No. S162570
(Ninth Circuit Court of Appeals No. 06-15847)
(U.S. District Court No. CV-05-03633-MJJ)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KEVIN MURRAY,
Plaintiff, Appellant and Respondent,

v.

ALASKA AIRLINES, INC.,
Defendant, Appellee and Petitioner.

On Certification From The United States Court Of Appeals For The Ninth Circuit

KEVIN MURRAY'S ANSWER BRIEF ON THE MERITS

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I

ISSUE CERTIFIED TO THIS COURT

This Court granted the request of the United States Court of Appeals for the Ninth Circuit, pursuant to California Rules of Court, rule 8.548, to answer the following question:

> **"Should issue-preclusive effect be given to a federal agency's investigative findings, when the subsequent administrative process provides the complainant the option of a formal adjudicatory hearing to determine the contested issues *de novo*, as well as subsequent judicial review of that determination, but the complainant elects not to invoke his right to that additional process?"**

When framing the question, the Ninth Circuit Court of Appeal noted that "the Supreme Court of California may reformulate our question."

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II

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Plaintiff/Appellant Kevin Murray is a former employee of Defendant Alaska Airlines, Inc. ("Alaska"). Mr. Murray was hired as a Quality Assurance Auditor by Alaska, and assigned to its Oakland Airport maintenance facility. 9th Circuit Excerpts of Record ("ER") 123. Mr. Murray determined that there were numerous aircraft safety problems at the facility. Many of these deficiencies were similar to maintenance and repair problems that had previously resulted in the crash of Alaska Airlines Flight 261. Plaintiff brought these problems to the attention of his supervisors and other management personnel. When no corrective actions were taken by management to resolve the issues, Murray contacted the FAA. ER 80.

Soon thereafter, Mr. Murray was terminated when the Oakland facility was closed by Alaska and the repairs and maintenance were "outsourced." The employees of Oakland were allowed to transfer to other facilities, but Plaintiff was denied the opportunity to transfer.

Id., ER 81.

On or about December 8, 2004, Mr. Murray filed an administrative complaint with the Department of Labor pursuant to 49 U.S.C. §42121 (ER 58). 49 U.S. C. §42121, the so-called "AIR 21" or "Whistleblower Protection Program" ("WPP") of §42121. The administrative complaint essentially alleged that Murray had been terminated and not received a reassignment to the Seattle facility of Appellee Alaska Airlines because of his disclosure to the FAA and OSHA of safety violations at the Oakland facility of Alaska which potentially affected air safety. ER 58. Mr. Murray abandoned his administrative complaint shortly after filing same, electing instead to pursue a civil action for wrongful termination under California common law. ER 79. Plaintiff did not participate in the administrative process after filing the DOL complaint. ER 82@18. The Department dismissed the case before holding any hearings, did not transcribe the proceedings, did not conduct the investigation as an adjudication proceeding with cross examination of

witnesses under oath. ER 62-64.

On or about June 8, 2005, the DOL sent Mr. Murray a letter stating that it had investigated his administrative complaint and had made certain findings. ER 62. The relevant findings of the agency were that Murray had engaged in protected activity, but that there was no causal link between his protected activity and the adverse job action, failure to allow a transfer to another Alaska facility upon its shutdown of the Oakland facility at which plaintiff was employed. The DOL letter further stated that plaintiff had the right to challenge the findings before an administrative law judge, and ultimately, to the Ninth Circuit Court of Appeals. ER 64.

On or about June 8, 2005, Mr. Murray filed a civil complaint in the Alameda County Superior Court, alleging two causes of action, "Wrongful Termination", and "Violation of Public Policy." ER 1. Both causes of action essentially alleged that Murray had been terminated and denied a transfer to other Alaska facilities in retaliation for his protected activity in

complaining to Alaska management and to the FAA regarding ongoing safety problems related to Alaska's aircraft maintenance programs. The case was timely removed to the United District Court on diversity grounds.

On or about February 7, 2006, Alaska Airlines filed a Motion for Summary Judgment. ER 22. Alaska's motion was filed on the bases that (1) the WPP expressly prohibits a collateral attack on the DOL decision; (2) the DOL decision constituted a final judgment that could not be collaterally attacked by bringing the common law civil action; and (3) the civil action was barred because plaintiff failed to exhaust judicial remedies by seeking direct judicial review of the administrative decision.

On March 27, 2006, the District Court issued its Order, granting summary judgment in favor of Alaska. The Court essentially determined that (1) the WPP's adjudicatory procedures are voluntary, not mandatory; (2) the WPP's adjudicatory procedures do not preempt state law causes of action; (3) the WPP does not

require aggrieved employees to prosecute retaliation claims through its administrative procedures; and that (4) Murray's claims were not barred by §42121(a)(4)(b)'s prohibition on collateral attacks. However, the Court determined that Mr. Murray's claims were barred by the doctrine of collateral estoppel. The Court applied California's rules of collateral estoppel as set forth in *Lucido v. Superior Court* 51 Cal.3d 335, 341 (1990). Those standards require that all of the following criteria apply to support a finding of collateral estoppel.

1. That the issue sought to be precluded from re-litigation is identical to that decided in the former proceeding.

2. That the issue was actually litigated in the former proceeding.

3. That the issue was necessarily decided in the former proceeding.

4. That the decision in the former proceeding was final and on the merits.

5. That the party against whom preclusion is

sought was a party to the former proceeding.

The determination of the motion at issue here essentially centered on the second factor, with the District Court determining that Mr. Murray had the "opportunity to litigate" the issue of causation in the administrative forum, but chose not to do so. The Court reasoned that this was sufficient to constitute the "actual litigation" requirement.

Here, preclusive collateral estoppel effect should not be given to the administrative finding made without plaintiff's participation, particularly in light of the fact that the substantial remedy of punitive damages was not available under AIR 21. Collateral estoppel under such circumstances is in conflict with California's strong public policy against wrongful termination in violation of public policy, particularly the strong public policy favoring air safety recognized by this Court in *Green v. Ralee Engineering* (1998) 19 Cal.4th 73.

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III

LEGAL ARGUMENT

A. The Whistleblower Protection Program is Not Mandatory

As the District Court confirmed in its Order, he Whistleblower Protection Program statute (WPP), 49 U.S.C. §42121, was not intended to be an exclusive or mandatory remedy as it states on its face that an affected individual "may" file a complaint with the Department of Labor. For the same reasons articulated by the District Court, the WPP does not preempt state common law claims. See *Branche v. Airtran Airways, Inc.* 342 F.3d 1248, 1264 (11th Cir. 2003). In short, the courts have concluded that the WPP is an additional, but optional, protection for whistleblowers.

Therefore, it is not mandatory for an employee to file such an administrative complaint or exhaust this remedy before bringing an action. 49 U.S.C. §42121; *Fadaie v. Alaska Airlines, Inc.* 293 F.Supp.2d 1210,

1220 (W.D Wash. 2003). The remedy available under AIR 21 is limited to reinstatement and "compensatory damages." *Id.* The question can thus be posed as whether one who initiates, and then abandons an administrative procedure which does provide the same panoply of remedies as a civil action, shall be held to have participated in an adjudicatory proceeding and be precluded from subsequent litigation. Here, the result should be no different than the situation where a plaintiff formally abandons the administrative proceeding by filing proper written notice of abandonment. Abandonment by formal means or by actual abandonment amounts to the same failure of the opportunity to litigate.

B. Collateral Estoppel Does Not Apply to an Unconsummated Administrative Finding

Under the circumstances of the present case, Mr. Murray's abandonment of the administrative complaint, and the DOL's findings based only on an OSHA investigation do not constitute an adjudicatory proceeding, or even the opportunity to adjudicate under

applicable California law.

In a diversity case, the law of the forum state governs questions of collateral estoppel. *Pardo v. Olson & Sons Inc.* (9th Cir. 1994) 40 F.3d 1063, 1066.

The investigation by OSHA on behalf of the Labor Department was too informal to have complied with the foregoing standards resulting in collateral estoppel. *Jacobs v. CBS Broadcasting, Inc.* 291 F.3d 1173 (9th Cir. 2002). In *Jacobs*, the Court overruled a summary judgment granted by the District Court for the Central District of Los Angeles on collateral estoppel grounds where necessary procedural safeguards were not in place in connection with an arbitration proceeding. The court noted that:

> "The WGA participating-writer determination did not provide the requisite procedural safeguards to give it issue-preclusive effect in California. The determination was made after an informal "investigation" into Givens' claims. The WGA did not take formal testimony from interested parties but, instead, engaged

in "discussions" . . . Givens had no opportunity to cross-examine witnesses. . . None of them had a right to examine the evidence presented by CBS and others. Givens and CBS simply provided the WGA with relevant information about the development of each project, and the WGA arrived at its conclusions through an examination of those materials. Finally, the WGA's participating-writer determination was subject to only very limited judicial review." *Id.*, at 1179.

In this case there was an informal investigation that resulted in "findings" from witnesses who were not sworn. Appellant was not present when those witnesses were interviewed. He was not allowed to cross examine the witnesses nor subpoena his own; there were no formal rules of evidence or of procedure. No record was kept of the proceedings. Given these facts, it is difficult to determine what issues were fully explored, much less "litigated".

The doctrine of collateral estoppel "rests upon the

ground that the party to be affected has litigated, or had an opportunity to litigate, the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to litigation."

In addition to the above factors, the courts consider whether the party against whom the earlier decision is asserted had a "full and fair" opportunity to litigate the issue. *Roos v. Red* (2005) 130 Cal.App.4th 870, 880. Collateral estoppel will not be applied if injustice would result or if the public interest requires that re-litigation not be foreclosed." *Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 902.

Other California authorities demonstrate that the doctrine is, and should be, applied sparingly. For example, a number of cases hold that, even in successive **judicial** proceedings where the opportunity to litigate arguably existed, the doctrine should not

be applied. These authorities also shed light on the nature of the "opportunity to litigate" concept which was the touchstone of the District Court's grant of summary judgment below.

In *Vella v. Hudgins* 20 Cal.3d 251 (1977), the Supreme Court held that a prior unlawful detainer judgment in which the same parties participated did not bar a subsequent action for imposition of a constructive trust and injunctive relief. In *Vella*, the plaintiff, who had originally owned the real property, lost her interest due to default on a second deed of trust, resulting in a foreclosure sale. Ms. Vella was evicted pursuant to an unlawful detainer proceeding in which she asserted an affirmative defense of fraud. The same allegations of fraud formed the basis of another action filed by her for imposition of a constructive trust. This action was apparently initiated prior to the unlawful detainer, but was tried later, due to the summary nature of the unlawful detainer proceeding. The constructive trust case was tried and the court concluded that the default which

resulted in the election to sell the property had been procured by fraud. The trial court ordered the property returned to Ms. Vella. The Court of Appeal reversed on the basis of collateral estoppel, holding that Vella's fraud claim had been conclusively adjudicated in the prior unlawful detainer proceeding.

This Court reversed, finding that:

"A judgment in unlawful detainer usually has very limited res judicata effect and will not prevent one who is dispossessed from bringing a subsequent action to resolve questions of title, **or to adjudicate other legal and equitable claims between the parties.** [emphasis added, citations omitted]. *Vella, supra,* at 255.

The Supreme Court also referred to *Wood v. Herson* (1974) 39 Cal.App.3d 737, a case in which an affirmative defense of fraud in an unlawful detainer action was virtually identical to fraud allegations in a subsequent suit and finding such issue to constitute *res judicata*. The Court in *Vella,* discussing the *Wood*

holding, found that:

> "We agree that "full and fair" litigation of an affirmative defense - even one not ordinarily cognizable in unlawful detainer, if it is raised without objection, and if a fair opportunity to litigate is provided - will result in a judgment conclusive upon issues material to that defense. In a summary proceeding such circumstances are uncommon. *Wood*, however, appears to be an appropriate example. There, the parties apparently chose to waive speedy resolution of the issue of possession in favor of an extensive adjudication of their conflicting claims by a superior court invested with jurisdiction to deal with any issues the disputants agreed to try. The more usual case is accurately characterized by our statement in *Cheny:* "Matters affecting the validity of the trust deed or primary obligation itself, or other basic defects in the plaintiff's title, are

neither properly raised in this summary proceeding for possession, nor are they concluded by the judgment." *(Cheny v. Trauzettel, supra,* 9 Cal.2d at p. 160.) "The record herein fails to disclose that Vella had the fair adversary hearing contemplated by us in *Crow*. The municipal court, in Hudgins' unlawful detainer action, was empowered to examine the conduct of the trustee's sale (if its validity had been challenged), and properly could consider whatever equitable defenses Vella might have raised insofar as they pertained directly to the right of possession. The court had no jurisdiction, however, to adjudicate title to property worth considerably more than its $5,000 jurisdictional limit, nor could its judgment on the issue of possession foreclose relitigation of matters material to a determination of title except to the extent that the summary proceeding afforded Vella a full and fair opportunity to litigate such

matters." *Vella, supra,* at 256.

In the present case, unlike even the *Vella* situation, the issue of causation was **never litigated.** Because Mr. Murray abandoned his administrative claim and did not further participate in the administrative proceedings, there can be no question that this issue was never actually litigated. The only "evidence" taken consisted of the interviews of witnesses conducted by the DOL's investigator. All of the evidence was obtained and relied upon **without opposition and without cross examination.**

Further, the remedy available in the administrative proceeding is clearly inferior to the remedy available in the common law wrongful termination case, in which full tort damages are recoverable. *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167.

We respectfully submit that there can be no collateral estoppel created by administrative findings which were never litigated under these circumstances. The issue of causation was never litigated at the

administrative level. Mr. Murray never had the opportunity to litigate it and should not be compelled to do so at his own peril once he made the decision to pursue the litigation.

Forcing whistleblowers to pursue administrative action at their own peril is completely at odds with the purposes of common law claims for wrongful termination in violation of public policy and the salutory purposes of the WPP.

C. Collateral Estoppel Does not Apply When the Remedy Sought is Different

There are three essential elements for application of the doctrine of collateral estoppel. First, the issue to be precluded must be identical to the issue previously litigated. Second, the proper action must have resulted in a final judgment on the merits. Third, the parties in the later action must be the same or in privity with the parties in the former action. *Teitelbaum Furs, Inc., v. Dominion Ins. Co., Ltd.* (1962) 58 Cal.2d 601.

In *Bronco Wine Co. v. Frank A. Logoluso Farms*

(1989) 214 Cal.App.4th, 699, the Court addressed the applicability of *People v. Sims* (1982) 32 Cal.3d 468 (relied on heavily by Alaska) to the situation where the remedy available in the administrative proceeding differed from that available in (subsequent) court proceedings. The Court noted that:

> "The *Sims* rule was not set forth in broad, far-reaching terms. Subsequent cases interpreting *Sims* have carefully scrutinized the nature of the remedy involved before applying collateral estoppel. For collateral estoppel to have any effect, the issue decided in the previous proceeding must be *identical*. (*Logoluso, supra,* at 709)

The Court further noted that:

> "In *Mahon v. Safeco Title Ins. Co.* (1988) 199 Cal.App.3d 616, the court held that a prior hearing before the Unemployment Insurance Appeals Board did not collaterally estop a future lawsuit for wrongful termination. The *Mahon* court rejected the employer's contention

that *Sims created a flat rule that whenever an administrative hearing is a judicial, adversarial hearing that collateral estoppel necessarily applies to its findings.* *Id* at p.622. *Mahon* focused on the difference in remedies afforded employers in the administrative scheme and a lawsuit for wrongful termination. Finding that the scheme or remedies was completely different between the two hearings, *Mahon* reasoned that collateral estoppel could not be applied to the administrative hearing before the Unemployment Insurance Appeals Board: "Resolving the issue also includes consideration of matters such as the effect of a nominal economic stake in the issue in the administrative hearing (*Kelly v. Trans Globe Travel Bureau, Inc.* (1976) 60 Cal.App.3d 195, 202-203...) and the policy of the administrative scheme concerning subsequent issue preclusion. . . We find no implication in *People v. Sims* that such considerations are

no longer pertinent to collateral estoppel doctrine. Both kinds of considerations present material grounds for rejecting such an effect for UIB determinations in a wrongful discharge action. The amount of money at stake in a UIB hearing will often be small and with respect to the costs of full blown litigation that could be warranted by the substantially greater stake in a wrongful discharge claim. Accordingly, a party to a UIB proceeding might be unfairly sandbagged if the results of the proceeding are given issue preclusion effect. (See *Gibson v. Unemployment Ins. Appeals Bd.* (1973) 9 Cal.3d 494, 499...)" (199 Cal.App.3d at p.622)" *Logoluso, supra,* at 711).

The *Logoluso* Court then found that there was no collateral estoppel effect in a situation where the administrative forum did not have the power to determine the amount necessary to fully compensate the plaintiff for his loss. Here, AIR 21 provides remedies for reinstatement and "compensatory damages". Clearly,

no punitive damages are allowed. Under California law, full tort damages are available for the common law tort wrongful termination in violation of public policy. *Tameny, supra*.

V

CONCLUSION

Preclusive collateral estoppel effect should not be given to the administrative finding made without plaintiff's participation, particularly in light of the fact that the substantial remedy of punitive damages was not available under AIR 21. Collateral estoppel under such circumstances is in conflict with California's strong public policy against wrongful termination in violation of public policy, particularly the strong public policy favoring air safety recognized by this Court in *Green v. Ralee Engineering* (1998) 19 Cal.4th 73. Further, collateral estoppel will not further the federal policies embodied in AIR 21, as Alaska suggests. Full and complete litigation of common law public policy claims, consistent with California's strong state public policy in favor of air

safety is an even more effective manner of enforcing our state's public policy.

DATE: September 17, 2008

RESPECTFULLY SUBMITTED
Law Offices of
James P. Stoneman II

By: _____
JAMES P. STONEMAN II
Attorney for Plaintiff - Appellant

CERTIFICATE OF COMPLIANCE
PURSUANT TO CAL.R.CT.8.520(c)(1)

Pursuant to California Rule of Court 8.520(c)(1), and in reliance upon the word count feature of the software used to prepare this document, I certify tht the attached Kevin Murray's Answer Brief on the Merits contains 3,331 words, exclusive of those materials not required to be counted under Rule 8.520(c)(3).

Dated: September 17, 2008

By: _____
JAMES P. STONEMAN II
Attorney for Plaintiff - Appellant

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of Los Angeles County. I am over the age of eighteen years and not a party to the within entitled action; my business address is: 100 West Foothill Boulevard, Claremont, California, 91711.

On September 17, 2008 I served the within KEVIN MURRAY'S ANSWER BRIEF ON THE MERITS on the interested parties in said action, by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SERVICE LIST ATTACHED

(**X**) **(BY MAIL)** I deposited such envelope with postage thereon fully prepaid, in the United States mail at Claremont, California.

() **FAXING** a true copy thereof

() **(BY PERSONAL SERVICE)**
() by personally delivering copies thereof to the person served.
() I delivered such envelope by and to the offices of the addressee pursuant to CCP Section 1011.

() **(FEDERAL EXPRESS)** by sealing the envelope and placing it for collection and delivery by Federal Express with delivery fees paid or provided for in accordance with ordinary business practices.

() **(ELECTRONIC MAIL)** by e-mailing a true copy of said document from my computer located at the above business address. I caused a copy of my e-mail to be printed, a copy of which is attached to this declaration. Said e-mail was directed to:_____.

I declare that I am employed in the office of a member of the bar of this court, at whose direction this service was made.

Executed on September 17, 2008 at Claremont, California.

KATHERINE E. KARAISCOS

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