REL: December 11, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190589

Mark Caton

v.

City of Pelham

Appeal from Shelby Circuit Court
(CV-16-900518)

MENDHEIM, Justice.

Mark Caton appeals from a summary judgment entered by the Shelby Circuit Court in favor of the City of Pelham ("the City"), in his action alleging retaliatory discharge against the City. We affirm.

I. Facts

Caton began a career as a police officer with the City of Birmingham in 1990. In approximately 2001, he was hired as a police officer by the City. In 2004, while he was still a police officer, Caton injured his neck when he was wrestling with a suspect. Caton did not receive treatment for his neck at the time, but the pain from the injury gradually increased. In April 2006, Caton transferred from the Pelham Police Department to the Pelham Fire Department. On June 26, 2012, Caton had a vertebrae-fusion surgery.

On July 7, 2015, Caton was participating in a job-training exercise with fellow firefighters. While some of the crew he worked with were testing a fire engine, Caton pulled a three-inch fire hose off the bed of the truck and began throwing it on the ground. Caton then began to feel his neck spasming and hurting. Caton informed his supervisor, Timmy Honeycutt, of the injury. A couple of days later, Caton informed

Honeycutt that he needed to see a doctor, and Caton went to Pelham Urgent Care, which prescribed muscle relaxers and told him that, if he did not get better, he would be referred to a specialist. Caton's pain did not subside, and he subsequently was referred to Dr. Thomas Powell, an orthopedic specialist. Dr. Powell began treating Caton in September 2015, and Caton visited Dr. Powell approximately four times over the course of two months. On November 16, 2015, Dr. Powell determined that Caton had reached maximum medical improvement with a zero percent impairment rating. Dr. Powell believed that Caton could return to regular-work duty with no restrictions. Caton testified that Dr. Powell did not inform him about the zero percent impairment rating.

Caton testified that, despite being cleared for work, the pain in his neck was so severe that he could not even put on a fire helmet without experiencing intense pain. Consequently, he requested from his worker's compensation insurer a panel of four doctors so that he could select a new doctor for treatment. In December 2015, while Caton waited to be given the panel of doctors, he stopped going to work at the fire station. On December 29, 2015, Pelham Fire Chief Danny Ray (hereinafter

"Chief Ray") had a telephone conversation with Caton about his absences; Deputy Fire Chief Blair Sides was present with Chief Ray for the call and heard the conversation because Chief Ray put Caton on speaker phone. During the conversation, Chief Ray informed Caton that he would need to show up for his next shift and that he would need to produce a doctor's excuse for his previous absences. Caton stated that he did not have a doctor's excuse because he had not been able to pick a new doctor for treatment. Despite this information, Chief Ray warned Caton that he needed to show up for his next shift. It is undisputed that on December 31, 2015, Caton did not show up for his next shift and, as a result, he was given a written employee warning notice and suspended for a shift without pay.

In January 2016, Caton was given the names of a panel of four doctors from which to select treatment. He selected Dr. E. Carter Morris with the Birmingham Neurosurgery and Spine Group. Dr. Morris diagnosed Caton with a nerve impingement at the C4-5 vertebrae of his neck and took Caton off full-work duty. Dr. Morris also provided Caton with two nerve-block injections, which gave Caton temporary relief from

his pain. On March 3, 2016, Dr. Morris determined that Caton was at maximum medical improvement and that he had a zero percent impairment rating. Caton was told he could return to work with light duty for one week, after which he would return to full duty.

On March 9, 2016, Caton had an argument with Chief Ray concerning the amount of time Caton had taken off from work. Chief Ray informed Caton that he would need a doctor's excuse for the time he had taken off, and Caton stated that he had no doctor's excuse because he had not been able to see a doctor during that period. Chief Ray stated that, without an excuse, Caton's previous paid time off would be counted against him during current work periods. Caton expressed that he wanted to record the conversation with his cellular telephone, but Chief Ray refused to continue the conversation if it was being recorded, and Chief Ray subsequently left the fire station. Because of this incident, Caton was given another employee warning notice, and he was suspended from work until March 30, 2016, for failure to provide a doctor's excuse for missed time and for insubordination.

In early June 2016, while Caton was on full work duty with his fire crew, they were dispatched to Oak Mountain State Park to help a hiker who had injured her ankle. Caton, along with other members of the crew, took turns carrying the hiker out of the park on a stretcher. Caton aggravated and reinjured his neck during this task, and, as a result, he filed another notice of injury. Caton testified that he returned to Dr. Morris following this reinjury and that Dr. Morris told Caton that he would perform surgery on Caton's neck if his worker's compensation insurance would cover it, and that the surgery would solve Caton's problems. However, according to Caton, Dr. Morris did not receive clearance to perform the surgery; consequently, Dr. Morris told Caton that there was nothing more he could to do to help Caton.[1]

[1]Medical records from Dr. Morris's office indicate that Caton's last visit to Dr. Morris was in May 2016. Caton telephoned Dr. Morris's office on June 27, 2016, requesting an appointment to discuss surgery. Dr. Morris stated in a follow-up note that he "[r]ecommend[s] that [Caton] see a physiatrist for neck pain. [Caton] does not have a new surgical problem and I have not recommended that he consider further neck surgery."

The City next sent Caton to Dr. Michelle Turnley, a physiatrist[2] at the Workplace Occupational Health Clinic located on the campus of the University of Alabama at Birmingham ("UAB"). Caton testified that he was unaware that Dr. Turnley was a "pain-management" doctor; he had thought that he was being referred to another spine-surgery doctor. Caton first visited Dr. Turnley on July 26, 2016. Caton testified that during that visit he had to wait over an hour before being seen, that no one in the office informed him that he would need to provide a urine sample to receive pain medications from Dr. Turnley, and that, as a result, he used the restroom while there but did not provide a sample.

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[2]

> "Physical medicine and rehabilitation (PMR), also called physiatry, is that branch of medicine that focuses on the prevention, diagnosis, and treatment of disorders of the musculoskeletal, cardiovascular, and pulmonary systems that produce impairment and functional disability.
>
> "... This type of physician concentrates on non-surgical solutions and restoration of bodily function for individuals who have simple mobility difficulties or more comprehensive cognitive issues."

Samuel D. Hodge, Jr., The Independent Medical Evaluator, 61 No. 6 Prac. Law. 31, 36 (Dec. 2015).

Dr. Turnley's medical notes state that she offered to reinstate the pain medications Caton had been taking under the direction of previous physicians, but he refused to sign a pain contract and declined to give a urine sample. Those notes also state that Dr. Turnley's office assistant told Caton that he needed to provide a urine sample to receive narcotics but that he stated that he would do without those drugs. Dr. Turnley prescribed physical therapy to Caton, which included receiving pain injections that Caton testified provided him with only temporary relief from his pain.

On August 23, 2016, Caton met with Dr. Turnley again. On that visit, Dr. Turnley recommended that Caton undergo a nerve study to gain further information about his problem, but Caton declined the recommendation because, he said, he had undergone a nerve study before that did not help, and he felt "that is not treatment; that's something that worker's comp people can say that there's nothing wrong with me when I know there is." Dr. Turnley prescribed more physical therapy for Caton.

Caton testified that following his second visit he experienced intense pain as a result of his injury, and so he telephoned Dr. Turnley's office and

asked if there was a way he could get some pain medication or get an immediate appointment. Dr. Turnley's office scheduled a visit for Caton for two weeks from that day. On September 21, 2016, Caton visited Dr. Turnley for the third time. Caton testified that he had to wait an hour and a half before he was seen. When he was finally seen, Caton asked Dr. Turnley for pain medication for the next time his pain became too intense, but Dr. Turnley reminded Caton that on his first visit he had not signed a pain contract and he had refused to provide a urine sample, so she declined to give him pain medication. Caton testified:

> "I said why aren't you treating me? And she goes, you don't want to piss me off. Her voice changed, she got -- for lack of a better word, an attitude. And that's why I said -- so my voice changed; I don't care -- I don't care if I piss you off at all. I mean, something to that effect. And that's when she said this is -- this is over.
>
> "I said why won't you treat me, why won't you do -- I'm begging her, and she's walking out of the room. And like I said, my other doctors, I ask questions, they talk to me; she won't say anything. All she says is you need to leave.
>
> "I said please refer me to Dr. Swaid [who treated Caton in 2012], refer me to anybody, anything but here, you're not doing anything for me, you've done nothing. And that's when she said to the receptionist, call security. I said you don't have

> to call security. I just want an answer to my question, you know."

Caton further testified that when Dr. Turnley would not help him, he left her office without engaging with security personnel. He went home and he called UAB to register a complaint about Dr. Turnley.

Dr. Turnley's patient notes relate the following with respect to the September 21, 2016, visit:

> "[Caton] comes in today fairly aggressively requesting pain medication. When I attempt to explain for him a rationale for not giving any he interrupted me [and] used a loud tone. He became intimidating, stating 'I was going to treat him' and 'you will give me pain medicine.' He was fairly loud and refused to leave the clinic and UAB police were called.
>
> "....
>
> "[Caton] became verbally aggressive in the clinic. During that time he was noted to ambulate very quickly with a normal gait and station, as well as move his neck in a full physiologic pattern. He did not appear to have any functional deficits. Additionally, someone in the waiting room saw him sling the door open like he was about to 'pull it off the hinges'; therefore, obviously he has no strength deficits."

On October 18, 2016, Dr. Turnley wrote Caton a letter in which she stated:

> "I would like to take this opportunity to notify you that I will no longer be your physician. You have been noncompliant with treatment as well as confrontational in the office. You have failed to follow my advice and recommendations regarding management. And, there are significant philosophical differences in our views of medical care and treatment. I will no longer be able to provide you with medical services because of these issues. You need to contact the adjuster on your claim, if you want to see another physician. ..."

On November 1, 2016, the City terminated Caton's employment. The termination notice stated that the "[t]ypes of [v]iolation" he had committed included "[i]nappropriate conduct" and "[v]iolation[s] of Polices/Procedures." The termination notice listed three times in Caton's career that he had been given warnings for failure to report to work without an excused absence, including December 31, 2015. Under "reasons" for the termination, the notice stated:

> "During an unscheduled visit to Dr. Michelle Turnley's office, your behavior and conduct became so egregious and irrational, by demanding pain medication, the office personnel called UAB Police to have you removed from the doctor's office. This type of unprofessional behavior is not tolerated and does not represent the City of Pelham image [sic]. Based on this event, your employment with the City of Pelham is hereby terminated."

Caton appealed his termination to the City's Personnel Board, and a hearing was conducted on December 1, 2016. Both Caton and the City presented witnesses and testimony at the hearing. The Personnel Board upheld the City's termination decision.

On November 6, 2016, Caton filed a claim for unemployment benefits with the Alabama Department of Labor (hereinafter "the Department"). A claims examiner for the Department determined, citing § 25-4-78(3)c., Ala. Code 1975,[3] that Caton was partially disqualified from receiving unemployment compensation benefits because he had been discharged from his employment for misconduct committed in connection with work. Caton appealed that determination to an administrative-hearing officer. On December 14, 2016, Caton was mailed a "Notice of Unemployment Compensation Hearing" from the Department informing

[3]The version of § 25-4-78(3)c. applicable at that time listed the consequences for unemployment compensation eligibility "[i]f [a person] was discharged from his most recent bona fide work for misconduct connected with his work [other than acts mentioned in paragraphs a. and b. of this subdivision (3)]." This Code section was amended effective January 1, 2020. The changes were not substantive. The language quoted is from the section as amended.

him that a hearing on his claim would be held on January 6, 2017, at 3:00 p.m. The notice explained several aspects of the hearing parameters:

> "REPRESENTATION: Testimony during the hearing may be given by either party without representation as it is the administrative hearing officer's responsibility to assist all parties in developing the facts in the case. However, if you wish, you may be represented by an attorney or other competent individual."
>
> "WITNESSES: If you have any witnesses whom you wish to testify at the hearing, you must notify them of the time and arrange for them to be at a telephone. The witnesses' telephone number[s] should be provided to the administrative hearing officer at the beginning of the hearing. Any requests for the issuance of subpoenas should be made immediately to the hearings and appeals division by calling .... Each party is entitled to cross-examine opposing witnesses.
>
> "DOCUMENTS: If you have documents or other evidence that you wish to introduce as exhibits during the hearing, these should be sent immediately to the hearing officer at the address shown at the top of your notice of telephone hearing or fax to ...."

On January 6, 2017, Caton was mailed a second "Notice of Unemployment Compensation Telephone Hearing" informing Caton that the hearing had been rescheduled for January 23, 2017, at 3:00 p.m. This second notice advised Caton of the same information about the hearing as the first notice. On January 24, 2017, Canton was mailed a third "Notice of

Unemployment Compensation Telephone Hearing" informing Caton that the hearing had again been rescheduled, this time for February 3, 2017, at 11:30 a.m. The third notice, like the previous two, advised Caton about the parameters of the hearing and his rights to representation, to subpoena and question witnesses, and to submit documents into evidence for the hearing.

On February 3, 2017, a hearing was held by telephone before the administrative-hearing officer. The City was represented at the hearing by an attorney and the City's mayor. Chief Ray was in attendance. Caton represented himself; the administrative-hearing officer specifically asked Caton if anyone was going to represent him in the hearing, and Caton replied in the negative. Caton did not request testimony from other witnesses, he did not state that he wanted any documents to be considered as evidence, and he did not raise any objection to the fact that his claim was not being decided by a jury. The administrative-hearing officer explained the issue being determined in the appeal:

> "Now, the reason we are here today, [Caton] was disqualified from a definite period of time under an examiner's determination. The claimant disagreed with that and filed an

> appeal. The section of law involved today will be 25-4-78(3)c of the law, which provides for a disqualification if an individual is discharged from their most recent bona fide work for misconduct committed in connection with the work.
>
> "So in the hearing today, I would need to determine was the claimant discharged, was the discharge for an act of misconduct, was that act of misconduct connected with work, and any details surrounding the final incident that led to that termination."

(Emphasis added.) The administrative-hearing officer asked if anyone had "a question about anything that I've said so far," and Caton answered "[n]o." All the testifying witnesses were placed under oath. Chief Ray first testified, discussing the incident between Caton and Dr. Turnley at her office, disciplinary actions that had been taken against Caton, and pertinent civil-service laws he believed Caton had violated. Caton was given the opportunity to ask questions of Chief Ray. He asked one question, which the City's counsel answered. The City's mayor then testified concerning the procedures the City used in terminating Caton's employment. Caton asked the mayor one question:

> "MR. CATON: Were there any other cases where an employee has violated the misconduct, Civil Service misconduct law, state law, and that he as a department head or mayor has ignored it?

> "[Administrative-Hearing Officer]: Well, sir, today though, we're here to discuss, you know, your separation, and I really can't allow testimony for you know, for other separations because this today is a fact -- you know, a fact-gathering mission regarding your separation, sir. So really I would not deem that as a relevant question for today. Any other questions at this time, Mr. Caton?
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> "MR. CATON: No, ma'am, I was just -- you know, the City has a tendency to pick and choose.
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> "[Administrative-Hearing Officer]: Yes, sir. And I'll allow that in your testimony in just a moment, sir, but let's just kind of move on. ..."

The administrative-hearing officer then heard testimony from Caton. Caton testified about his perspective of what had occurred at Dr. Turnley's office on September 21, 2016, he conceded that he had been given reprimands on three occasions during his employment with the City, and explained the process that had occurred with respect to the termination of his employment. Caton was then cross-examined by the City's counsel, primarily about the incident at Dr. Turnley's office on September 21, 2016, and his suspension from work in December 2015. Caton was then given another opportunity to provide additional testimony on his behalf and to ask any more questions of the other witnesses. The administrative-

hearing officer ended the hearing by informing all the parties present that she would issue a written decision and that "[w]hoever disagrees with my decision, there will be additional appeal rights listed on the decision form itself."

On February 6, 2017, the administrative-hearing officer issued a written decision affirming the claim examiner's decision. In part, the administrative-hearing officer's decision stated:

> "On or about October 27, 2016, the [the City's] human resources manager received a worker's compensation physician complaint about [Caton] for disrespectful attitude and behavior toward the physician during an office visit on September 21, 2016. [Caton] was on worker's compensation due to an on-the-job injury. ... This behavior is in violation of the [City's] civil service law adopted by the City as the code of conduct for all city employees in 1988. As [Caton] was on a final written warning for an unrelated incident, [Caton] was discharged on November 1, 2016, by the Mayor for violation of the standards of conduct policy for conduct unbecoming.
>
> "CONCLUSIONS: Section 25-4-78(3)c of the law provides that an individual shall be disqualified for total or partial unemployment if he was discharged from his most recent bona fide work for misconduct committed in connection with the work. 'Misconduct' is defined as conduct evincing a disregard of an employer's interests or of the standard of behavior which he has the right to expect of his employee. The employer has the right to expect an employee not to violate a known company policy. The preponderance of evidence shows

> that [Caton] did violate the company policy. Thus, [Caton] was discharged for misconduct connected with work and is subject to disqualification under this section of the law."

Caton appealed the administrative-hearing officer's decision to the Department's Board of Appeals. On March 24, 2017, the Board of Appeals issued a decision: "The Board of Appeals, after reviewing the record and the application for leave to appeal to the Board of Appeals, hereby denies said application." The notice of this decision advised Caton that he had a right to appeal the decision to the circuit court under § 25-4-95, Ala. Code 1975. Caton chose not to exercise his right of appeal.

Caton had filed his original complaint in the Shelby Circuit Court against the City on June 24, 2016, claiming worker's compensation benefits for the injury to his neck he sustained on July 7, 2015. Caton's attorneys of record were Alan K. Bellenger and Gregory Brockwell, both of whom signed the complaint. Simultaneously with the filing of the complaint, Caton filed interrogatories, a request for admissions, and a request for production, all of which also were signed by both Bellenger and Brockwell. On September 16, 2016, the City filed an answer to the complaint.

On March 14, 2017, Caton amended his complaint to allege retaliatory discharge in violation of § 25–5–11.1, Ala. Code 1975. Bellenger and Brockwell were both listed as Caton's attorneys of record in the amended complaint.

On April 3, 2017, Caton and the City filed a Workers' Compensation Settlement Petition and Agreement. The settlement agreement specifically exempted from the release Caton's retaliatory-discharge claim. Also on April 3, 2017, the trial court conducted a settlement hearing, and on the same date the trial court entered an order approving the settlement agreement. The settlement order specifically named Bellenger as Caton's "attorney of record" for an award of attorney fees as part of the settlement. Also on April 3, 2017, Caton filed a "Satisfaction of Judgment" that expressly noted that "[t]his does not satisfy [Caton's] claim for retaliatory discharge, which shall remain pending."

On May 9, 2017, the City filed its answer to the amended complaint. Among other things, the City pleaded the affirmative defense of collateral estoppel. On September 6, 2017, the City filed an amended answer in

which it affirmatively pleaded the defenses of res judicata and collateral estoppel.

On November 29, 2018, the City filed a motion for a summary judgment. In that motion, the City argued, among other things, that Caton was collaterally estopped from asserting a retaliatory-discharge claim against the City because Caton had been denied unemployment compensation on the basis of a determination that his employment had been terminated for misconduct. The City sought to serve the motion through the Alabama judicial system electronic-filing system, Alacourt, to Bellenger and Brockwell. However, Brockwell was not registered on the Alacourt filing system in this case, and, as a result, Brockwell did not receive the City's summary-judgment motion.

The trial court did not hold a hearing on the City's summary-judgment motion. On January 4, 2019, the trial court entered an order granting the City's summary-judgment motion on the basis of collateral estoppel. Like the motion, the summary-judgment order was not served on Brockwell.

On May 3, 2019, after learning about the entry of summary-judgment order on January 4, 2019, Caton filed a Rule 60(b), Ala. R. Civ. P., motion to set aside the judgment. In that motion, Caton explained that his representation in this case had been bifurcated between Bellenger and Brockwell. Specifically, Bellenger had handled Caton's worker's compensation claim, and Brockwell was handling Caton's retaliatory-discharge claim. Thus, according to Caton, Bellenger's representation of him had ended on April 3, 2017, with the entry of the order approving the settlement of the worker's compensation claim. The Rule 60(b) motion asserted:

> "Since the settlement of the workers' compensation claim, [the City's] counsel has been in communication with [Brockwell] as counsel for [Caton]. [The City] and [the City's] counsel know that [Brockwell] is the counsel for Caton, not Mr. Bellenger. Indeed, the last significant activity in the case was the deposition of [Caton] that was taken by [the City's] counsel in the offices of [Brockwell] in July, 2018."

The motion further asserted that "it should have been clear to [the City] that [Caton's] current counsel[, Brockwell,] would not receive electronic service" because the readout on the Alafile electronic system lists who is registered to receive documents in each case and it did not list Brockwell.

Both Caton and Brockwell professed not to know why Brockwell "did not appear on the electronic service list and did not receive the e-filing notices" of the summary-judgment motion or the summary-judgment order.

On May 15, 2019, the City filed a response in opposition to Caton's Rule 60(b) motion. In that motion, the City asserted that it had intended to serve both of Caton's attorneys through the Alacourt filing system and that Bellenger had received all filings, that the City was unaware that Brockwell had not received the City's summary-judgment motion, that Bellenger never formally withdrew from representing Caton in the case, and that the City was unaware that Caton had a bifurcated system of representation in the case. Based on the foregoing assertions, the City contended that Caton was served with the November 29, 2018, summary-judgment motion and the trial court's January 4, 2019, order granting that motion. It also argued that, even if Caton had not been aware of the summary-judgment motion or the order granting that motion, Caton was entirely at fault for any such lack of awareness and that, therefore, the Rule 60(b) motion should be denied. Finally, the City contended that lack

of service is an error that may be remedied solely by a motion under Rule 77(d), Ala. R. Civ. P., and that Caton had failed to file a timely motion to extend his time for appealing the summary judgment.

On June 27, 2019, Caton filed a supplement to his Rule 60(b) motion in which he submitted an affidavit from Bellenger. In his affidavit, Bellenger affirmed that he had represented Caton only during the worker's compensation portion of the litigation. He added:

> "10. My representation of Mr. Caton ended on April 3, 2017. I have had no further involvement with the matter since April 3, 2017. This fact is known to [the City's] counsel, Frank Head, Esq., and was known to him at all relevant times.
>
> "11. After April 3, 2017, I had no reason to communicate either with Mr. Caton or with Mr. Brockwell. They were working directly with each other, and Mr. Brockwell was handling the case from that point forward.
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> "12. After April 3, 2017, I also had no reason to communicate with [the City's] counsel. [The City's] counsel was aware that my involvement had ended and that Mr. Brockwell was handling the case from that point forward.
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> "13. At no point was I ever aware that Mr. Brockwell was not receiving AlaFile notices in the case."

On July 3, 2019, the trial court held a hearing on Caton's Rule 60(b) motion. On the same day, the trial court entered an order granting

Caton's motion and set aside the January 4, 2019, summary judgment in favor of the City. The trial court also set a hearing for the City's summary-judgment motion for October 16, 2019. On October 14, 2019, Caton filed a response in opposition to the summary-judgment motion. Caton attached to his response an affidavit and his deposition in this case.

Following the hearing, on October 21, 2019, the trial court entered an order denying the City's summary-judgment motion, stating that it was "satisfied that there are genuine issues of material fact that are not ripe for summary judgment but rather must be resolved by trial." The case was eventually set to be tried on March 9, 2020.

On January 29, 2020, the City filed a "Renewed Motion for Summary Judgment." In its renewed summary-judgment motion, the City focused solely on its previous contention that Caton's retaliatory-discharge claim was barred by the doctrine of collateral estoppel because of the conclusion reached as to the termination of Caton's employment in the unemployment-compensation proceedings. Unlike in its previous summary-judgment motion, the City provided a detailed rendition of the facts in the unemployment-compensation proceedings, and it attached to

its motion multiple documents from those proceedings, including the transcript of the telephonic hearing held by the administrative-hearing officer.

On March 5, 2020, Caton filed a response in opposition to the renewed summary-judgment motion. In his response, Caton, in part, contended that in the unemployment-compensation proceedings he was not given an adequate opportunity to litigate the issue whether he had been terminated for misconduct, and so the doctrine of collateral estoppel should not apply in this case. Caton also argued that the motion should be denied because application of the doctrine of collateral estoppel to his retaliatory-discharge claim would violate his constitutional right to trial by jury.

On April 16, 2020, the trial court entered a summary judgment in favor of the City on the ground that Caton's "retaliatory-discharge claim is barred by collateral estoppel in accordance with Wal-Mart Stores, Inc. v. Smitherman, 743 So. 2d 442 (Ala. 1999), and Wal-Mart Stores, Inc. v. Hepp, 882 So. 2d 329 (Ala. 2003)." The trial court specifically addressed Caton's contention that he had not been able to adequately litigate in the

unemployment-compensation proceedings the issue of the reason for the termination of his employment:

> "The submissions by the [City] in its Renewed Motion for Summary Judgment clearly show [Caton] had an adequate opportunity to litigate. He had a right to call or subpoena witnesses for evidentiary purposes, present testimony, cross-examine witnesses, present or subpoena documents as evidence, be represented by counsel or otherwise, make arguments, and have his case decided by a neutral, impartial hearing officer. [Caton] was advised of his rights. [Caton] was present and fully participated in the hearing. [Caton] had a right to appeal the decision of the administrative hearing officer, and did so, and had a right to appeal the decision of the State Board of Appeals to the Circuit Court. [Caton] failed to exercise this right, and did not appeal to the Circuit Court. The transcript and appeal pleadings and decisions show that the pertinent issues herein were litigated and decided in the unemployment compensation proceeding. There has been a determination that [Caton] was not terminated by the Defendant for solely instituting or maintaining his workers' compensation claim, but rather for misconduct in connection with his work. The Court finds that [Caton's] other contentions are also without merit."

Caton appealed the trial court's judgment on April 23, 2020.

II. Standard of Review

> "Where, as in this case, the defendant moves for a summary judgment based on an affirmative defense, this Court applies the following standard of review:

> " 'When there is no genuine issue of material fact as to any element of an affirmative defense, ... and it is shown that the defendant is entitled to a judgment as a matter of law, summary judgment is proper. If there is a genuine issue of material fact as to any element of the affirmative defense, summary judgment is inappropriate. Rule 56(c), Ala. R. Civ. P. In determining whether there is a genuine issue of material fact as to each element of an affirmative defense, this Court must review the record in a light most favorable to the plaintiff (the nonmoving party) and must resolve all reasonable doubts against the defendant (the movant).'
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> "Bechtel v. Crown Central Petroleum Corp., 495 So. 2d 1052, 1053 (Ala. 1986)."

Wal-Mart Stores, Inc. v. Smitherman, 743 So. 2d 442, 444–45 (Ala. 1999), overruled on other grounds, Ex parte Rogers, 68 So. 3d 773 (Ala. 2010)).

III. Analysis

A. The City's Motion to Dismiss the Appeal

The City has filed a motion to dismiss Caton's appeal. The City contends that Caton's appeal is untimely because Caton never filed a notice of appeal from the trial court's January 4, 2019, order entering a summary judgment for the City. Of course, as we recounted in the rendition of the facts, the trial court set aside its January 4, 2019, order

in response to a Rule 60(b) motion Caton filed on May 3, 2019. The City essentially regurgitates the arguments it presented in opposition to Caton's Rule 60(b) motion before the trial court in contending that the trial court should not have entertained that Rule 60(b) motion.

Caton contends that we should ignore the City's motion to dismiss because, he says, it could have immediately challenged the trial court's October 21, 2019, order that set aside the January 4, 2019, summary judgment, but declined to do so. It is true that the City could have sought immediate review of the trial court's October 21, 2019, order through a mandamus petition. See, e.g., Ex parte A & B Transp., Inc., 8 So. 3d 924, 931 (Ala. 2007) (noting that "[a] petition for the writ of mandamus is a proper method for attacking the grant of a Rule 60(b) motion"). But it does not follow that the City was required to seek review by petition for a writ of mandamus to challenge the October 21, 2019, order. Seeking review of an order granting relief from a judgment is not like, for instance, seeking review of a ruling on a motion for a change of venue, which may be reviewed only through a petition for a writ of mandamus. See, e.g., Lawler Mobile Homes, Inc. v. Tarver, 492 So. 2d 297, 302 (Ala. 1986)

(explaining that "[t]he denial of a motion for a change of venue in a civil action is not such a ruling of the trial court as may be reviewed by this Court on an appeal from a final judgment in the cause. ... The proper method for obtaining review of a trial court's ruling on a motion for a change of venue is by a writ of mandamus"). Instead, the grant of a Rule 60(b) motion, like most interlocutory trial-court orders, may be challenged after the trial court's entry of a final order. See, e.g., Cf. Morton v. Clark, 403 So. 2d 234, 235 (Ala. Civ. App. 1981) (noting that an order setting aside a default judgment "may ... be reviewable on appeal after trial on the merits"); 11 Charles Alan Wright et al., Federal Practice & Procedure § 2871 (3d ed. 2012) ("An order granting a motion under Rule 60(b) and ordering a new trial is purely interlocutory and not appealable, although on appeal from a judgment entered after the new trial the appellate court will review whether it was error to have reopened the first judgment." (footnote omitted)).

In a related vein, Caton argues that, in order for the City to properly challenge the October 21, 2019, order setting aside the first summary judgment, the City needed to file a cross-appeal in this case, which it

failed to do. It is true that ordinarily "interlocutory orders merge with final judgments" and, therefore, most interlocutory orders may be appealed once a final judgment is entered. McCormack v. AmSouth Bank, N.A., 759 So. 2d 538, 541 (Ala. 1999). See also Barnes v. George, 569 So. 2d 382, 383 (Ala. 1990) (allowing challenge to grant of Rule 60(b)(2) motion for new trial after judgment in the new trial). However, the order Caton appealed from, the April 16, 2020, order, entered a summary judgment in favor of the City. "Generally an appeal can be brought only by a party or his personal representative ... from an adverse ruling ... contained in a final judgment." Home Indem. Co. v. Anders, 459 So. 2d 836, 842 (Ala. 1984) (citations omitted). The ruling in the April 16, 2020, order was not adverse to the City. Thus, a cross-appeal was not available to the City as a means to challenge the October 21, 2019, order that set aside the first summary judgment in the City's favor. Accordingly, a motion to dismiss the appeal is the City's only avenue to challenge the October 21, 2019, order.

That said, the City's arguments in its motion to dismiss are not well taken. The City argues that Caton's Rule 60(b) motion "was actually the

initiation of a separate, independent proceeding which required a new filing fee pursuant to § 12-19-70 and 71, [Ala. Code 1975]." City's Memorandum in Support of Motion to Dismiss, p. 12. Because this Court has concluded that the failure to pay a filing fee in a new action is a jurisdictional defect, see Ex parte CVS Pharmacy, LLC, 209 So. 3d 1111, 1115-17 (Ala. 2016), and Caton did not pay such a fee when he filed his Rule 60(b) motion, the City contends that Caton's Rule 60(b) motion was due to be dismissed.

This is, frankly, a bizarre argument because, as the Committee Comments to Rule 60(b) indicate, the ordinary course for seeking relief under Rule 60(b) is to file a motion in the same case that the filing party seeks to have reconsidered.

> "The normal procedure to attack a judgment under this rule will be by motion in the court which rendered the judgment. If the relief does not appear to be available under the rule, or if relief from the judgment is sought in some other court than the court which rendered the judgment, the party should bring an independent proceeding."

Rule 60, Ala. R. Civ. P., Committee Comments on 1973 Adoption. The City offers no reason why Caton's Rule 60(b) motion had to be brought as

a separate independent proceeding, and we see no reason why a separate action was required, so no new filing fee was required for the trial court to entertain Caton's Rule 60(b) motion.[4]

The City next contends that Caton's Rule 60(b) was really arguing that he was entitled to relief based on a lack of notice from the circuit clerk of the January 4, 2019, order entering a summary judgment for the City. The City notes that this Court has held that "Rule 77(d)[, Ala. R. Civ. P.,] provides the exclusive remedy in situations where a party claims lack of notice, and Rule 60(b) cannot be substituted as a method to extend the time within which to appeal." Lindstrom v. Jones, 603 So. 2d 960, 961 (Ala. 1992). Rule 77(d), Ala. R. Civ. P., provides, in part:

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[4]Even if Caton's proper avenue had been an independent action, the failure to file his Rule 60(b) motion as a new action would not have been fatal to the filing. See 2 Gregory Cook, Alabama Rules of Civil Procedure Annotated Rule 60 (5th ed. 2018) (explaining that "an erroneous choice between these procedures [a motion or an independent action] is not fatal to the party attacking the judgment. There is little procedural difference between the two methods of attack, and since nomenclature is unimportant, courts have consistently treated a proceeding in form an independent action as if it were a motion, and vice versa, where one but not the other was technically appropriate, and any procedural difference between them was immaterial in the case").

> "Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail or by electronic transmittal in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and who was not present in person or by that party's attorney or not otherwise notified, when such order or judgment was rendered, and make a note on the docket of the mailing or electronic transmittal. Such mailing or electronic transmittal is sufficient notice for all purposes for which notice of the entry of an order is required by these Rules, but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except that upon a showing of excusable neglect based on a failure of the party to learn of the entry of the judgment or order the circuit court in any action may extend the time for appeal not exceeding thirty (30) days from the expiration of the original time now provided for appeals in civil actions."

The City contends that because Caton did not file an appeal from the January 4, 2019, order within even the extended time Rule 77(d) permits based on a lack of notice of the entry of judgment, Caton's appeal is due to be dismissed as untimely.

The problem with this argument is that it misstates the grounds under which Caton filed his Rule 60(b) motion. Specifically, Caton contended not only that he failed to receive notice of the January 4, 2019, summary-judgment order from the circuit clerk, but also that the City had

failed to serve its November 29, 2018, summary-judgment motion on either him or his attorney for the retaliatory-discharge claim, Brockwell, even though the City was well aware that Brockwell was Caton's sole attorney at that point in the litigation. Thus, Caton contended that he was entitled to relief from the judgment in part based on the opposing party's failure to fulfill its duty under Rule 5, Ala. R. Civ. P., to serve a potentially dispositive motion upon his attorney. Such an alleged failure of service is a cognizable ground under Rule 60(b). See, e.g., Nolan v. Nolan, 429 So. 2d 596, 596 (Ala. Civ. App. 1982).[5]

The City's remaining argument for dismissal consists of an insistence that it did serve its November 29, 2018, summary-judgment motion on one of Caton's attorneys, Bellenger, and so the trial court

[5]Alternatively, Caton also contended that his Rule 60(b) motion was due to be granted based on the excusable neglect of Brockwell for failing to ensure that he was registered in the Alabama judicial system's electronic filing system for this case. That is also a cognizable ground under Rule 60(b)(1). See Burleson v. Burleson, 19 So. 3d 233, 239 (Ala. Civ. App. 2009) ("Our caselaw recognizes that the failure of a party to advise the clerk of a proper service address may 'fall into the category of excusable neglect ....' DeQuesada v. DeQuesada, 698 So. 2d 1096, 1099 (Ala. Civ. App. 1996).").

should not have granted Caton relief from the judgment on the basis that Caton's counsel had not been served.

> " 'A strong presumption of correctness attaches to the trial court's determination of a motion made pursuant to Rule 60(b), and the decision whether to grant or deny the motion is within the sound discretion of the trial judge, and the appellate standard of review is whether the trial court [exceeded] its discretion.' "

Osborn v. Roche, 813 So. 2d 811, 815 (Ala. 2001) (quoting Ex parte Dowling, 477 So. 2d 400, 402 (Ala. 1985)). Caton presented evidence in support of his Rule 60(b) motion, including affidavits from both of his attorneys, detailing the nature of their respective representation in the case. The City presented its own argument in opposition, noting that Bellenger never withdrew as counsel from the case and that he continued to receive electronic notices of all party filings and court orders in the case. Given the conflict in the evidence, it was plainly within the trial court's discretion to grant or deny Caton's Rule 60(b) motion. The trial court granted the motion and set aside the first summary judgment in favor of the City. Thereafter, the parties relitigated the summary-judgment issues, and the trial court eventually entered another summary

judgment in favor of the City. Caton filed a timely appeal to the April 16, 2020, summary-judgment order. Therefore, the City's motion to dismiss the appeal is due to be denied.

B. Caton's Argument Against the Entry of the Summary Judgment

As we noted in the rendition of facts, the trial court entered a summary judgment for the City on the ground that Caton was collaterally estopped from maintaining his retaliatory-discharge claim against the City because of the determination in the unemployment-compensation proceedings that Caton's employment had been terminated for misconduct.

> "In order for an employee to establish a prima facie case of retaliatory discharge the employee must show: 1) an employment relationship, 2) an on-the-job injury, 3) knowledge on the part of the employer of the on-the-job injury, and 4) subsequent termination of employment based solely upon the employee's on-the-job injury and the filing of a workers' compensation claim."

Alabama Power Co. v. Aldridge, 854 So. 2d 554, 563 (Ala. 2002). Conversely, if it is established that an employee was terminated for reasons other than filing a worker's compensation claim, then the employee's claim fails. See, e.g., Aldridge, 854 So. 2d at 568 ("[W]here a

conclusive determination can be made that retaliation is not the sole basis for the discharge a judgment as a matter of law is appropriate.").

In Wal-Mart Stores, Inc. v. Smitherman, 743 So. 2d 442 (Ala. 1999), and Wal-Mart Stores, Inc. v. Hepp, 882 So. 2d 329 (Ala. 2003), "[t]he issue ... was whether the doctrine of collateral estoppel barred a retaliatory-discharge action brought pursuant to a provision of the Workers' Compensation Act, Ala. Code 1975, § 25–5–11.1, when an unemployment-compensation claim had previously been adjudicated against the employee in an administrative proceeding." Ex parte Rogers, 68 So. 3d 773, 776 (Ala. 2010).[6]

> "In both Smitherman and Hepp, our supreme court determined that collateral estoppel could be used to bar a retaliatory-discharge plaintiff from arguing that he or she was discharged for a reason other than 'misconduct connected with his [or her] work' when that plaintiff had been denied full unemployment-compensation benefits under Ala. Code 1975, § 25–4–78(3)c., because of 'misconduct connected with his [or her] work.'[1]
>
> "_____

[6]Both Smitherman and Hepp were overruled by Rogers on a ground that did not implicate the collateral-estoppel issue.

> "[1]Section 25–4–78(3)c. disqualifies an employee from receiving full unemployment-compensation benefits when an employee is discharged for misconduct connected with his or her work but permits an award of partial benefits. Section 25–4–78(3)b., [Ala Code 1975,] however, disqualifies an employee from receiving any unemployment-compensation benefits because of misconduct connected with his or her work repeated after previous warning regarding that misconduct."

Hale v. Hyundai Motor Mfg. Alabama, LLC, 86 So. 3d 1015, 1022 (Ala. Civ. App. 2012). See also Ex parte Buffalo Rock Co., 941 So. 2d 273, 277 (Ala. 2006) (citing Smitherman and Hepp for the proposition that "[i]t is clear that the doctrine of collateral estoppel may be raised as a defense to a retaliatory-discharge claim to bar the relitigation of an issue raised and decided in an unemployment-compensation hearing").

> "In order for the doctrine of collateral estoppel to apply to an issue raised in an administrative proceeding, the following elements must be present:
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> > "'"'(1) there is identity of the parties or their privies; (2) there is identity of issues; (3) the parties had an adequate opportunity to litigate the issues in the administrative proceeding; (4) the issues to be estopped were actually litigated and determined in the

> administrative proceeding; and (5) the findings on the issues to be estopped were necessary to the administrative decision.'"'"

Smitherman, 743 So. 2d at 445 (quoting Ex parte Smith, 683 So. 2d 431, 433 (Ala. 1996), quoting in turn Ex parte Shelby Med. Ctr., Inc., 564 So. 2d 63, 68 (Ala. 1990), quoting in turn Pantex Towing Corp. v. Glidewell, 763 F.2d 1241, 1245 (11th Cir.1985))).

The parties in the unemployment-compensation proceedings were identical to the parties in this retaliatory-discharge action. In the unemployment-compensation proceedings, the administrative-hearing officer explained that "in the hearing today, I would need to determine was the claimant discharged, was the discharge for an act of misconduct, was that act of misconduct connected with work, and any details surrounding the final incident that led to that termination." Thus, the reasons for Caton's termination from employment with the City constituted a necessary part of the determination whether Caton was entitled to unemployment-compensation benefits. A determination was made in Caton's unemployment-compensation proceedings that "[Caton]

was discharged for misconduct connected with work and is subject to disqualification under [§ 25–4–78(3)c.]." In other words, there was a determination in the unemployment-compensation proceedings that Caton's employment was terminated for a reason other than his filing of a worker's compensation claim. Finally, because this Court, on multiple previous occasions, has approved the application of the doctrine of collateral estoppel in the unemployment-compensation context, it would be difficult to conclude that Caton was not given an adequate opportunity to litigate the issue (although we address that issue more fully below). Consequently, collateral estoppel barred Caton's retaliatory-discharge claim against the City.

Caton does not dispute the holdings in Smitherman and Hepp. Instead, he contends that he presented an argument that was not addressed in those cases and that the trial court failed to address as well. Specifically, Caton contends that the application of the doctrine of collateral estoppel based on a determination made in the administrative unemployment-compensation proceedings violates his right to trial by jury

protected by the Seventh Amendment to the United States Constitution[7] and Art. I, § 11 of the Alabama Constitution of 1901.[8] Caton asserts that, even if he had appealed the denial of his application for appeal by the Department's Board of Appeals to the circuit court, it still would not have cured the jury-trial deficiency because such appeals are adjudicated by bench trial. See § 25-4-95, Ala. Code 1975, providing for appeal to the circuit court from a decision of the Department's Board of Appeals and stating that "[a]ctions under this chapter shall be tried by any judge of the circuit court to whom application is made at any location in said circuit"; and Ex parte Miles, 248 Ala. 386, 388, 27 So. 2d 777, 778 (1946) (holding that " the statute means trial without a jury when it says that the actions shall be tried 'by any judge of the circuit court' "). Caton insists that,

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[7]The Seventh Amendment provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

[8]Article I, § 11 provides: "That the right of trial by jury shall remain inviolate."

> "[f]or much too long, this Court and the lower courts of this state have allowed non-jury unemployment compensation proceedings to deny the people of Alabama the right to trial by jury in retaliatory discharge actions. ... Mr. Caton is raising a novel issue of constitutional law to this Court. This Court now has the opportunity to correct the miscarriage of justice that has happened not only to Mr. Caton, but also to countless others before him."

Caton's brief, pp. 20-21.

Distilled to its essence, Caton is contending that determinations in administrative proceedings should not have a preclusive effect in any case where a trial by jury is ordinarily available.[9] Although this Court has not expressly addressed the issue of the right to trial by jury in cases from administrative proceedings applying the doctrine of collateral estoppel, multiple courts in other jurisdictions -- including the United States Supreme Court[10] -- have done so.

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[9]Caton has not argued that unemployment-compensation proceedings are distinctive in some way from other administrative proceedings such that applying the doctrine of collateral estoppel is uniquely harmful in the unemployment-compensation context.

[10]We note that

> "[t]he provisions of the Seventh Amendment are not binding upon state courts. Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed. 961 (1916). Decisions of

> "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. 'When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.' United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966). Such repose is justified on the sound and obvious principle of judicial policy that 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. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979). The principle holds true when a court
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> federal courts based on the Seventh Amendment are, therefore, instructive but not compulsory. Kraas v. American Bakeries Co., 231 Ala. 278, 164 So. 565 (1935)."

Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 164 (Ala. 1991). At the same time,

> "Alabama cases have held that the Seventh Amendment is not materially different from Article I, § 11 of the Alabama Constitution. See, e.g., Poston v. Gaddis, 335 So.2d 165 (Ala. Civ. App.), cert. denied, 335 So. 2d 169 (Ala. 1976). Both constitutional provisions preserve the right to jury trial as it existed at common law when the provisions were ratified. Id."

Eason v. Bynon, 781 So. 2d 238, 241 (Ala. Civ. App. 2000).

> has resolved an issue, and should do so equally when the issue has been decided by an administrative agency, be it state or federal, see University of Tennessee v. Elliott, 478 U.S. 788, 798 (1986), which acts in a judicial capacity."

Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 107–08 (1991) (emphasis added). In B & B Hardware, Inc. v. Hargis Industries, Inc., 575 U.S. 138, 150 (2015), the United States Supreme Court reiterated its belief that applying the doctrine of collateral estoppel based on administrative determinations is appropriate:

> "We reject Hargis' statutory argument that we should jettison administrative preclusion in whole or in part to avoid potential constitutional concerns. As to the Seventh Amendment, for instance, the Court has already held that the right to a jury trial does not negate the issue-preclusive effect of a judgment, even if that judgment was entered by a juryless tribunal. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 337 (1979). It would seem to follow naturally that although the Seventh Amendment creates a jury trial right in suits for trademark damages, see Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477, 479–480 (1962), TTAB [Trademark Trial and Appeal Board] decisions still can have preclusive effect in such suits. Hargis disputes this reasoning even though it admits that in 1791 ' "a party was not entitled to have a jury determine issues that had been previously adjudicated by a chancellor in equity." ' Brief for Respondent 39 (quoting Parklane Hosiery, supra, at 333). Instead, Hargis contends that issue preclusion should not apply to TTAB registration decisions because there were no agencies at common law. But our precedent holds that the Seventh Amendment does not strip competent tribunals of the

> power to issue judgments with preclusive effect; that logic would not seem to turn on the nature of the competent tribunal. And at the same time, adopting Hargis' view would dramatically undercut agency preclusion, despite what the Court has already said to the contrary. Nothing in Hargis' avoidance argument is weighty enough to overcome these weaknesses."

(Emphasis added.)

The central point expressed by the United States Supreme Court in both Solimino and B & B Hardware was that, as long as the administrative process in question has the characteristics of an adjudication, there is no reason determinations made in administrative proceedings should not have the same preclusive effect that a court decision would have. The same idea is expressed in the Restatement (Second) of Judgments § 83(1) (1982), which provides that "a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court" as long as the administrative "proceeding resulting in the determination entailed the essential elements of adjudication." Those "essential elements of adjudication" include "[a]dequate notice to persons who are to be bound by the adjudication" and

"[t]he right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties." Id. at § 83(2). Our Court of Civil Appeals has similarly noted:

> "It is well settled that the doctrine of res judicata -- a term which encompasses within its scope both claim preclusion and issue preclusion (see Marshall County Concerned Citizens v. City of Guntersville, 598 So. 2d 1331, 1332 (Ala. 1992)) -- may properly be said to apply to a previous agency decision 'only when that decision is made after a trial-type hearing, i.e., "when what the agency does resembles what a trial court does." ' Kid's Stuff Learning Ctr., Inc. v. State Dep't of Human Res., 660 So. 2d 613, 617 (Ala. Civ. App. 1995) (quoting II K. Davis & R. Pierce, Jr., Administrative Law Treatise § 13.3 at 250 (3d ed. 1994)); accord, Restatement (Second) of Judgments § 83(2) (1982) ...."

Alabama Bd. of Nursing v. Williams, 941 So. 2d 990, 996 (Ala. Civ. App. 2005) (emphasis added). Indeed, as one court has observed, any "uncertainty and confusion [that] exist[s] in the case law as to whether the decisions of an administrative agency may ever collaterally estop a later action" arise, not from any perceived violation of the right to trial by jury, but rather from " 'the varying types of administrative agencies and their procedures, and widespread disagreement whether their decisions are

judicial, quasi-judicial, or administrative only.' " People v. Sims, 32 Cal. 3d 468, 477, 651 P.2d 321, 326–27, 86 Cal. Rptr. 77, 82 (1982) (quoting Williams v. City of Oakland, 30 Cal. App. 3d 64, 68, 106 Cal. Rptr. 101, 103 (1973)).

Decision-making by an adjudicative tribunal is necessary for the doctrine of collateral estoppel to apply because the goal of the doctrine is "to encourage judicial economy by allowing issues ... to be decided in a single proceeding, so that there can be a final resolution of the conflict between the parties." Ex parte Smith, 683 So. 2d 431, 436 (Ala. 1996). If Caton's reasoning was followed, then it would also be true that any matters decided in bench trials could not have preclusive effect in subsequent cases in which jury trials are available.[11] As the United States Supreme Court explained in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), however, finding preclusion based on bench-trial determinations has never been viewed as contrary to the right to trial by jury.

[11]Indeed, this conclusion follows from Caton's contention that the doctrine of collateral estoppel should not have applied even if he had appealed his unemployment-compensation claim to the circuit court for a trial de novo.

> "'[T]he thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed in 1791.' Curtis v. Loether, 415 U.S. 189, 193 [(1974)]. At common law, a litigant was not entitled to have a jury determine issues that had been previously adjudicated by a chancellor in equity. Hopkins v. Lee, [19 U.S.] 6 Wheat. 109 [(1821)]; Smith v. Kernochen, [48 U.S.] 7 How. 198, 217–218 [(1849)]; Brady v. Daly, 175 U.S. 148, 158–159 [(1899)]; Shapiro & Coquillette, The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill, 85 Harv. L. Rev. 442, 448–458 (1971).[21]
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> "_____
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> [21]"The authors of this article conclude that the historical sources 'indicate[] that in the late eighteenth and early nineteenth centuries, determinations in equity were thought to have as much force as determinations at law, and that the possible impact on jury trial rights was not viewed with concern. ... If collateral estoppel is otherwise warranted, the jury trial question should not stand in the way.' 85 Harv. L. Rev., at 455–456. This common-law rule is adopted in the Restatement of Judgments § 68, Comment j (1942)."

439 U.S. at 333.[12]

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[12]Although not mentioned by the parties, we note that states are split on whether determinations in administrative unemployment-compensation proceedings should have a preclusive effect in retaliatory-discharge cases. See, e.g., April D. Reeves, Employment Law Wal-Mart Stores, Inc. v. Smitherman: Applying Collateral Estoppel to Issues Raised in Administrative Proceedings, 24 Am. J. Trial Advoc. 679, 683-85 (2001) (listing cases from states on both sides of the issue); Ann C. Hodges, The Preclusive Effect of Unemployment Compensation Determinations in Subsequent Litigation: A Federal Solution, 38 Wayne L. Rev. 1803, 1869

The only remaining question, then, is whether the unemployment-compensation proceedings had the essential elements of adjudication such that Caton had the opportunity to fully and fairly litigate the issue of the reasons for the termination of his employment. As we recounted in the rendition of the facts, Caton was given adequate notice of the telephonic hearing before the administrative-hearing officer, he was repeatedly informed that he had the right to be represented by counsel at that hearing, that he had the right to subpoena and to call witnesses on his behalf and to cross-examine witnesses of the opposing party, and that he had the right to introduce documentary evidence in support of his position. The fact that Caton did not exercise several of those rights is immaterial to whether the elements of adjudication were available in the telephonic hearing. At that hearing, it was clearly communicated to Caton that the central issue to be decided was the reasons for his

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(1992) (noting that "[t]wenty-three states have enacted statutory limits on according preclusive effect to unemployment compensation decisions," but also listing cases in several states applying the doctrine of collateral estoppel based on determinations in unemployment-compensation proceedings).

termination from employment with the City, and Caton did not express any confusion about the purpose of the hearing. All the witnesses who testified at the hearing were placed under oath before they testified, and Caton was given the opportunity to ask questions of witnesses. Caton also was given a full opportunity to tell his side of the events that led up to his termination. Additionally, Caton had the opportunity to appeal the decision of the administrative-hearing officer to the Department's Board of Appeals and also to appeal the Board of Appeals' decision to the circuit court for de novo review in a bench trial. In sum, it is clear that the unemployment-compensation proceedings provided the essential elements of an adjudication such that Caton had an opportunity to adequately litigate the issue whether his termination from employment with the City was based on misconduct. Therefore, applying the doctrine of collateral estoppel in this case on the basis of the determination in the administrative proceedings did not violate Caton's right to a trial by jury.

IV. Conclusion

Based on the foregoing, we conclude that the application of the doctrine of collateral estoppel in this case does not violate Caton's right to

a trial by jury and that the doctrine of collateral estoppel bars Caton's retaliatory-discharge claim against the City. Caton does not present any other reason why the trial court's judgment should be reversed. Therefore, we affirm the summary judgment in favor of the City.

MOTION TO DISMISS DENIED; AFFIRMED.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, and Stewart, JJ., concur.

Mitchell, J., concurs specially.

MITCHELL, Justice (concurring specially).

Because of our precedent applying the doctrine of collateral estoppel to decisions of administrative tribunals, I concur in the majority opinion. I write separately, however, to express concerns I have about the foundation of this precedent and the inevitable questions it raises concerning the separation of powers under our State's Constitution.

This Court has a long line of cases applying the doctrine of collateral estoppel to administrative proceedings that includes Wal-Mart Stores, Inc. v. Smitherman, 743 So. 2d 442 (Ala. 1999), and Wal-Mart Stores, Inc. v. Hepp, 882 So. 2d 329, 333 (Ala. 2003). But when I trace this rule back to its original appearance in our caselaw, it seems clear that it did not arise organically through the substantive reasoning of this Court. Rather, it was grafted from a nonbinding decision of the United States Court of Appeals for the Eleventh Circuit. See Ex parte Shelby Med. Ctr., Inc., 564 So.2d 63, 68 (Ala.1990) (quoting Pantex Towing Corp. v. Glidewell, 763 F.2d 1241, 1245 (11th Cir.1985)).

Remarkably, the Eleventh Circuit provided no independent reasoning in Pantex Towing for applying collateral estoppel to issues

decided by administrative agencies -- the court simply adopted the premise because the parties to that case had agreed to it. Pantex Towing, 763 F.2d 1241, 1245 ("[T]he parties agree that when an administrative body has acted in a judicial capacity and has issued a valid and final decision on disputed issues of fact properly before it, collateral estoppel will apply to preclude relitigation of fact issues only if" the requisite test is satisfied.). And the line of United States Supreme Court decisions giving rise to the parties' agreement in Pantex Towing has itself been criticized as weakly reasoned. See B & B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138, 174 (2015) (Thomas, J., dissenting) ("I disagree with the majority's willingness to endorse [the] unfounded presumption [that Congress intends for the adjudicatory decisions of administrative agencies to have preclusive effect in court] and to apply it to an adjudication in a private-rights dispute, as that analysis raises serious constitutional questions."). Although this shaky basis for our Court's application of collateral estoppel to administrative determinations is not fatal, parties

denied the opportunity to litigate an issue before the judiciary deserve to know why.[13]

Additionally, this application of collateral estoppel appears to offend the traditional understanding of separation of powers. See The Federalist No. 47 (James Madison) (Clinton Rossiter ed. 1961). Granting preclusive effect to a determination of an administrative agency -- which is part of the executive branch -- almost certainly siphons power granted to the judicial branch. See Ala. Const. 1901, Art. III, § 42 ("[E]xcept as expressly directed or permitted in this constitution, ... the executive branch may not exercise the legislative or judicial power ...."). But Alabama's Constitution departs from this historical understanding in Article VII, § 139(b), which

[13] The application of the similar-but-distinct doctrine of res judicata to findings from administrative hearings has a more organic grounding in our cases, though its support is equally opaque. It seems that our Court has merely stated that the practice is "accepted" without ever making an attempt to justify the choice with supportive reasoning. See State v. Brooks, 255 Ala. 689, 694, 53 So. 2d 329, 333 (1951)) ("It is an accepted principle that '[t]he rule which forbids the reopening of a matter once judicially determined by competent authority applies as well to the judicial and quasi-judicial acts of public, executive, or administrative officers and boards acting within their jurisdiction as to the judgments of courts having general judicial powers.'" (citation omitted)).

grants the Legislature the ability to "vest in administrative agencies established by law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies are created." Logically, there can be no constitutional violation where the administrative agencies are constitutionally entitled to act in a judicial capacity properly delegated by the Legislature.

Nevertheless, our Constitution does not require that Alabama courts give collateral-estoppel effect to administrative determinations. Collateral estoppel is a doctrine of our Court, and we are the master of our own doctrine. As such, I am open to revisiting whether the State judiciary should apply the doctrine of collateral estoppel to administrative adjudicatory decisions in a future case where the issue is properly before us and is substantively briefed.