and authority in heaven and on earth. Why has anyone ultimately been given power and authority over others, and how might they be best utilized in the fire station or in the home? We'll take a look at leadership from this Biblical perspective for some answers.

We're also keeping up with our series on suicide with a closer look at the intervention piece and the Biblical principles with which it may coincide.

CP 177-176. Thus, they violated SVFD policy. CP 106-114.

Consistent with SVFD's policy, Mr. Sprague could have sent an email stating that he needed shift coverage in order to attend an organizational

(church, PTA, Boy Scouts, etc.) function. Such an email is associated with SVFD business, *i.e.* making sure all shifts are covered, and is, therefore, permissible. Mr. Sprague could have also informed other employees of resources available from a specific organization, such as his church, to assist with mental health issues. Mr. Sprague was advised of this. CP 147-148. Instead, Mr. Sprague included personal and non-business related messages and opinions in his emails through the SVFD email account in violation of S&O #171. CP 147-149; 151; 153-155; 157-158; 160-162; 164-166; 168-170; 172-196; 201; 203; 208-211.

Amicus cited the following with approval,

[t]he 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.

(Br. of Amicus Pacific Justice Institute in Supp. of Pet'r Jonathan J. Sprague at 11) (citing *Perry Educ. Ass'n v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983)). Consistent with this passage, SVFD did not restrict Mr. Sprague's posting because of his particular viewpoint. It was based on the non-business purpose of the email, and to comply with constitutional mandates.

C. The Washington State Constitution prohibits Mr. Sprague from using SVFD email, which is public property, to disseminate his personal religious message.

Article I, Section 11 of the Washington State Constitution provides:

No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.

Mr. Sprague, as a public employee and Captain of the SVFD, insisted on using the SVFD email system, a public resource and public property, to specifically support Christianity, a religious establishment. By way of example, Mr. Sprague sent the following email utilizing the SVFD email system:

There are clearly some radical difference in the leadership style of Jesus, who, according to the Bible, was given all power and authority in heaven and on earth.

CP 168-169.

Mr. Sprague's acts were in direct violation of the Washington State Constitution.

D. The SVFD firehouse, as a branch of the public agency, permits all constitutionally protected speech.

By the very nature of the work firefighters perform, the firehouse incorporates some aspects of home life. However, SVFD cannot condone behavior that exposes it to constitutional violations. Recognizing the unique workplace environment of the SVFD firehouse, Mr. Sprague was

informed that he could use SVFD Internet access to send personal emails using his personal email account. CP 147. He chose not to exercise this option to disseminate his personal email messages. Instead, he chose to directly contravene orders from SVFD and utilize the SVFD email system in violation of S&O #171.

Furthermore, Mr. Sprague's emails using the SVFD email account, which are subject to public disclosure and disseminated to his co-workers, including subordinate employees, exposed SVFD to liability under the Establishment Clause. *See* RCW 42.56.010(3); *Mechling v. City of Monroe*, 152 Wn. App. 830, 843-844, 222 P.3d 808 (2009) (wherein the Court found that "E-mail messages of public officials or employees are subject to a public records request..."). Allowing Mr. Sprague to use SVFD email to send religious emails and to post religious material on the bulletin boards would give the impression or appearance of a governmental endorsement of Mr. Sprague's religious messages. Such an endorsement would be unconstitutional. *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 651 (9th Cir. 2006).

As the lower court noted "SVFD permitted Mr. Sprague, during work hours, to discuss his Christian views with his colleagues both verbally and through his personal email. What SVFD prohibited was employees using

its [email] for nonbusiness purposes.” *Sprague*, 196 Wn. App. at 33, 381

P.3d 1259. The court further acknowledged that:

SVFD successfully navigated between the Scylla of not respecting Mr. Sprague’s free speech right and the Charybdis of exposing it to Establishment Clause liability by appearing to endorse a particular religion.

Id. at 36, 381 P.3d 1259.

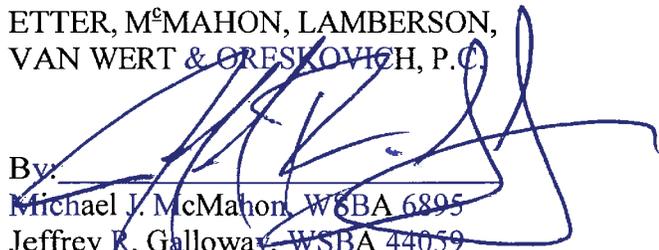
The decisions of the trial court and the court of appeals must be affirmed.

III. CONCLUSION

Based upon the foregoing argument and authority, Spokane Valley Fire Department and Mike and Linda Thompson respectfully request this Court affirm the trial court’s summary judgment orders as well as the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED this 31st day of May 2017.

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DECLARATION OF SERVICE

I, Kristie M. Miller, declare and say as follows:

1. I am a citizen of the United States and resident of the State of Washington, over the age of 18 years, not a party to the above-entitled action, and am competent to be a witness herein. My business address is 618 W. Riverside Ave., Ste. 210, Spokane, Washington 99201-5048, and telephone number is 509-747-9100.

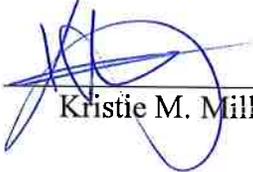
2. On May 31, 2017, I caused to be served RESPONDENTS' RESPONSE TO BRIEF OF AMICUS CURIAE PACIFIC JUSTICE INSTITUTE on the individuals named below in the specified manner indicated.

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

Dated this 31st day of May, 2017, at Spokane, Washington.



Kristie M. Miller