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

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KEVIN MURRAY,
Plaintiff and Appellant,

v.

ALASKA AIRLINES, INC.,
Defendant and Appellee.

Appeal From Judgment Of The United States District Court
For The Northern District Of California
(Hon. Martin J. Jenkins, Presiding)

ALASKA AIRLINES, INC.'S REPLY BRIEF ON THE MERITS

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I.

PLAINTIFF HAS FAILED TO SHOW WHY COLLATERAL ESTOPPEL SHOULD NOT APPLY TO THIS CASE.

A. Plaintiff's Argument That He "Initiated, Then Abandoned" An Administrative Procedure Misstates The Facts.

Plaintiff attempts to reformulate the issue presented in this case as "whether one who initiates, and then abandons an administrative procedure . . . shall be held to have participated in an adjudicatory proceeding and be precluded from subsequent litigation." Kevin Murray's Answer Brief on the Merits ("Answer") at 9. This reformulation ignores a critical fact: though the regulations governing proceedings under the AIR21 statute, 49 U.S.C. §42121, provide a means to withdraw an administrative complaint (29 C.F.R. §1979.111(a) (2007)), *Plaintiff failed to do so*. Moreover, the abandonment of a claim requires administrative approval. *Id.* Plaintiff should not be permitted to short-circuit that requirement by unilaterally "abandoning" his administrative appeal *without* Secretarial approval, particularly *after* he had received an adverse decision.

B. The Department Of Labor Procedures Are Entitled To Collateral Estoppel Effect.

As our opening brief demonstrates, this case meets the test set forth by this Court to determine whether administrative agency decisions are to be given preclusive effect. Alaska Airlines' Opening Brief on the Merits ("Opening Brief") at 9-23. Plaintiff's Answer does nothing to change that analysis.

First, in reviewing Plaintiff's claim the Department of Labor was "acting in a judicial capacity" to resolve "disputed issues of fact properly before it which the parties have had an *adequate opportunity to litigate*." *People v. Sims*, 32 Cal. 3d 468, 479 (1982) (quoting *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966)) (emphasis added by *Sims* Court). As this Court has recognized, in determining whether there was an opportunity to litigate for purposes of applying collateral estoppel, it is irrelevant whether the

plaintiff actually availed himself of that opportunity. *Lucido v. Superior Court*, 51 Cal. 3d 335, 340 n.2 (1990); *see also Rymer v. Hagler*, 211 Cal. App. 3d 1171, 1178-79 (1989) ("[i]t is the opportunity to litigate that is important . . . , *not whether the litigant availed himself or herself of the opportunity*") (emphasis added); *Castillo v. City of Los Angeles*, 92 Cal. App. 4th 477, 482 (2001) (what is relevant is that plaintiff "was entitled to a full hearing and [would have] had ample opportunity to raise issues and present evidence at that hearing"). Indeed, Plaintiff fails to explain how his case is any different from cases in which issue-preclusive effect is given to default judgments—the most obvious example of collateral estoppel barring the claim of a litigant who has failed to avail himself of the "opportunity to litigate." *See* Opening Brief at 15-16 and cases cited.

Instead, Plaintiff devotes four pages of his brief to discussing *Vella v. Hudgins*, 20 Cal. 3d 251 (1977), apparently for the proposition that even where the opportunity to litigate exists, this Court should not apply collateral estoppel. Answer at 13-17. But *Vella* is not applicable to this case. *Vella* concerned an action by a former property owner to set aside a trustee's sale, alleging that the purchaser at the sale had fraudulently induced the property owner to default. 20 Cal. 3d at 253. The trial court, after denying defendant's motion to strike on the ground that a previous determination of the fraud issue had been made in a prior unlawful detainer action, concluded that plaintiff's default had indeed been induced by fraud. *Id.* at 254. On appeal, the defendant sought to overturn the judgment, contending that the claim of fraud had already been adjudicated in the unlawful detainer action. This Court held that the prior proceeding did not have res judicata effect because the municipal court in an unlawful detainer action had "no jurisdiction" to consider all of the issues material to a determination of title. 20 Cal. 3d at 257; *see also id.* at 255 (in an unlawful detainer action, "only claims bearing directly upon the right to immediate possession are cognizable"; thus, a judgment in unlawful detainer "will not prevent one who is dispossessed from bringing a subsequent action to resolve questions

of title"). Thus, *Vella* stands for the proposition that courts will not give issue-preclusive effect to a prior proceeding in which the court did not have the *power* to afford the litigants a full and fair opportunity to litigate the issue in dispute. That rule does not help Plaintiff, who does not and cannot contend that the Department of Labor lacked the power to determine the causation issue that he tendered in the administrative proceeding.

Second, the traditional criteria for applying collateral estoppel to issues resolved by an agency acting in a judicial capacity were satisfied by the administrative proceedings Plaintiff initiated before the Department of Labor. Opening Brief at 16-17; *Sims*, 32 Cal. 3d at 484 & n.14; *see also People v. Garcia*, 39 Cal. 4th 1070, 1077 (2006). Indeed, Plaintiff challenges only one of five criteria necessary for the application of collateral estoppel in this context,[1] arguing that the Secretary of Labor's investigation and decision were "too informal" and thus that it is "difficult to determine what issues were fully explored, much less 'litigated.'" Answer at 10 (citing *Jacobs v. CBS Broad., Inc.*, 291 F.3d 1173 (9th Cir. 2002)). But the formality of proceedings is *not* dispositive of whether an issue is "actually litigated." Instead, "[a]n issue is actually litigated 'when it is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined.'" *Sims*, 32 Cal. 3d at 484 (quoting RESTATEMENT (SECOND) OF JUDGMENTS §27 cmt. d (1982)) (alterations omitted). And there is no doubt that the issue of whether Plaintiff was terminated due to whistle-blowing was "actually determined" by the Department of Labor. *See* Opening Brief at 17.

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[1]Under California law, collateral estoppel applies to bar relitigation of an issue decided at a former proceeding if (1) "the issue sought to be precluded from relitigation [is] identical to that decided in [the] former proceeding"; (2) the issue was "actually litigated in the former proceeding"; (3) the issue was "necessarily decided in the former proceeding"; (4) "the decision in the former proceeding [was] final and on the merits"; and (5) "the party against whom preclusion is sought [is] the same as, or in privity with, the party to the former proceeding." *Lucido v. Superior Court*, 51 Cal. 3d at 341.

Jacobs v. CBS Broadcasting, Inc., 291 F.3d 1173 (2002), is not to the contrary. There the court declined to give an arbitration collateral estoppel effect because the arbitration "provided too few procedural safeguards to constitute an adjudicatory proceeding." *Id.* at 1179. But in that case the arbitration was not subject to plenary judicial review. *See Moncharsh v. Hiely & Blasé*, 3 Cal. 4th 1, 6, 9-12 (1992) (arbitration award cannot be vacated for errors of fact or law). Here, in contrast, the Department's decision was subject to both full administrative review *and* judicial review. *See* Opening Brief at 5, 11, 13-16. Thus, Plaintiff was entitled to a full, formal administrative hearing that would have afforded him all the rights he now asserts were lacking in the initial stage of the administrative process. *Sims*, 32 Cal. 3d at 484; *see* 29 C.F.R. §18.24 (2007) (subpoenas); *id.* §18.47 (exhibits); *id.* §18.52 (record of hearings); *id.* §18.59 (certification of official record); *see generally id.* §1979.107(a) (providing that WPP hearings under AIR21 statute will generally be conducted in accordance with rules of practice and procedure codified at 29 C.F.R. pt. 18(A)). He therefore cannot complain that the Department of Labor's procedures were "too informal" to be given collateral estoppel effect.

C. The Fact That The AIR21 Statute Does Not Provide Punitive Damages Is Irrelevant.

Plaintiff claims that the unavailability of punitive damages under the AIR21 statute precludes application of collateral estoppel, because there can be no collateral estoppel where "the remedy available in the administrative proceedings is clearly inferior to the remedy available" in judicial proceedings. Answer at 17, 21-22. Not so.

Remedies need not be identical between two proceedings for collateral estoppel to apply. *E.g., Sims*, 32 Cal. 3d at 483-90 (administrative decision afforded collateral estoppel effect for purposes of subsequent criminal prosecution). The cases Plaintiff cites do not dictate otherwise. For example, in *Mahon v. Safeco Title Insurance Co.*, 199 Cal. App. 3d 616 (1988), the court held that the plaintiff was not collaterally estopped from raising the issue of

wrongful discharge by an adverse determination of that issue in a prior unemployment compensation proceeding. *Id.* at 622-23. To begin with, the Legislature had enacted Unemployment Insurance Code Section 1960 pending appeal, which specifically provided that administrative adjudications in unemployment compensation proceedings are not entitled to collateral estoppel effect. *Id.* at 619-20 & n.1. Moreover, the court also concluded that it was not unfair to apply the statute to that case because the common law prior to Section 1960's enactment would not have precluded plaintiff's suit, for two reasons. *First*, the court held that because the "amount of money at stake in [an unemployment compensation] hearing will often be small in comparison to the costs of full blown litigation that could be warranted by the substantially greater stake in a wrongful discharge claim," a party to a unemployment compensation proceeding "might be unfairly sandbagged if the results of the proceeding are given issue preclusion effect." *Id.* at 622. *Second*, the court held that the administrative scheme applicable to unemployment insurance, which was intended to be "speedy and informal," did not allow for issue preclusion. "If the [unemployment compensation] adjudication controls the outcome of the potentially more costly wrongful discharge claim, it is foreseeable that the parties will deploy far greater resources in the administrative forum, leading to delay." *Id.* at 622-23.

Neither of these rationales applies here. Plaintiff's sole basis for asserting that the administrative proceedings before the Department of Labor involved a smaller "economic stake" than does this case is because that proceeding did not allow for punitive damages. *See* Answer at 21-22. However, far from being a centerpiece of litigation, punitive damages are never a matter of right and are not available in many cases (*e.g.*, breach of contract). So, it would make little sense to make the applicability of collateral estoppel turn on the availability of such disfavored damages. *See Piscitelli v. Friedenberg*, 87 Cal. App. 4th 953, 980 (2001) ("This court has recognized the disfavored nature of punitive damage awards; they

create the 'anomaly of excessive compensation and are therefore not favored in the law'") (quoting *Dumas v. Stocker*, 213 Cal. App. 3d 1262, 1266 (1989). On the contrary, the availability of additional measures of damages—including punitive damages—in a second lawsuit does diminish the collateral estoppel effect of prior proceedings. *See Klinell v. Shirey*, 223 Cal. App. 2d 239, 246 (1963) (holding that collateral estoppel applies and that it did not "make any difference that additional items of damages were alleged, namely, loss of profits . . . and punitive damages"). Even the availability of "fundamentally different sanctions" in a subsequent proceeding is insufficient to defeat collateral estoppel; the touchstone of the "identical issue" requirement is "'whether identical factual allegations' are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same." *Lucido v. Superior Court*, 51 Cal. 3d 335, 342 (1990) (collateral estoppel precludes criminal prosecution based on identical conduct raised in prior probation revocation proceeding, despite availability of "fundamentally different sanctions" in the two proceedings).

Moreover, the administrative scheme implementing the AIR21 statute—unlike the scheme in the unemployment insurance context—was not intended to be "speedy and informal." Indeed, it expressly provides for several levels of full-blown administrative and judicial review. Nor, for that matter, is there any federal counterpart to Unemployment Insurance Code Section 1960. Indeed, federal law is quite the opposite of the state law applied in *Mahon*. Far from expressly prohibiting application of collateral estoppel to AIR21 proceedings, federal law specifically provides that the Secretary's decision is "final" if no appeal is filed within thirty days. *See* 49 U.S.C. §42121(b)(2)(A) (if hearing not timely requested, Secretary's "preliminary order shall be deemed a final order that is not subject to judicial review").

Bronco Wine Co. v. Frank A. Loguloso Farms, 214 Cal. App. 3d 699 (1989), is likewise inapplicable. In that case, a grape grower filed a complaint against a winemaker with the Department of Food

and Agriculture, contending that the Department should revoke the winemaker's license to produce wine based on its underpayments for grapes (which allegedly violated the Food and Agriculture Code). *Id.* at 704-05. The grower also sued the winemaker for breach of contract based on the same underpayments. *Id.* at 703-04. On appeal from the trial court's judgment, the winemaker argued that the trial court's calculation of contract damages at the contract price was at odds with certain findings made in the administrative proceedings. *Id.* at 704. The Court of Appeal rejected the contention, holding that the administrative tribunal had not in fact resolved the issue as to which plaintiff sought collateral estoppel. *Id.* at 712 ("The issue of contract prices was not previously determined in the administrative proceedings").

Plaintiff seizes on language in the *Bronco* opinion stating that the Department of Food and Agriculture had no "authority to fully remedy breaches of contract or potential business torts." *Id.* But Plaintiff never claims that he could not be fully compensated in the AIR21 administrative proceeding—indeed, he *concedes* that "AIR21 provides remedies for reinstatement and 'compensatory damages.'" Answer at 21. Moreover, in *Bronco*, the governing statute expressly provided that the administrative agency's "authority is not exclusive but . . . is in addition to any other remedies that may be available to a party." 214 Cal. App. 3d at 712. Here, as we have seen, the governing federal statute expressly makes the administrative decision final.

D. The Court Should Follow The Many State And Federal Public Policies Which Support Applying Collateral Estoppel.

Plaintiff concedes that "[p]ublic policy and the interests of litigants alike require that there be an end to litigation." Answer at 12. That is precisely our point. Opening Brief at 22 ("public policy is served by protecting parties from endless litigation") (citing *Rymer*, 211 Cal. App. 3d at 1180-81). But that is not the only strong policy that would be furthered by applying collateral estoppel here.

First, applying collateral estoppel to the Secretary's findings will promote judicial economy by minimizing repetitive litigation. *Sims*, 32 Cal. 3d at 488. The federal scheme implemented by the AIR21 statute affords plaintiffs the choice between quick but limited remedies from the Department of Labor, or broader but less immediate remedies from the courts. However, that framework would be undermined by allowing dissatisfied plaintiffs to treat administrative proceedings as mere advisory opinions. *See Johnson v. City of Loma Linda*, 24 Cal. 4th 61, 72 (2000); *see also Knickerbocker v. City of Stockton*, 199 Cal. App. 3d 235, 243 (1988) ("it would render the administrative hearing a meaningless and idle act . . .").

Second, giving efficacy to the Secretary's administrative decision strengthens the integrity of California's judicial system. *Sims*, 32 Cal. 3d at 488 (possibility of inconsistent judgments could undermine the integrity of *both* the judicial system and the administrative hearing process).

Third, this Court should defer to the expressed intent of the AIR21 statute that failure to timely request (or, in this case, to request at all) a hearing before an ALJ results in a final decision not subject to judicial review, lest the Court undermine public confidence in the administrative scheme established by the statute. 49 U.S.C. §42121(b)(2)(A); *see also* 29 C.F.R. §1979.106(b)(2) (2007).

Fourth, applying collateral estoppel here is also consistent with federal administrative law. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991) ("We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality"); *see also* Opening Brief at 20-22 and cases cited therein.

Plaintiff has *no response* to these public policy concerns. Instead, he merely complains that "[f]orcing whistleblowers to pursue administrative action at their own peril is completely at odds with the purposes of common law claims for wrongful termination . . . and the salutary purposes of the [AIR21 statute]." Answer

at 18. Again, Plaintiff misses the point. He chose to invoke the federal administrative process; he was not "forced" to do so. He could have withdrawn from the administrative process at any point, but he chose not to do so. He had the right to have the Secretary's decision reviewed, first by an ALJ after a trial-type hearing, and second, by a federal Court of Appeals, but he chose not to do so. In short, Plaintiff was not "forced" into anything; he simply (and unaccountably) failed to exercise his rights. No public policy supports affording Plaintiff a second bite at the apple.

II.

PLAINTIFF IGNORES HIS FAILURE TO EXHAUST JUDICIAL REMEDIES, ANOTHER REASON TO APPLY COLLATERAL ESTOPPEL.

Our Opening Brief demonstrated that application of collateral estoppel is also warranted by Plaintiff's failure to exhaust judicial remedies. Opening Brief at 23-25. Yet Plaintiff mentions exhaustion in only one sentence, contending that because AIR21 is not an exclusive or mandatory remedy, "it is not mandatory for an employee to . . . exhaust this remedy before bringing an action." Answer at 8. This is a non-sequitur. While Plaintiff did not have to invoke his administrative remedy to pursue his wrongful termination claim, once he did so, he had either to withdraw his claim formally (with Secretarial approval) or pursue available administrative and judicial remedies. *See, e.g., Page v. Los Angeles County Probation Dep't*, 123 Cal. App. 4th 1135, 1142 (2004) ("having chosen a forum for discrimination claims, a public employee must exhaust 'the chosen administrative forum's procedural requirements'").

His failure to do so provides another basis for the application of collateral estoppel. *See* Opening Brief at 23-25.

CONCLUSION

For the reasons set forth above, and in our Opening Brief, the Court should answer the question certified by the Ninth Circuit and hold that collateral estoppel applies to the Secretary of Labor's decision that there was no causal link between Plaintiff's whistleblowing activities and his subsequent termination.

DATED: October 9, 2008.

Respectfully,

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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, I certify that the attached Alaska Airlines, Inc.'s Reply Brief On The Merits contains 3,016 words, exclusive of those materials not required to be counted under Rule 8.520(c)(3).

DATED: October 9, 2008.

By _____
DAVID J. REIS

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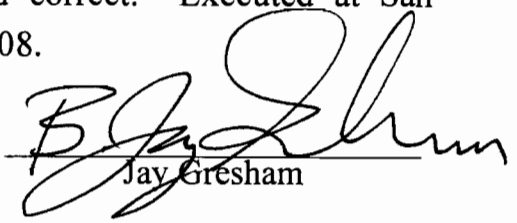

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