STATE OF WISCONSIN CIRCUIT COURT BRANCH 5 DANE COUNTY

PASTORI M. BALELE,
Petitioner,

v.

Case No. 98-CV-0257

WISCONSIN PERSONNEL COMMISSION, DEPARTMENT OF ADMINISTRATION, DEPARTMENT OF EMPLOYMENT RELATIONS, and DIVISION OF MERIT RECRUITMENT AND SELECTION,
Respondent.

DECISION AND ORDER

On February 2, 1998, pursuant to sec. 111.375(2) and ch. 227, Stats., petitioner Pastori Balele filed for a judicial review of a decision of the Wisconsin Personnel Commission. Balele had filed a discrimination complaint under the Wisconsin Fair Employment Act (WFEA), secs. 111.31 - 111.395, Stats., against the Wisconsin Department of Administration (DOA) and the Wisconsin Division of Merit Recruitment and Selection (DMRS). The Personnel Commission decided that the claim was precluded on grounds of claim preclusion by the judgment of the federal district court in Pastori Balele v. James Klauser, et al., Case No. 92-CV-0841 (W.D. Wis., Nov, 14, 1993). Balele alleges that the doctrine of claim preclusion was misapplied, and that the doctrine of issue preclusion should have been addressed. This judicial review requires consideration of the doctrines of claim preclusion (formerly res judicata) and issue preclusion (formerly collateral estoppel), and a determination of whether either doctrine applies to the facts of Balele's case.

BACKGROUND

In July of 1988, Pastori Balele, a black male of African national origin, was employed by the State Bureau of Procurement as a procurement management assistant. During this time, Balele was seeking rapid advancement, and interviewed for promotions to

Administrative Officer (AO2 and AO5) positions. Balele also desired a third Administrative Officer (AO4) position. This position was filled by an individual laterally transferred by appointment (not by promotion from within the bureau).

Having been passed over for promotion, Balele filed a WFEA complaint with the Commission on December 9, 1988. In that complaint he alleged that he had been unlawfully discriminated against by the DOA and DMRS on the basis of his national origin, race, and color when DOA selected two white males for the positions of Deputy Administrator of the DOA Division of Agency services (the "AO5" position) and Director of the DOA Bureau of Procurement (the "AO4" position).

A hearing was conducted on the AO5 issues on May 2 and 3, 1991. The Commission issued its final decision and order finding no probable cause to believe that discrimination had occurred in relation to the AO5 position and dismissing that part of the complaint on January 24, 1992. The AO4 issue was held in abeyance while Balele pursued a civil action in federal court.

On November 13, 1992, Balele filed a civil action in federal district court for the western district of Wisconsin. Balele alleged that DOA, DMRS, and several individual state officers unlawfully discriminated against him on the basis of his national origin, race, and color when DOA selected two white males for the AO4 and AO5 positions, and unlawfully retaliated against him for filing prior WFEA complaints with the Commission. (§ 2000e, et seq., under 42 U.S.C. §§1981, 1983, 1985, under the WFEA, and under the Wisconsin Civil Service Law, ch. 230, Stats.).

On June 10, 1993, the federal district court granted partial summary judgment for the

defendants as to certain claims, including claims under the Wisconsin Fair Employment Act and Wisconsin Civil Service Law. In respect to these claims the federal district court concluded that it was without jurisdiction and that there was no private cause of action for Balele's state claims because the state administrative remedies were exclusive. In particular, the court stated that, "he will have to avail himself of the administrative remedies provided in those statutes." (Tab 18 of Record- Fed. Dist. Ct. Op., at 5).

As for the remaining claims, the federal district court entered judgment against Balele and in favor of DOA, DMRS, and the individual state officers on November 24, 1993. It concluded that no such discrimination or retaliation had occurred. (Tr. 102-09). Balele subsequently moved for a new trial contending, among other things, that the court was confused as to the agreed issues. Judge Crabb concluded that Balele had "had a full opportunity to try all of the issues raised in his lawsuit," and denied the motion on December 13, 1993. (Tab 12 of Record- Commission Ruling, at 4).

The judgment of the federal district court was affirmed by the federal court of appeals for the Seventh Circuit on January 11, 1996. The Seventh Circuit agreed that Balele failed to show either intentional discrimination or "any indication of disparate impact with regard to either the AO4 or AO5 position" (Seventh Circuit Op., at 12).

Following the decision from the Seventh Circuit, the Commission wrote a letter on September 9, 1997, to Balele and to DOA stating in pertinent part:

> The above-referenced complaint of discrimination relates to hiring decisions for two different positions. The discrimination charge relating to the hiring decision for one of these two positions was heard and decided by the Commission in 1991. The discrimination charge relating to the hiring decision for the other position, however, was held in abeyance pending the outcome of a related federal court action. ...It has recently come to the Commission's attention...that the Seventh Circuit dismissed this related action

> in January 1996. In view of this dismissal, the Commission will assume that the above-referenced case should be dismissed as well. As a result, it will be placed on the agenda for dismissal...unless the complainant provides sufficient justification on or before that date for keeping this case open before the Commission.

(Tab 17 of Record).

On October 15, 1997, Balele requested that the Commission keep the case open and that the Commission schedule a hearing with respect to his WFEA complaint regarding the AO4 position. Balele argued that the district court judgment should not preclude him from pursuing his WFEA complaint with respect to the AO4 position, for three reasons under Northern States Power Co. v. Bugher, 189 Wis. 2d 541, 525 N.W.2d 723 (1995). First, the district court did not determine the issues stipulated by the parties for adjudication, namely, whether Balele would have been selected for the AO4 position, rather than the white male who was selected, if the position had been opened for competition and advertised. Second, the district court's application of federal law with respect to the AO4 position was inconsistent with the proper application of the WFEA. Third, it is more difficult for a plaintiff to prove discrimination under 42 U.S.C. § 1983 than it is to prove discrimination under WFEA.

On November 13, 1997, DOA and DMRS moved to dismiss Balele's WFEA complaint on the ground that the district court's judgment precludes his WFEA complaint under the claim and issue preclusion doctrines.

On December 3, 1997, the Commission issued a ruling dismissing Balele's complaint on the ground of claim preclusion, citing Schaeffer v. State Personnel Comm., 150 Wis. 2d 132, 138-139, 441 N.W.2d 292 (Ct. App. 1989). The Commission stated: "[C]omplainant selected his forum, he had an opportunity to fully litigate his claims there, and respondents,

as a result, are entitled to closure." (Commission's Ruling, at 7).

On December 8, 1997, Balele petitioned the Commission to reconsider its ruling. Balele noted that the Commission had not mentioned issue preclusion in its ruling, and he suggested that he could "now relitigate his case under issue preclusion doctrine." DOA and DMRS opposed Balele's petition for reconsideration.

On January 6, 1998, the Commission denied Balele's petition for reconsideration, stating:

> Complainant's basic contention in this petition is that, despite the fact that this case has been dismissed based on claim preclusion grounds, the doctrine of issue preclusion provides a basis for litigating this case. However, once a case is dismissed, there is nothing left to litigate. The doctrine of issue preclusion does not operate to provide a basis for a cause of action, but instead an additional means by which all or part of a cause of action may be dismissed.

Balele now seeks judicial review of the Commission's decision dismissing his WFEA complaint.

STANDARD OF REVIEW

Whether preclusion doctrines apply in a particular case is a question of law. See Depratt v. West Bend Mutual Insurance Co., 113 Wis. 2d 306, 310, 334 N.W.2d 883, 885 (1983); Lindas v. Cady, 183 Wis. 2d 547, 552, 515 N.W.2d 458 (1994). Courts review administrative agency preclusion rulings independently and without deference to the agency. See Northern States Power Co., 189 Wis. 2d at 551. On judicial review the court is concerned with whether or not the Commission's holding is correct - not whether its reasoning is correct. See Liberty Trucking Co. v. ILHR Department, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973). The immediate issue on review is not whether the Commission's reasoning is flawless, or whether issue preclusion should have been discussed as an

alternative to claim preclusion, but rather, whether the Commission's holding that Balele is precluded from pursuing his WFEA discrimination complaint before the commission is correct. Cf. Liberty Trucking Co, 57 Wis. 2d at 342.

DISCUSSION

I. THE DOCTRINE OF CLAIM PRECLUSION

The doctrine of claim preclusion holds that "a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings." Depratt, 113 Wis. 2d at 311; Northern States Power Co., 189 Wis. 2d at 551. In order for earlier proceedings to act as a claim preclusive bar in relation to the present suit, three criteria must be satisfied: 1) an identity between the parties or their privies in the prior and present suits; 2) an identity between the causes of action in the two suits; 3) a final judgment on the merits in a court of competent jurisdiction. See Depratt, 113 Wis. 2d at 311; Northern States Power Co., 189 Wis. 2d at 551. Wisconsin courts apply the "transactional rule" in determining whether the claims or causes of action in the two cases are sufficiently identical: "a basic factual situation generally gives rise to only one cause of action, no matter how many different theories of relief may apply. ... The cause of action...is the fact situation on which [the first] claim was based." Schaeffer, 150 Wis. 2d at 140-41 (quoting Marshall-Wisconsin v. Juneau Square, 130 Wis. 2d 247, 265-66, 387 N.W.2d 106 (Ct. App. 1986), aff'd in part, rev'd in part, 139 Wis. 2d 112, 406 N.W.2d 764 (1987)). If the present claim arose out of the same "transaction as that involved in the former action, the present claim is barred even though the plaintiff is prepared in the second action to present evidence or grounds or theories of the case not presented in the former action, or to seek remedies or forms of relief not demanded

in the first action." Depratt, 113 Wis. 2d at 312; Schaeffer, 150 Wis. 2d at 140-41; Parks v. City of Madison, 171 Wis. 2d at 730, 734, 492 N.W.2d 365 (Ct. App. 1992). In sum, the purpose of the claim preclusion doctrine is to prevent multiple litigation of the same claim, and it is based on the assumption that fairness to the defendant requires that at some point litigation involving the particular controversy must come to an end. See Depratt, 113 Wis. 2d at 312.

On December 3, 1997, the Commission issued a ruling dismissing Balele's complaint on the ground of claim preclusion. In order for the earlier proceedings in federal court to act as a claim preclusive bar in relation to the present suit there must be an identity between the parties or their privies in the prior and present suits. See Depratt, 113 Wis. 2d at 311; Northern States Power Co., 189 Wis. 2d at 551. In this case, the same parties are involved in both proceedings.

Furthermore, in order for earlier proceedings to act as a claim preclusive bar in relation to the present suit there must be an identity between the causes of action in the two suits. See Depratt, 113 Wis. 2d at 311; Northern States Power Co., 189 Wis. 2d at 551. The Personnel Commission's decision that Balele's claim is barred by the doctrine of claim preclusion relies on Schaeffer, in which the court of appeals affirmed a Commission decision applying transactional analysis and concluding that the federal and state (WFEA) claims arose out of the same basic factual situation. See Schaeffer, 150 Wis. 2d at 141. In this regard, Balele's case is indistinguishable from Schaeffer, because Balele's state claim arises out of the same basic events and the same conduct of the defendants as does his federal action, and there is an identity of the parties or their privies. Cf. Schaeffer, 150 Wis. 2d at 140-41.

Finally, in order for earlier proceedings to act as a claim preclusive bar in relation to the present suit there must be a final judgment on the merits in a court of competent jurisdiction. See Depratt, 113 Wis. 2d at 311; Northern States Power Co., 189 Wis. 2d at 551. "A summary judgment... is sufficient to meet the requirement of a conclusive and final judgment." Schaeffer, 150 Wis. 2d at 138-39. The earlier proceedings of the federal district court resulted in a summary judgment dismissal of the WFEA claim, and thus, a strict interpretation and application of Schaeffer would dictate that Balele's state (WFEA) claim is barred by the doctrine of claim preclusion.

Balele argues that Schaeffer is not controlling because of the subsequent decision of the court of appeals in Parks. In Parks, the court ruled that Parks was not precluded from pursuing a state court action (challenging his "improper" removal from employment) because of a prior federal court summary judgment dismissing his federal civil rights claims but dismissing his pendent state claims without prejudice. Although Park's state court action arose from the same transaction as that involved in the federal action, the court ruled that the doctrine of claim preclusion did not apply because of an exception to the doctrine, which states that if the court in the first action would clearly not have had jurisdiction to entertain the omitted theory or ground, or having jurisdiction, would clearly have declined to exercise jurisdiction as a matter of discretion, then the second action presenting the omitted theory or ground may not be precluded. See Parks, 171 Wis. 2d at 735-38.

In Balele's case, the federal court entered judgment in favor of the defendants on the merits of his federal civil rights claims, and granted summary judgment dismissing his state claims. The court then concluded that it was without jurisdiction over Balele's state law

claims and that there was no private cause of action for such claims because the state administrative remedies were exclusive. The court stated: "If plaintiff wishes to pursue any remedies under either the Fair Employment Act or the Civil Service Law, he will have to avail himself of the administrative remedies provided in those statutes."[1] (Fed. Dist. Ct. Op., at 5). Thus, in making note of specific remedies that were available to Balele, it can be inferred that the federal district court intended that the claims be dismissed without prejudice. Furthermore, Balele, by filing a complaint with the Personnel Commission, has taken the prerequisite steps. And although he continues to claim that he was the victim of national origin, race or color discrimination, or retaliation (the same claim that was adjudicated at the federal level), it appears that his case fits the exception recognized in Parks. Consequently, under the doctrine of claim preclusion as interpreted in Parks, the federal court judgment in Balele's case could not preclude him from pursuing his WFEA discrimination complaint before the Commission as a matter of claim preclusion.

Curiously, although Schaeffer and Parks were written by the same judge, the court in Parks does not even mention Schaeffer, much less distinguish or overrule it. Because of the confusion created by these competing Court of Appeals cases, it is important to consider the doctrine of issue preclusion, in an effort to ensure a thorough review of the Commission's decision.

II. THE DOCTRINE OF ISSUE PRECLUSION:

The doctrine of issue preclusion refers to the effect of a judgment in precluding

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[1]For example, Ch. 230.85 provides that a state employee who believes that a supervisor or appointing authority has administered a retaliatory action against that employee, can file a written complaint, and that the commission shall receive and investigate that complaint.

relitigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in a prior action. See Northern States Power Co., 189 Wis. 2d at 550. "The doctrine of issue preclusion does not operate to provide a basis for a cause of action, but instead an additional means by which all or part of a cause of action may be dismissed." (Commission's Ruling on Rehearing, at 2).[2] Issue preclusion, unlike claim preclusion, does not require an identity of the parties. See Northern States Power Co., at 550-51; Michelle T., 173 Wis. 2d at 687. Issue preclusion is a narrower doctrine than claim preclusion and requires courts to conduct a "fundamental fairness" analysis before applying the doctrine. See Id. The fundamental fairness analysis requires courts to consider:

> [S]ome 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 [issue preclusion] to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

See Lindas, 183 Wis. 2d at 560-61; Michelle T., 173 Wis. 2d at 688-9.

In order for earlier proceedings to act as an issue preclusive bar in relation to the present suit there must be an identity between the causes of action in the two suits. See Depratt, 113 Wis. 2d at 311; Northern States Power Co., 189 Wis. 2d at 551. "[A] basic factual situation generally gives rise to only one cause of action, no matter how many

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[2]Balele argues that the doctrine of issue preclusion provides a basis for pursuing his complaint, rather than providing a basis for dismissing his WFEA discrimination complaint. What he has failed to take note of is that issue preclusion is not an independent cause of action, but rather a legal theory; its absence from the Commission's decision does not provide grounds for a rehearing, and does not render the decision insufficient or less than final.

different theories of relief may apply...The cause of action...is the fact situation on which [the first] claim was based." Schaeffer, 150 Wis. 2d at 140-41. It is clear that Balele's state claim arises out of the same basic events and the same conduct of the defendants as does his federal action: that Balele was not promoted to either the AO4 or AO5 position because he was allegedly discriminated against on the basis of his national origin, race, and color when white males were selected, and allegedly retaliated against for filing prior WFEA complaints with the Commission.

Having found an identity of issues stemming from the same basic fact pattern, the court, in an effort to satisfy the fundamental fairness analysis, will look for 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? Balele had the right to obtain, and did obtain review of the federal district court judgment. On January 11, 1996, the federal court of appeals affirmed the judgment of the federal district court, holding that Balele failed to show either intentional discrimination or "any indication of disparate impact with regard to either the AO4 or AO5 position" (Seventh Circuit Op., at 12).

(2) Is the question one of law that involves two distinct claims or intervening contextual shifts in the law? The question is one of law that involves one claim, not two distinct claims. The two dispositive issues involved in the claim under both federal civil rights laws and under the WFEA, as stipulated by the parties are: (I) whether the defendants discriminated against Balele because of his race, color and national origin when they failed to appoint him to the

AO4 position, and (II) whether the defendants retaliated against Balele.[3] Barring this action would not be "fundamentally unfair" because this claim, and both of its issues, was addressed in Judge Crabb's ruling:

> ...So in short, I just don't find, Mr. Balele, that you've established that there was any discrimination, either intentional on the part of the decision makers Rogers, Bach and Whitburn, or that there was any disparate impact in the actions that were taken or that any of the defendants took the actions that they did in order to retaliate against you for having filed complaints with the Personnel Commission, and I will enter judgment for the defendants.

(Tab. 16 of Record - 11/23/97 Fed. Dist. Ct. Tr., at 108)

Furthermore, there have not been any intervening contextual shifts in the law that would render barring this action "fundamentally unfair" because Balele would still carry the burden of proving intentional discrimination or disparate impact.

(3) Do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue? Balele's discrimination complaint is not a civil service appeal implicating state civil service rules. It is a discrimination complaint under the WFEA which alleges that he was the victim of national origin, race or color discrimination, or retaliation. As the Commission pointed out in its decision, the federal court is as qualified an expert as the Commission when it comes to deciding garden variety discrimination and retaliation issues such as those raised by Balele.[4]

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[3] A third stipulated issue was whether Gates would have been selected for the AO4 position had the competition for the position been open to all. Balele argues that the federal court decision should not be preclusive because this third issue was not mentioned. However, given the court's ruling that there was no discrimination or retaliation, it is wholly immaterial under both federal civil rights laws and under the WFEA whether Gates would have been appointed had some other selection method been used.

[4] Balele argues that American Motors Corp. v. ILHR Dept., states that remedies under federal civil rights laws and remedies under the WFEA "are to be pursued separately." 101 Wis. 2d 337, 353 (1981). The underlying concern of a different federal law being applied in lieu of state law is absent in this case and distinguishes American Motors Corp.. Furthermore, the court did not suggest that a federal decision under federal civil

(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? Balele argues that the burden of proving intentional discrimination in federal civil rights laws is greater than proving negligent discrimination under WFEA, and that this difference prevents him from gaining access to a remedy otherwise available to him. Balele cites no case law for the proposition that the WFEA creates a remedy for negligent discrimination, and in fact there is none. Wisconsin law recognizes two theories of employment discrimination - the disparate impact theory and the disparate treatment theory. See Racine Unified School Dist. v. LIRC, 164 Wis. 2d 567, 594-95, 476 N.W.2d 707 (Ct. App. 1991); Wisconsin Tele. Co. v. DILHR, 68 Wis. 2d 345, 368, 228 N.W.2d 649, 661-62 (1975). The disparate impact theory is invoked to attack facially neutral policies which, although applied evenly, impact more heavily on a protected group. See Racine Unified School Dist., 164 Wis. 2d at 595; Griggs v. Duke Power Co., 401 U.S. 424, 430-32 (1971). Under the disparate treatment theory, the complainant must show that the employer treats some people less favorably than others because they belong to a protected class. See Racine Unified School Dist., 164 Wis. 2d at 595; International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 (1977). Thus, a complainant asserting a disparate treatment theory must prove discriminatory intent to prevail, while a complainant asserting a disparate impact theory need not offer any such proof. See Racine Unified School Dist., 164 Wis. 2d at 595.

Insofar as Balele actually is attempting to distinguish between disparate treatment and disparate impact discrimination, and although the latter may be actionable under WFEA but

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rights laws could not have preclusive effect on a subsequent state administrative proceeding under the WFEA.

not under § 1983, that distinction is unavailing to Balele because the federal district court ruled in favor of the defendant both as to intentional/disparate treatment discrimination and as to disparate impact discrimination. "Since Wisconsin and federal law recognize these alternative forms of theories, we conclude that federal law discussing these approaches is relevant and persuasive." Racine Unified School Dist., 164 Wis. 2d at 595; Hamilton v. DILHR, 94 Wis. 2d 611, 621, 288 N.W.2d 857, 861 (1980).

(5) Are matters of public policy and individual circumstances involved that would render the application of collateral estoppel [issue preclusion] to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action? Balele feels that the federal district court wrongfully decided the issues of discrimination, retaliation, and disparate impact. However, he puts forth no evidence of any error in law or fact. Furthermore, the decision was affirmed on appeal by the Seventh Circuit Court of Appeals. No matters of public policy and individual circumstances are involved that would render the application of issue preclusion fundamentally unfair. Balele elected to pursue his federal district court case first, and he was afforded a full and fair opportunity to have his claims decided. Cf. Schaeffer, 150 Wis. 2d at 141-42. Furthermore, the goal of judicial efficiency and finality, and the goal of protecting parties against repetitious and harassing litigation, outweigh Balele's right to pursue his WFEA discrimination complaint before the Commission. Cf. Michelle T., 173 Wis. 2d at 688.

Thus, it is the opinion of this court that Balele received a full and fair adjudication of all issues involved in the action. Balele's WFEA discrimination and retaliation claims are issues of law that have been actually litigated and decided in a prior action, and therefore are

barred by the doctrine of issue preclusion. Furthermore, applying issue preclusion in this case comports with the "fundamental fairness" analysis articulated in Michelle T., 173 Wis. 2d at 689; Lindas, 183 Wis. 2d at 561; Northern States Power Co., 189 Wis. 2d at 550.

ACCORDINGLY,

Although the Commission may not have expressed flawless reasoning in only applying the claim preclusion doctrine, the Court finds the Commission's decision to bar relitigation of the discrimination and retaliation issues to be correct. The WFEA claim, although not definitively barred by the claim preclusion doctrine, is barred by the judgment of the federal district court in Pastori Balele v. James Klauser, et al., Case no. 92-CV-0841 (W.D. Wis., Nov. 14, 1993) and the more narrow doctrine of issue preclusion. The decision of the Wisconsin Personnel Commission is AFFIRMED.

Dated this 10th day of August, 1998.

BY THE COURT:

Hon. Robert R. Pekowsky
Circuit Judge, Branch 5

cc: Mr. Pastori M. Balele
AAG David C. Rice