

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

SUPREME COURT OF THE STATE OF WASHINGTON

JONATHAN J. SPRAGUE, a married man,

Plaintiff-Petitioners,

vs.

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

Defendants-Respondents.

SUPPLEMENTAL BRIEF OF JONATHAN J. SPRAGUE

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

Jonathan J. Sprague (“Sprague”) appeals from a decision of Division III of the Court of Appeals affirming his dismissal from his position as a captain with the Spokane Valley Fire Department (“SVFD”), and the dismissal of his suit for injunctive relief.

Sprague was fired because he refused to follow an unwritten but official SVFD policy that encouraged expression of viewpoints on topics such as suicide prevention and stress management, but excluded religious viewpoints from being expressed on those same topics. Sprague asked the Civil Service Commission to reinstate him, arguing that the policy that was used to justify his termination was unconstitutional. The Commission found that there were no facts in dispute,¹ but found that SVFD properly fired Sprague for violating its policy that prohibited religious viewpoints in bulletin board posts or emails.

Sprague filed suit in Superior Court seeking damages and injunctive relief. SVFD moved for summary judgment, arguing that Sprague’s appearance before the Civil Service Commission collaterally estopped him from seeking any relief. At the same time, Sprague filed a motion for partial summary judgment that the admitted and undisputed official (but unwritten)

¹ CP 51: “The facts relating to this matter are, for the most part, undisputed.”

policy SVFD used as the basis for Sprague's termination violated free speech protections in both the state and federal constitutions. The trial court granted SVFD's motion and denied Sprague's motion, finding that the elements of collateral estoppel had been satisfied and that SVFD was allowed to prohibit expression of religious viewpoints. Sprague timely appealed. Sprague asked Division III to reverse the finding on collateral estoppel, since the Civil Service Commission resolved no factual dispute and lacked competence to resolve constitutional questions, and thus collateral estoppel should not apply. In addition, Sprague pointed to the undisputed evidence that Sprague had been disciplined and terminated for disobeying a policy that SVFD could not constitutionally enforce.

In a split decision, Division III of the Court of Appeals affirmed the trial court over dissent, based on the incorrect assumption that a *written* policy adopted by SVFD addressing the "private" use of SVFD resources was the "official" policy—despite undisputed evidence that exclusion of religious viewpoints was communicated and enforced as SVFD's official policy. After finding that this written policy was content neutral (a point never disputed by Sprague), the majority went on to treat Sprague's claim of unconstitutionality as though it challenged only the *application* of SVFD's written policy rather than the official but unwritten policy that was actually the basis for his discipline and termination. Although Sprague

acknowledged that the policy of excluding religious viewpoints did not discriminate among religious—presumably the same rule would have been applied to a Muslim or a Hindu—the majority focused on language in the Civil Service Commission opinion stating “Sprague was not terminated for religious reasons.” *Sprague v. Spokane Valley Fire Dep't*, 196 Wn. App. 21, 31, 381 P.3d 1259 (2016).

Based on the misunderstanding of what was at issue in the Civil Service Commission proceeding—whether it had resolved disputed facts or simply declined to accept Sprague’s argument that the policy’s discriminatory treatment of religious and non-religious speech was unconstitutional—the Division III majority held that the principle of collateral estoppel applied to the ultimate conclusion reached by the Commission; namely, whether Sprague’s employment had properly been terminated. Because SVFD’s motion for summary judgment was based solely on collateral estoppel, a correct understanding of the nature of the findings made by the Civil Service Commission requires reversal of the decisions below.

II. ISSUES PRESENTED FOR REVIEW

- A. Can claims for declaratory and injunctive relief proceed independently as to the constitutionality of an employer’s speech policy even if the employee’s individual employment claim was dismissed on the basis of collateral estoppel by an administrative agency ruling?

- B. When an official albeit unwritten employment policy is implemented uniformly by an agency, but differs from the agency's written policy, can employee maintain a facial challenge to the constitutionality of the unwritten policy?
- C. Can a public employee be fired for including his religious viewpoint in communications using email and electronic bulletin boards which are otherwise allowed properly used to communicate on the same topics?
- D. Does the legal conclusion by an administrative body regarding the constitutionality of a free-speech restriction prohibit subsequent review of the constitutionality of that restriction under the doctrine of collateral estoppel?
- E. Are the requirements for application of collateral estoppel satisfied in this case?

III. SUPPLEMENTAL STATEMENT OF THE CASE

The basic facts of this case were presented in the briefs filed by Sprague in the Court of Appeals. However, because the Court of Appeals majority misapprehended the critical facts, it is important to highlight the undisputed facts in the record:

1. *Sprague did not challenge the written policy (#171) that restricted use of the email system to SVFD business.* The Court of Appeals began its analysis by analyzing whether the "SVFD email policy" was constitutional.² But Sprague never challenged Policy #171, which provided that "the use of the electronic mail system is reserved solely for SVFD

² "The initial question before us involves Mr. Sprague's First Amendment challenge to the e-mail policy." *Sprague*, 196 Wn. App. at 27.

business and should not be used for personal business.” CP 108. This policy did not exclude the pursuit of business that was “linked to SVFD business.” CP 351. Valerie Biladeau, the CR 30(b)(6) representative of SVFD, testified (and there is no contradiction in the record) that employees were permitted, even encouraged to use the e-mail system for what could be considered personal business so long as it was “linked” to SVFD business. For example, an employee could use the email system to solicit assistance in taking care of the employee’s dog, so long as that was linked to a request that the employee stay beyond working hours. CP351. Similarly, SVFD had no objection to Sprague sending emails notifying other employees of the meetings of the Spokane County Christian Firefighters, but objected to his message containing a quotation from Scripture. CP 361-62.

More significantly, and more directly related to this case, the email system was regularly used—with the approval of SVFD—for the sharing of viewpoints about such topics as suicide prevention, team building, and stress reduction. (CP 286, 293.) These topics were directly related to SVFD business because the firefighters employed by SVFD were (and are) often the first responders to searing scenes of suicide, gruesome motor vehicle accidents, the ravages of fire, and other human tragedies. CP 84 (Sprague’s former boss, a firefighter, had recently committed suicide and SVFD had paid for suicide prevention courses). The Court of Appeals stated that

Sprague “repeatedly violated SVFD policy against private use of government property. It should go without saying that a fire department’s business is firefighting, not discussion of religion.” *Sprague*, 196 Wn. App. at 32. But this characterization is inaccurate in two critical respects. First, the fire department’s “business” consisted not simply of pointing a firehose at a fire, but extended to the challenges of being first responders and the need to build an effective organization. Thus, the discussion by employees of issues such as suicide prevention or leadership were directly related to SVFD’s official business. They were topics initially raised by the Chief and SVFD’s HR department (through the same email system). Sprague did not introduce an irrelevant subject into a discussion forum devoted to SVFD business; he simply joined a discussion already underway on a topic that was directly related to SVFD’s mission. Second, SVFD explicitly permitted the expression of personal views on these topics, and Sprague was welcome to offer his own—so long as he did not address them from a religious point of view. CP 481 (SVFD Designated Representative Valerie Biladeau admits the difference between Sprague’s speech and the Department’s speech was that Sprague’s speech was included “his belief as he sees his studies in Christ”).

2. *Sprague did not claim the ostensibly neutral written policy was discriminatorily applied to him, but rather the unwritten but still*

official policy that served as the basis for his discipline and termination was facially invalid. The Court of Appeals majority made another error in characterizing the nature of Sprague's claim:

Much of Mr. Sprague's claims, including his challenge to the SVFD e-mail policy, presume the existence of a policy of discrimination against the expression of religious viewpoints. Mr. Sprague can only establish the existence of such a policy if he can establish that the otherwise viewpoint neutral SVFD e-mail system policy was applied in a discriminatory manner against religious expression. The civil service commission found as a matter of fact that this was not the case. There was "no evidence" of any such practice.

Sprague, 196 Wn. App. at 32. This was not a case where the employer had an official policy that required equal treatment, but secretly practiced favoritism of one group over another. Sprague challenged the unwritten but official policy described by Valerie Biladeau, SVFD's CR 30(b)(6) witness.³ Sprague did not complain that the written policy had been ignored on the basis of discriminatory animus. He argued that the unwritten policy contained an unconstitutional restriction hostile to religious viewpoints.

3. *The Civil Service Commission did not make factual findings adverse to Sprague.* The final error in describing the record below relates to the proceedings of the Civil Service Commission. The majority stated:

The commission made two related factual determinations that are dispositive in this case. First, it determined that "Sprague was not terminated for religious reasons." CP at 54. Second, it found that

³ As discussed in greater detail later in this brief, Biladeau described SVFD's policy as requiring that communications be "content-neutral," by which she meant excluding religious expression.

“there was no evidence presented . . . that the rules were applied unevenly and with discrimination based upon Sprague’s expression of his Christian views.” CP at 55.

Sprague, 196 Wn. App. at 31. These two quotations, while admittedly found in the Civil Service Commission’s findings, do not reflect the nature of the proceeding. As to the first statement, “Sprague was not terminated for religious reasons,” the Commission began the section entitled “Background” by noting,

The facts relating to this matter are, for the most part, undisputed. Chief Thompson had engaged in progressive discipline of Sprague for violating direct orders not to use the Spokane Valley Fire Department’s property, in this case, internal electronic bulletin board and electronic mail system to express to other fire fighters his Christian views on a number of topics”

CP 52. In other words, Sprague was fired because he disobeyed an order not to express his religious views on topics that were otherwise appropriately the subject of discussion. When the Commission stated that Sprague was not terminated for religious reasons, they meant something other than what was ascribed to them by the Court of Appeals: that there was a neutral reason (insubordination) that justified his termination. This is borne out by the second “factual finding” cited by the Court of Appeals. The full paragraph of the Civil Service Commission Findings makes their meaning clear:

There was no 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**

departmental 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 (emphasis added). The Commission, in other words, found no discrimination because it incorrectly believed it was acceptable to ban *all* religious viewpoints (not just Christian views) from departmental communication. But Sprague never contended he had been singled out and treated unfavorably relative to other religious views. He challenged SVFD's policy of excluding all religious views when expressed on the same topics otherwise open for discussion in the same forum. The Commission's description of the even-handed enforcement of the official policy prohibiting all religious viewpoints was not a factual finding on a disputed matter, but rather merely a recitation of undisputed facts.

4. *The bulletin board and email systems were available only to department employees.* The Court of Appeals majority addressed the question of the type of forum in which Sprague's speech occurred, because it is relevant to determine the types of restrictions that can constitutionally be placed on the speech that occurs in such a forum. Sprague never disputed the characterization of the email system and the electronic bulletin board as non-public forums. In fact, the exclusion of the public from these forums constitutes a critical factual difference between this case and the situation in *Berry v. Department of Social Services*, 447 F.3d 642 (9th Cir. 2006) (the

case relied upon by the concurring opinion of Judge Lawrence-Berrey). In *Berry* the 9th Circuit opinion made clear that the employee was free to discuss religion with his fellow employees (447 F.3d at 646), but he was disciplined for employing religious symbols in a workspace in which he met with public clients of his public service employer, and for insisting that he had the right to share his faith with his clients. Because Sprague expressed his religious views only in a non-public forum, he never triggered any of the concerns about proselytizing the public that permitted the agency in *Berry* to restrict their employee's speech.

IV. SUPPLEMENTAL ARGUMENT

Procedurally, it is not Sprague's burden on appeal to establish that SVFD's policy was unconstitutional; if there are any doubts as to the question, the case should be remanded for further proceeding. SVFD asked for a dismissal solely on the basis of collateral estoppel, and it was Sprague's cross-motion for partial summary judgment that asked the trial court to find that the policy was unconstitutional as a matter of law. A determination that Sprague was not entitled to summary judgment does not operate as a separate basis for affirming the judgment below; instead, the question remains as to whether collateral estoppel was properly applied to bar all of his claims for relief. Nonetheless, a proper understanding of the constitutional claim is essential both to determining whether collateral

estoppel applies, and even if it were to apply to his employment claim, whether it bars him from seeking injunctive relief.

A. The claims for declaratory and injunctive relief should have been permitted to proceed even if Sprague was collaterally estopped from relitigating his employment claim.

The arguments in subsequent sections of this brief demonstrate that the Court of Appeals erroneously affirmed the dismissal of Sprague's employment claim. However, even if Sprague was collaterally estopped from litigating his wrongful dismissal from SVFD, this has no bearing on his claim for declaratory and injunctive relief as to the unconstitutional policy adopted by his employer.⁴

Surprisingly, the Court of Appeals never addressed this argument raised on appeal,⁵ despite well settled law that grants standing to one who has been subjected to an unconstitutional policy.⁶ It is agreed by all (including the Court of Appeals) that the Civil Service Commission had no authority or competence either to decide the constitutionality of SVFD's

⁴ It bears repeating that the trial court's rejection of Sprague's argument regarding constitutionality does not operate as a decision on the merits; because SVFD relied solely upon collateral estoppel as the ground for dismissal at the trial court, if collateral estoppel does not apply to a claim for injunctive relief, then the dismissal of plaintiff's claims in their entirety would be erroneous.

⁵ Sprague's Opening Brief assigns error to the trial court's dismissal (p. 5) and provides argument to support this assignment of error (pp. 29-31).

⁶ *State v. Immelt*, 173 Wn.2d 1, 267 P.3d 305 (2011) (defendant convicted of violating vehicle horn ordinance had standing to challenge constitutionality of statute).

policy or to grant injunctive relief.⁷ Therefore Sprague should not have been estopped to pursue injunctive relief, even if his claim for wrongful termination was properly dismissed. On this ground alone the judgment below should be reversed and the case remanded for further proceeding.

B. The existence of an official policy, even if unwritten, permits a facial challenge if the policy violates the constitution.

As noted previously, the Court of Appeals erred in treating SVFD's written policy regarding use of the email system (#171) as though it were the policy that Sprague was challenging, and that any other challenge would be an "as-applied" challenge to that policy. Instead, Sprague challenged the official (but unwritten) policy that prohibited Sprague from expressing religious viewpoints in email discussions or on electronic bulletin boards that were otherwise available for the expression of personal opinion. Consequently, the Court of Appeals should have considered Sprague's facial challenge to the policy described by Valerie Biladeau in her deposition.

Once the appeal is properly framed in this way, the evidence on the critical issues is undisputed. This is significant not only on the question of

⁷ The statute governing and authorizing the Civil Service Commission hearing explicitly limits its jurisdiction: "such hearing shall be confined to the determination of whether the judgment or order of removal, discharge, demotion or suspension made by the commission, was or was not made in good faith for cause, and no appeal to such court shall be taken except upon such ground or grounds." RCW § 41.08.090.

whether SVFD's policy was unconstitutional (entitling Sprague to disobey an unconstitutional order) but also to the question of whether the Civil Service Commission was deciding an issue of fact that would operate to collaterally estop subsequent litigation.

C. A public employee enjoys first amendment protection for expressing religious viewpoints in a forum that is otherwise open to the expression of personal views.

There is no dispute that a public employee enjoys first amendment rights. The only dispute is whether Sprague's first amendment rights were violated. While an employer may restrict the speech of its employees for legitimate reasons, it cannot use unconstitutional criteria to privilege some speech while inhibiting other speech. For example, a government employer could require that its employees refrain from using its electronic communications systems to express political views; but it could not constitutionally permit expression of views praising the President while forbidding expression of views criticizing her. Yet SVFD followed a policy almost as egregious. It permitted the use of its electronic communications system for the expression of personal viewpoints on topics such as suicide prevention or leadership, but excluded religious viewpoints.⁸

⁸ In the language of Valerie Biladeau, SVFD's CR 30(b)(6) representative, it was permissible to express viewpoints in response to newsletters addressing topics such as suicide prevention or leadership, but they had to be "content neutral." CP 362.

Because there was no genuine dispute as to the nature of SVFD's policy, or its role in Sprague's termination, the trial court erred in failing to grant Sprague's motion for partial summary judgment asking the policy to be declared unconstitutional. It also highlights the difference between cases where the reason for the employee's termination—whether it was based upon an allegedly unconstitutional form of discrimination, or instead was based on a neutral policy such as a reduction in force or enforcement of a sexual harassment policy—was disputed and then resolved by a Civil Service Commission.

D. A legal conclusion by an administrative body regarding the constitutionality of an employment policy should not be given collateral estoppel effect in subsequent litigation.

Both the trial court and the Court of Appeals agreed that the Civil Service Commission was not competent to decide the constitutionality of SVFD's policy. Yet by giving the Civil Service Commission's decision collateral estoppel effect, that is precisely what the trial court and the Court of Appeals did. If the Civil Service Commission had resolved a fact adversely to Sprague—for example, SVFD's motivation in firing Sprague—then Sprague could be collaterally estopped from relitigating that factual issue in subsequent litigation. But the Civil Service Commission did no such thing. All parties agreed that Sprague was fired because he refused to follow a policy that forbade him from expressing religious

viewpoints. The sole question before the Civil Service Commission was whether that firing was justified. Sprague asked the Civil Service Commission to find that SVFD's policy was unconstitutional, and they refused. They expressed their view that the policy adopted by SVFD was consistent with other cases in which restrictions on employee speech were found to be constitutional.

E. The requirements to apply collateral estoppel were not met in this case

“Collateral estoppel ‘has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.’” *State Farm Fire & Cas. Co. v. Ford Motor Co.*, 186 Wn. App. 715, 721-22, 346 P.3d 771, 774 (Div. 1 2015), quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979).

Before a court will invoke collateral estoppel, the party asserting the doctrine must prove: "(1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) application of the doctrine does not work an injustice."

In re Estate of Hambleton, 181 Wn.2d 802, 834, 335 P.3d 398, 415 (2014), quoting *Nielson v. Spanaway Gen. Med Clinic, Inc.*, 135 Wn.2d 255, 262-63, 956 P.2d 312 (1998). With respect to the first criterion, this brief has

previously identified the error committed by the trial court in deciding not only Sprague’s employment claim on the basis of collateral estoppel, but also his claim for declaratory and injunctive relief.⁹

But the central flaw in the trial court’s application of collateral estoppel is its failure to recognize that the fourth criterion—whether the application of collateral estoppel would work an injustice—was not met. This factor hinges on whether there was a “full and fair hearing” on the issue being litigated. *State Farm v. Ford*, 186 Wn. App. at 715; *Hadley v. Maxwell*, 144 Wn.2d 306, 27 P.3d 600 (2001). There are several reasons to conclude that the “full and fair hearing” test was not met.

1. The Civil Service Commission lacked subject matter jurisdiction to rule on Sprague’s constitutional claims.

Essential to a full and fair hearing is that the prior adjudication be conducted by a tribunal that had subject matter jurisdiction over the issue now being litigated. In this action Sprague sought a declaration that SVFD’s policy preventing the expression of religious viewpoints violated both the first amendment to the United States Constitution and its Washington State equivalent, Art. I, § 11. The trial court below found that

⁹ In addition to the wrongful termination claim, Sprague claimed retaliatory discharge based upon his assertion of constitutional rights, and also sought injunctive relief. Even if the “issue” of wrongful discharge is subject to collateral estoppel, the “issues” of retaliatory discharge and injunctive relief were not. Nonetheless, the trial court dismissed Sprague’s claim in its entirety. CP 494.

Sprague's constitutional claims were decided adverse to Sprague by the Civil Service Commission in the process of refusing to reinstate Sprague after his termination. Yet it is clear that the Civil Service Commission lacked subject matter jurisdiction to enter such a judgment. The Civil Service Commission's jurisdiction was limited to deciding personnel issues governed by the Civil Service rules. Not only did it lack the experience and training to decide whether SVFD's policies were constitutional; it lacked jurisdiction over SVFD to impose equitable remedies such as an injunction preventing further operation of an unconstitutional policy. Thus, the trial court erred in finding that Sprague had received a "full and fair hearing" of his claims as the basis for applying collateral estoppel.

2. The Civil Service Commission lacked the competence to evaluate the constitutionality of SVFD's policy.

Another requirement for a "full and fair hearing" is the institutional competence to decide the issue that is litigated in the second tribunal. The interpretation of the provisions in the federal and state constitutions regarding free speech and religion are admittedly complex and quite contentious even among members of the United States Supreme Court. By contrast, the members of the Civil Service Commission are not qualified as attorneys; they lack both the resources and the training to apply the complex doctrines that often confound trial and appellate courts. In assessing

whether an agency's decision making should be given preclusive effect in a subsequent proceeding, the Washington Supreme Court has directed that consideration should be given to "procedural differences" in the way that the agency and the later court operate. *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 508, 745 P.2d 958 (1987). Because the Civil Service Commission lacks the ability to weigh and decide legal issues such as the constitutionality of the policy in dispute here, its determination of the issue should not be given preclusive effect in a subsequent proceeding.

It is true that in his hearing before the Civil Service Commission Sprague asked the Commission to respect his constitutional rights and therefore reinstate him, but in making that argument Sprague did not (and could not) confer upon the Commission members a competence that they lacked—namely to determine whether SVFD's policy satisfied constitutional standards.

3. Collateral estoppel applies *only* to the *facts* found by the Commission.

Sprague agrees that the Commission was competent to decide *factual* issues relating to Sprague's termination. In fact, as the Commission itself noted, "The facts relating to this matter are, for the most part, undisputed." While the Commission lacked both subject matter jurisdiction and competence to decide the issue of whether SVFD's policy was

constitutional, the Commission's findings regarding the reasons for Sprague's termination are undisputed:

Chief Thompson had engaged in progressive discipline of Sprague for violating direct orders not to use the Spokane Valley Fire Department's property, in this case, internal electronic bulletin board and electronic mail system to express to other fire fighters his Christian views on a number of topics, both arguably of a religious and secular nature, including quoting scripture from the Bible.

CP 99 (Commission Findings and Decision).

Sprague also concedes that an administrative agency is competent to decide *factual* issues presented to it that relate to the agency's competence. While the traditional description of collateral estoppel speaks of "issues" rather than "facts" as such, it is clear that, particularly in reference to the decisions of administrative agencies, it is the agency's factual determinations, rather than legal analysis, that bar subsequent relitigation: "Collateral estoppel means that when an issue of ultimate *fact* has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Northwest Wholesale, Inc. v. PAC Organic Fruit, LLC*, 183 Wn. App. 459, 334 P.3d 63 (Div. 3 2014) (emphasis added).

This limitation is even more pronounced when the previous tribunal is an administrative agency rather than a court whose competence extends more broadly than that of an administrative agency. When considering

whether to give preclusive effect to an administrative agency's decision, courts should consider "(1) whether the agency acting within its competence made a *factual* decision; (2) agency and court procedural differences; and (3) policy considerations." *Shoemaker*, 109 Wn.2d at 508 (emphasis added). An illustration of the distinguishing which must be undertaken between a factual determination (which may have preclusive effect) and a legal determination (which does not have preclusive effect) can be found in *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 254 P.3d 818 (2011). In that case the plaintiff had filed a tort claim against a general contractor. The contractor asked the trial court to apply the doctrine of collateral estoppel, arguing that the plaintiff had received worker's compensation benefits from Idaho, and by doing so deprived Washington courts of jurisdiction. The trial court agreed, and the dismissal was affirmed by the Court of Appeals. However, the Supreme Court reversed, granting preclusive effect to the previous tribunal's factual determinations, but not its legal conclusions:

The Court of Appeals may have been understandably confused by the Idaho courts' apparent conflation of the term "jurisdiction" with factual issues relevant to whether a tort action is barred. [Citation omitted]. However, it is not the issue of subject matter jurisdiction that the Idaho courts have held precludes a tort claim, but rather the factual issue of whether the injury occurred in the "course of employment."

Williams, 171 Wn.2d at 733, 254 P.3d at 822.

4. *Shoemaker* does not support the application of collateral estoppel in this case

As noted above, the Court of Appeals incorrectly characterized Sprague's claim, both before the Civil Service Commission as well as in the trial court, as alleging a discriminatory *application* of an otherwise neutral policy.¹⁰ Instead, it was the policy itself that was challenged in the Civil Service Commission hearing. Moreover, there is no disagreement that with respect to determining the constitutionality of the policy adopted by SVFD, the Civil Service Commission lacked the competence to decide that issue, and therefore it has no preclusive effect.¹¹ But rather than recognize that the Civil Service Commission did not decide a contested factual matter, the Court of Appeals attempted to shoehorn this case into the mold of *Shoemaker*, 109 Wn.2d 504. In *Shoemaker* the employee (a police officer) claimed that he had been demoted in retaliation for testimony he had given

¹⁰ “[Sprague] correctly takes issue with the civil service commission’s legal conclusions, but they are not what cause him problems here. Instead, it is the unchallenged factual determinations concerning the reasons for termination that doom this appeal.” *Sprague*, 196 Wn. App. at 30.

Similarly, the majority opinion states:

Much of Mr. Sprague’s claims, including his challenge to the SVFD e-mail policy, presume the existence of a policy of discrimination against the expression of religious viewpoints. Mr. Sprague can only establish the existence of such a policy if he can establish that the otherwise viewpoint neutral SVFD e-mail system policy was applied in a discriminatory manner against religious expression. The civil service commission found as a matter of fact that this was not the case.

Id. at 32.

¹¹ “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” (footnote omitted). *Id.* at 31.

regarding department irregularities. The employer presented evidence that the demotion was not retaliatory but was necessitated by a reduction in force. In other words, the key issue was the *motivation* of the department in taking the adverse employment action, and the Civil Service Commission determined that factual issue adversely to the employee. Consequently the Supreme Court ruled that the agency's determination precluded relitigating that issue.

The Court of Appeals below cited *Shoemaker* as though it were dispositive of Sprague's claims:

The commission made two related factual determinations that are dispositive in this case. First, it determined that "Sprague was not terminated for religious reasons." CP at 54. Second, it found that "there was no evidence presented . . . that the rules were applied unevenly and with discrimination based upon Sprague's expression of his Christian views." CP at 55.

Sprague, 196 Wn. App. at 31. If SVFD's *motivation* had been at issue, as it was in *Shoemaker*, or if Sprague had contested whether an otherwise neutral policy were *applied* in a discriminatory manner, then this case would fit the mold of *Shoemaker*. But because Sprague never contested his employer's motivation, or claimed a discriminatory application of the policy, there was no factual dispute that was resolved against him. Consequently, the rule in *Shoemaker* has no application to this case.

The trial court expressed the belief that while the Commission could not decide legal issues, it was competent to decide the factual issues that would support a finding of constitutionality. RP 50-51. Such a distinction is theoretically possible, but it has no application here. For example, in *Catsiff v. McCarty*, 167 Wn. App. 698, 274 P.3d 1063 (Div. 3 2012), the plaintiff objected to the city's restrictions on billboards. If the parties had disputed whether the restrictions were limited to size and height, and an administrative agency had determined facts upon which it could be concluded that there were no restrictions on content, then the agency's findings with respect to whether or not the restriction was content neutral could be given collateral estoppel effect to determine whether the city's restrictions were constitutional.

By contrast, in this case the Commission made no "necessary findings to support" a finding of constitutionality. RP 51. Quite the contrary. The Civil Service Commission did not find that SVFD's policy was content neutral. The decision of the Commission does not even discuss the term. Instead, the Commission considered first whether Sprague had disobeyed a direct order of his superior officer, and found that he had. In answer to Sprague's claim that he was subject to unjust discrimination, the Commission wrote, "There was no 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 departmental employees were allowed to express similar religious views using department property.*” CP 55 (emphasis added). In other words, there was a consistent policy of excluding religious views.

In *Collier v. City of Tacoma*, 121 Wn.2d 737, 854 P.2d 1046 (1993) the city sought to justify its exclusion of political signs by pointing out that it excluded *all* political signs, not just the ones it disagreed with. “Tacoma contends that since the ordinances serve a purpose unrelated to a sign’s content, the ordinances are content-neutral.” *Id.* at 751. The court rejected that approach, finding that by singling out political speech for adverse treatment, the city had imposed an unconstitutional restriction on free speech. Similarly, here SVFD (with the Commission’s blessing) thought that by excluding *all* religious speech—not just the speech it disagreed with—it acted constitutionally. While the trial court might have applied collateral estoppel principles with regard to disputed factual issues that were decided by the previous tribunal, it mistakenly viewed the determination of constitutionality as a factual rather than a legal matter.

V. 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 1st day of May, 2017.



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

Attorneys for Petitioner

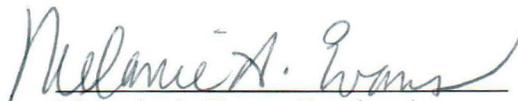
CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington that on May 1, 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

Signed on May 1, 2017 at Spokane, Washington.


Melanie A. Evans, Paralegal