STATE OF WISCONSIN CIRCUIT COURT
BRANCH 8

DANE COUNTY

STEVEN G. BUTZLAFF,
Plaintiff,

V.

Case No. 97 CV 1319

STATE OF WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,
Defendant.

DECISION AND ORDER

BACKGROUND

This is before the court on State of Wisconsin Department of Health and Family Services' (Defendant's) motion for summary judgement Defendant urges that Steven G. Butzlaff's (Plaintiff's) claim, alleging violation of Wisconsin's Family and Medical Leave Act (FMLA), is barred by issue preclusion, claim preclusion and estoppel of record After review of the applicable law, I conclude that the motion must be denied My reasons follow.

FACTS

Plaintiff was fired from his probationary position as a Security Officer 3 at the Mendota Mental Health Institute on May 2, 1990. On June 15, 1990, he filed a complaint with the State of Wisconsin Personnel Commission alleging that he was fired in violation of the FMLA, §103.10 Wis. Stats. The Commission granted Defendant's motion to dismiss the complaint on the grounds that Plaintiff had not been on the job long enough to be protected by FMLA. That decision was reversed and remanded to the Commission for a hearing on

the merits following judicial review.[1] The Commission rendered its final decision on January 23, 1996, denying Plaintiff's complaint, and Plaintiff filed a petition for review. The Honorable Richard J. Callaway rendered his decision, affirming the Commission's decision, on March 19, 1997. Plaintiff filed this action on May 14, 1997.

STANDARD OF REVIEW

Summary judgment is a means by which to determine whether a legal dispute can be resolved before trial. U S. Oil v Midwest Auto Care Services, 150 Wis. 2d 80, 86, 440 N.W.2d 825 (Ct. App. 1989). Under §802.08(2), Wis. Stats , summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law " Voss v City of Middleton, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991)

The standard methodology which a trial court follows when deciding a summary judgment motion involves three steps. First, the court examines the pleadings to determine whether a claim for relief has been stated. Id. at 747-48 (citations omitted). Second, the court examines the moving party's affidavits and other proof to determine whether a *prima facie* showing has been made which would entitle the moving party to judgment as a matter of law Id. Finally, if the moving party has made a *prima facie* case for summary judgment, the court examines the opposing party's affidavits and other proof to determine whether disputed material facts exist or whether there are undisputed material facts from

[1] Burzlaff v. Personnel Commission, 166 Wis. 2d 1028, 480 N.W.2d 559 (Ct. App. 1992).

which reasonable alternative inferences may be drawn to entitle the opposing party to a trial. Id.

Summary judgment is appropriate only when material facts are not in dispute and only when inferences that may be reasonably drawn from those facts are not doubtful and lead to but one conclusion. Fuller v. Riedel, 159 Wis. 2d 323, 464 N.W.2d 97 (Ct. App. 1990). Any reasonable doubt as to the existence of a genuine issue of material fact must be resolved against the granting of the motion. Heck & Paetow Claim Service, Inc. v. Heck, 93 Wis. 2d 349, 356, 286 N.W.2d 831 (1980).

DISCUSSION

As stated above, Defendant has moved for summary judgement in this action on the grounds that the action is barred by issue preclusion,[2] claim preclusion[3] and estoppel by

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[2]Issue preclusion refers to the effect of a judgment in foreclosing relitigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in a prior action. Northern States Power Co., 189 Wis. 2d at 550 Issue preclusion is a narrower doctrine than claim preclusion and requires courts to conduct a "fundamental fairness" analysis before applying the doctrine. Id. at 551. Under this fundamental fairness analysis, "courts consider an array of factors in deciding whether issue preclusion is equitable in a particular case " Id. The court may consider some or all of the following factors to protect the rights of all parties to a full and fair adjudication of all issues involved in the action:

> (1) could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment; (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law; (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue; (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or (5) are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action? Michelle T. v. Crozier, 173 Wis 2d 681, 689, 495 N.W.2d 327 (1992).

record.[4] Plaintiff argues that FMLA abrogates the common law by providing for a civil action in court following an administrative proceeding. (Plaintiff's Brief in Response to Motion for Summary Judgement at 2.) Defendant urges that Plaintiff has failed to prove that the legislature intended to abrogate the common law in all actions under §103.10(13), stats. (Defendant's Reply brief at 2.) Accordingly, the first issue to address is whether the Wisconsin Legislature abrogated the common law doctrines of issue preclusion, claim preclusion and estoppel of record when it enacted §103 10(13), stats.

In order for a common law doctrine to be abrogated, the legislature must have clearly expressed in either 1) specific language, or 2) in such a manner as to leave no reasonable doubt, that it intended to abrogate the common law Mlynarski v. St. Rita's Congregation, 31 Wis. 2d 54, 58-59, 142 N.W 2d 207 (1966)

The court finds two cases instructive on the issue of abrogation. In NBZ, Inc. v

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[3]Under claim preclusion a final judgment is conclusive in all subsequent actions between the same parties, or their privies, as to all matters that were litigated or that might have been litigated in the former proceeding Northern States Power Co. v. Burgher, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995) (Citations omitted). In applying claim preclusion, the essential principal is fairness. Stuart v Stuart, 140 Wis. 2d 455, 461, 410 N.W.2d 632 (Ct App. 1987) Claim preclusion is designed to draw lines between meritorious claims on the one hand and the vexatious, repetitious and needless claims on the other hand. Northern States Power Co., 189 Wis. 2d at 550. However, claim preclusion must never be applied in such a fashion as to deprive a party of the opportunity to have a full and fair determination of an issue. Stuart, 140 Wis. 2d at 461. In order for a case to be dismissed on claim preclusion the court must find the following elements: (1) the parties or their privies in the prior and present suits must be identical; (2) the causes of action in the two suits must be identical; and (3) there must have been a final judgement on the merits in a court of competent jurisdiction.

[4]Estoppel of record is identical to claim preclusion, except that it is the record of the prior proceeding, rather than the judgement, that bars the subsequent proceeding. Lindas v Cady, 183 Wis. 2d 547, 558, 515 N.W.2d 458 (1994) (internal citations omitted)

Pilarski, 185 Wis. 2d 827, 520 N.W.2d 93 (Ct. App. 1994), the court of appeals addressed whether restrictive covenants in employment contracts, which were subject to the requirements of §103.465, stats.,[5] were also subject to the common law contract principles that required the contract to be supported by consideration. NBZ, 185 Wis. 2d at 833. The court first found §103.465, stats., to be ambiguous as the plain language did not address whether consideration was required Id. at 836. The court then found that there was no clear expression of a legislative intent to abrogate the common law principles of "offer," "acceptance" and "consideration" which are the principles that form a contract. Id. at 837 Finding that there was no clear expression of legislative intent on the issue, the court determined that the restrictive covenant in the employment contract had to be supported by consideration. Id.

Similarly, in Bob Ryan Leasing v. Sampair, 125 Wis. 2d 266, 371 N.W.2d 405 (Ct. App. 1985) the court of appeals found that §779.43(3), stats.,[6] did not impose a garage

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[5]"A covenant by an assistant, servant or agent not to compete with his employer or principal during the term of the employment or agency, or thereafter, within a specified territory and during a specified time is unlawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any such restrictive covenant imposing an unreasonable restraint is illegal, void and unenforceable even as to so much of the covenant or performance as would be a reasonable restraint."

[6]Section 779.43(2) and (3), Stats., provides. (2) Every keeper of an inn, hotel, boarding house or lodging house shall have a lien upon and may retain the possession of all the baggage and other effects brought into the place by any guest, boarder or lodger, whether the baggage and effects are the property of or under the control of the guest, boarder or lodger . . . .

(3) Every keeper of a garage, . . . keeping any . . . automobiles, . . . shall have a lien thereon and may retain the possession thereof for the amount due for the keep, support, storage or repair and care thereof until paid. But no garage keeper shall exercise the lien upon any automobile unless there shall be posted in some conspicuous place in the garage a card, stating the charges for storing automobiles, easily readable at a distance of 15 feet.

keeper's lien against an owner, where the storage occurred without the owner's consent, due to the statute not explicitly altering the common law requirement of owner consent before imposition of a lien. In so finding, the court compared sub-sections (2) and (3) and said:

> The language of sec. 779.43(3) does not explicitly change the common law rule, and we construe the statute to require the consent of the owner before the bailee acquires lien rights against him. Section 779.43(2), Stats., governing innkeepers' liens, **expressly provides for the lien regardless whether the property belongs to the guest. Subsection (2), therefore, abrogates the common law rule that requires consent.** Subsection (3), governing garage keepers' liens, fails to mention the ownership of the property as a factor in the creation of the lien. When the legislature amended the predecessor statute to sec. 779.43(2) in 1913, it could have also easily amended the predecessor statute to subsection (3) to add language to abrogate the common law rule that requires the consent of the owner before the garage keeper's lien is created.

Bob Ryan Leasing, 125 Wis. 2d at 269 (emphasis added.)

Turning to the case before this court, §103 10(13), states, in pertinent part:

> Civil Action. (a) an employe or the department may bring an action in circuit court against an employer to recover damages caused by a violation of sub. (11) after the completion of an administrative proceeding, including judicial review, concerning the same violation.
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> (b) An action under par. (a) shall be commenced within the later of the following periods, or be barred:
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> 1 Within 60 days from the completion of an administrative proceeding, including judicial review, concerning the same violation.
>
> 2. Twelve months after the violation occurred, or the department or employe should reasonably have known the violation occurred.

The court is satisfied that the plain language of the statute, "an employe . . . may bring an action in circuit court against an employer to recover damages caused by a violation of sub. (11) after the completion of an administrative proceeding, including judicial review, **concerning the same violation**," and "An action under par. (a) shall be commenced within . . 60 days from the completion of an administrative proceeding, including judicial review,

concerning the same violation," clearly expresses the legislative intent to abrogate the common law doctrines of issue preclusion, claim preclusion and estoppel by record. As the language of the statute clearly and unambiguously sets forth the legislative intent, it is the duty of this court to apply that intent. Swatek v County of Dane, 192 Wis. 2d 47, 57, 531 N.W.2d 45 (1995).[7]

As an aside, the court notes that its decision on this motion is the same as the decision entered by the court on September 3, 1997, which denied Defendants' motion to dismiss. Both decisions are based upon (and cite to) specific language in §103.10(13), Stats. In the words of Yogi Berra, "It ain't over 'till it's over." Counsel are advised that as it relates to the issue of whether Plaintiff may prosecute this action, "It's over."

[7]The court realizes that Defendant's position on the abrogation issue would be different had Plaintiff won at the administrative level. *See,* Defendant's Reply Brief on Motion for Summary Judgement at 2 ("Did Butzlaff prove that the Legislature intended to abrogate the common law in all actions under §103.10(13), Stats.?"); Defendant's Motion to Dismiss with Supporting Authority at ¶ 5-7; Defendant's Reply Brief Support Motion to Dismiss at 3 ("Complainants are not allowed to pursue de novo court actions against their employers under §103.10(13), Stats., where the enforcement agency, in a final order, found no violation of the WFMLL.") However, this court cannot debate the merits of the legislation. In re Custody of H.S.H.-K., 193 Wis. 2d 649, 734, 533 N W 2d 419 (1995)(concurrence and dissent.) Nor can this court rewrite the legislation. Id at 729 (Steinmetz, concurrence and dissent)(internal citations omitted.)

CONCLUSION

For the reasons set forth above, Defendants' motion for summary judgement is DENIED.

IT IS SO ORDERED.

Dated this 4 day of February, 1998.

BY THE COURT:

Patrick J Fiedler, Judge
Circuit Court, Branch 8

cc. Attorney Thomas Arnon Allen
AAG Richard B. Moriarty