

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**DOROTHY CARR**, Appellant,

v.

**Secretary, WISCONSIN DEPARTMENT OF CORRECTIONS**, Respondent

Case 21  
No. 63240  
PA(adv)-32

**Decision No. 32521**

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**Appearances:**

**Dorothy Carr**, appearing on her own behalf.

**John R. Sweeney**, Assistant Attorney General, Wisconsin Department of Justice, P.O. Box 7857, Madison, WI 53707-7857, appearing on behalf of the Department of Corrections.

**ORDER DENYING MOTION TO DISMISS**

This matter, which arises from the imposition of discipline, is before the Wisconsin Employment Relations Commission (the Commission) on Respondent's motion to dismiss the appeal based on issue and claim preclusion.

Some of the relevant procedural history of this case is set forth below in the Findings of Fact. In addition, we note that upon Appellant's request and after Respondent stated it had no objection, the parties were informed on January 31, 2003 that the matter would "be held in abeyance pending the conclusion of related matters pending in federal court." On July 30, 2004, Appellant's attorney advised a representative of the Commission that the related case was still pending in federal court. In August 2006, a representative of the Commission again contacted Appellant's attorney regarding the status of the case and learned that the federal court proceedings had concluded and that said attorney was no longer serving as Appellant's counsel. Between September 2006 and April 2007, Appellant sought to retain another attorney but was unsuccessful. Respondent initially filed the motion that is the subject of this ruling on May 2, 2007. The briefing schedule was delayed in part by several requests by the parties for extensions. The final date for submitting written arguments was January 11, 2008.

Dec. No. 32521

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

**FINDINGS OF FACT**

1. Carr began working for the State of Wisconsin in 1985. During the months leading up to January 1998, she was employed at DOC's Ethan Allen School as a Supervising Youth Counselor.

2. In 1998, after an injury, Carr began an extended medical leave without pay.

3. In February 2002, Respondent issued correspondence to Carr directing her to submit to a medical evaluation that had been scheduled for March 29, 2002. Carr contends she never received the correspondence. By letter dated March 22, 2002, DOC informed Carr that her employment had been terminated effective the same date.

4. Carr filed suit in Milwaukee County Circuit Court on March 25, 2002, requesting a temporary restraining order and a temporary injunction in an effort to prevent the agency from requiring her to undergo the medical evaluation. On April 1, 2002, she also filed a supplemental motion for a writ of mandamus or a temporary injunction. The action was removed to federal district court, Eastern District of Wisconsin, where it was assigned Case No. 02-C-0331.

5. Carr filed a letter of appeal with the Wisconsin Personnel Commission on April 24, 2002, relating to the March 22, 2002 discharge letter. At that time, the authority to process appeals of State civil service transactions rested with the now-abolished Personnel Commission, which designated the appeal as Case No. 02-0022-PC. According to the letter of appeal, Carr did not learn of the discharge letter until March 26.

6. On April 26, the agency rescinded the March 22<sup>nd</sup> discharge. One month later, DOC issued a second discharge letter that was effective May 16, 2002.

7. Carr filed an amended letter of appeal on June 5 relating to the May 16 discharge.

8. On November 27, 2002, Carr filed an amended complaint in federal court for Case No. 02-C-0331. The complaint described events in her employment up to, and including, the May 16, 2002 (second) discharge letter. She made the following allegations:

COUNT 1  
ADA/Rehabilitation Act

...

13. That DOC regarded plaintiff as disabled.

14. That at all material times, based upon a misperception of plaintiff's disability, plaintiff was wrongfully foreclosed from all job opportunities within and equivalent to the classification of Supervising Youth Counsel.

15. That from March 1998 and at all material times thereafter, based upon a misperception of plaintiff's disability, plaintiff was wrongfully foreclosed from all job opportunities of any kind.

16. That in 1998, based upon a misperception of plaintiff's disability, plaintiff was wrongfully foreclosed from a promotion to Assistant Institution Unit Supervisor at Ethan Allen School.

17. That plaintiff was perceived as substantially limited in her ability to work.

18. That at all material times, the defendants failed to provide plaintiff with a reasonable accommodation.

19. That the accommodation provided to plaintiff in 1997 was unreasonable.

20. That at all material times, the defendants failed to engage in an adequate interactive process with the plaintiff.

21. That the defendants wrongfully imposed job requirements to exclude and screen plaintiff out of employment due to her disability and in retaliation for her protected activity.

22. That the request for an independent medical examination and medical records authorization was unreasonable, unfounded and unlawful.

23. That the request for an independent medical examination and for a medical records authorization were a mere pretext to officially terminate plaintiff's employment due to her disability and in retaliation for her protected activity.

24. That the request for an independent medical examination and for a medical records authorization was in violation of plaintiff's privacy rights.

25. That the defendants wrongfully failed to provide plaintiff with a reasonable accommodation, suspended and terminated her employment because of her disability and in retaliation for her protected activity.

26. That by the aforementioned conduct plaintiff was subjected to harassment and different terms, conditions and privileges of employment on the basis of her disability.

27. That DOC failed to adequately train its employees, agents and servants to respond to accommodation requests and to adequately redress complaints of disability discrimination and harassment, such as those made by the plaintiff.

28. That the conduct of the defendants were (sic) in violation of the ADA, Rehabilitation Act and parallel rules of defendant DOC.

COUNT 2  
Title VII

...

30. That plaintiff was denied equal[] terms, conditions and privileges of employment due to her race with respect to Supervising Youth Counselor positions which were vacant during 1999 through 2002, Officer 2 positions which were vacant from 2001 through 2002 and with respect to her mandatory restoration rights.

31. That plaintiff was subjected to unequal treatment during 1999 through 2002 in retaliation for her opposition of practices made illegal by Title VII and because she had filed complaints, a lawsuit and sought injunctive relief.

32. That the conduct of the defendants were (sic) in violation of Title VII and parallel rules of defendant DOC.

COUNT 3  
42 U.S.C. s. 1983

...

34. That the conduct of the defendants were (sic) in violation of plaintiff's federal rights, as well as parallel provisions of defendant DOC's rules and state law, including her right to procedural and substantive due process, occupational liberty, equal protection of the law and her right to privacy.

35. That the conduct of the defendants were (sic) in violation of 42 U.S.C. s. 1993 in that it constitutes a deprivation of rights, privileges and immunities, secured by the Constitution, by persons acting under color of state law.

COUNT 4  
42 U.S.C. s. 1981

...

37. That the failure of the defendants to follow DOC's rules, practices, policies and procedures with regard to the terms, conditions and privileges of plaintiff's employment constitutes a breach of plaintiff's employment contract in violation of 42 U.S.C. sec. 1981.

COUNT 5  
42 U.S.C. s. 1985

...

39. That upon information and belief, at all material times herein, each of the defendants sued herein was the agent and employee of each of the remaining defendants and was at all times acting within the purpose and scope of such agency and employment.

40. That upon information and belief the foreclosure of plaintiff from her employment as a Supervising Youth Counselor and from any employment with DOC was in furtherance of a conspiracy to foreclose her employment because of her disability and/or race and because she opposed and filed complaints regarding illegal conduct.

COUNT 6  
State Law

...

42. That the conduct of the defendants in failing to follow DOC's rules, policies, practices and procedures were in violation of state law, requiring state agencies to abide by their own rules.

43. That the conduct of the defendants in violating the statutory rules was negligent per se.

44. That the conduct of the defendants set forth herein is in violation of state law, including the Wisconsin Constitution.

9. On January 24, 2003, the Personnel Commission issued a ruling that established the issue for hearing in the present matter as: “Whether there was just cause for the discharge of petitioner, and whether the discharge constituted an excessive penalty.”

10. Effective July 26, 2003, 2003 Wisconsin Act 33 abolished the Personnel Commission and transferred jurisdiction for hearing appeals relating to State civil service matters to the Wisconsin Employment Relations Commission. The WERC docketed the instant appeal as set forth in the caption to this decision.

11. On September 4, 2003, the federal district court granted DOC’s motion to dismiss the majority of Carr’s claims in Case No. 02-C-0331. In July 2004 the district court granted the Department’s motion for summary judgment on Carr’s claim that her discharge constituted race discrimination and was in retaliation for having filed an earlier discrimination claim, and the claim that she was discharged without due process. Carr took an appeal and on March 30, 2005 in *CARR V. WISCONSIN DEPARTMENT OF CORRECTIONS, ET AL.*, No. 04-3192, 129 FED.APPX. 306, 2005 WL 773982, the Seventh Circuit affirmed the conclusions of the district court.<sup>1</sup>

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

### CONCLUSIONS OF LAW

1. A just cause claim was not available to Carr in the federal court proceeding and hence the final determination of Carr’s claims in the federal court proceeding does not preclude the instant just cause claim.

2. To the extent Carr’s just cause claim in the instant case depends upon allegations of race discrimination, disability discrimination, retaliation for having filed discrimination complaints against the Respondent, and/or failure to provide her with due process in the form of a meaningful pre-termination hearing, those issues have been determined by the federal court in Case No. 02-C-0331 and may not be relitigated in the instant case.

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<sup>1</sup>Seventh Circuit Rule 53(b)(2)(iv) permits citation of unpublished orders for issue and claim preclusion purposes.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

**ORDER**

Except for the issues set forth in Conclusion of Law (2), above, Respondent's motion to dismiss is denied.

Given under our hands and seal at the City of Madison, Wisconsin, this 13<sup>th</sup> day of August, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

**Department of Corrections (Carr)**

**MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS**

This matter is before the Commission on the motion of Respondent Department of Corrections (DOC) to dismiss Appellant Carr's appeal based upon issue and claim preclusion. Carr's underlying appeal seeks review of DOC's decision to discharge her in May of 2002.

The parties have already established the following issue for hearing: "Whether there was just cause for the discharge of [Appellant], and whether the discharge constituted an excessive penalty." Despite this established issue, Respondent wrote in its initial brief that "Carr's current complaint in the Wisconsin Employment Relations Commission is based on two discrimination charges she filed with the Personnel Commission" and attached copies of two "Charge of Discrimination" forms that had been assigned charge numbers by the Equal Employment Opportunities Commission. A representative of the WERC subsequently informed Respondent that its motion was premised on a misapprehension of the genesis of the pending case:

The issue for hearing in this case, which was formerly identified as Personnel Commission Case No. 02-0022-PC, was established by order of the Personnel Commission dated January 24, 2003 . . . .

Ms. Carr's two discrimination claims that were filed with the Personnel Commission were assigned Case Nos. 98-0021-PC-ER and 01-0174-PC-ER. In the event those cases remained open at the time of the Personnel Commission's demise in 2003, they were transferred to the Equal Rights Division of the Department of Workforce Development and not to the WERC.

I am providing Respondent DOC a period of 20 days to indicate what (if any) effect this information has on Respondent's pending Motion to Dismiss based on issue and claim preclusion.

DOC responded by stating it would stand by its original brief and that no further argument was required.<sup>2</sup> DOC also wrote:

It is the Respondent's position that Wisconsin law on issue and claim preclusion takes a transactional approach which essentially says you may litigate a set of facts once. The fact that the standards in different forums may be different, does not give a complainant the right to litigate the same set of facts more than

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<sup>2</sup> In correspondence dated January 10, 2008, the Appellant asked the Commission "not to consider" Respondent's reply brief of the same date. According to Ms. Carr, the reply brief was due on December 26, 2007, so it was late. She also contends the reply brief did not respond to her own response brief. The case file shows that the Respondent was initially directed to reply to Carr's December 12<sup>th</sup> brief within seven days. Respondent's deadline was extended twice, on December 13 and December 17, because of the hospitalization of Respondent's attorney. The second extension was to January 11. Respondent obviously complied with the schedule by submitting a brief that was received by the Commission on January 11. The brief was, in fact, responsive to Carr's arguments. Therefore, Appellant's request has been denied and we have considered the Respondent's reply brief.

once.



In the Appellant's submissions in response to the motion, she argues that she has not obtained a ruling on her "motion for writ of mandamus or temporary injunction," apparently filed as part of the lawsuit she had filed in Milwaukee County Circuit Court in March 2002. The Commission, however, is not a court but an administrative agency, whose authority is limited by statute. Unlike a court, the Commission lacks the authority to issue a writ of mandamus or a temporary injunction under the pertinent authorizing statutes, i.e., Sec. 230.44 and .45, Stats. *LYONS v. DHSS*, CASE NO. 79-81-PC (PERS. COMM. 4/26/79), affirmed by Dane County Circuit Court, *DHSS v. WIS. PERS. COMM. (LYONS)*, 80-CV-4948, 7/14/81; *VAN ROOY v. DILHR & DER*, CASE NOS. 87-0117-PC, 87-0134-PC-ER (PERS. COMM. 10/1/1987).

Appellant also argues, as follows:

The issue of "just cause" and illegal actions was not recognized by the federal court in the first lawsuit nor in the second lawsuit which was removed to the federal court. There was no actual litigation of, for example:

- Termination of my employment in 2002 without just cause
- Removal from Assistant Institution Unit Supervisor position in 1996 without just cause.
- Failure to restore me in 1996 to my previous position of Supervising Youth Counselor without just cause
- The suspension without pay/reduction in base pay during the period 1996 to 1997 and 1998 to 2002 when I was placed in medical leave without pay, without just cause.
- Various illegal arbitrary actions, including job description changes, blocking access to vacancies/job opportunities by, e.g., requirement of medical exam and blanket medical release, failure to accommodate, failure to engage in an interactive process, interference with benefits.

Contrary to the foregoing list of issues, however, it is clear from the Personnel Commission's articulation of the issue in the instant case in its September 24, 2003 ruling that it is solely the Department's decision to terminate Appellant's employment that is before the Commission here.<sup>3</sup>

Accordingly, we must decide whether the claims and/or issues in Ms. Carr's now-dismissed federal lawsuits preclude in whole or in part her claim in the instant case that DOC terminated her employment without just cause in May 2002. The amended complaint in the relevant federal court matter, Case No. 02-C-0331, is set forth above at some length. It encompassed Carr's initial discharge (March 22, 2002), the rescission of that discharge, and the second discharge letter of May 16, 2002. The federal district court first dismissed some of Carr's claims in an interim ruling<sup>4</sup> and then, on July 21, 2004, granted summary judgment

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<sup>3</sup> By the same token, although Respondent bases its motion on both federal suits filed by Ms. Carr, only the second federal action is relevant to Carr's discharge; the other federal court action related to events prior to her discharge.

<sup>4</sup> Neither party has submitted a copy of the interim ruling to the Commission.

against the Appellant as to her Title VII claim, her §1981 claim and her §1983 due process claim. In an unpublished order, the Seventh Circuit affirmed on appeal. We will first address the implications of these federal court rulings as to claim preclusion and then as to issue preclusion.

### Claim preclusion

DOC contends that because Carr's May 2002 discharge was the subject of the federal court proceeding, she is precluded from advancing a just cause claim before the Commission relating to the same "transaction," i.e., the same discharge decision. Respondent cites the following language from *KRUCKENBERG V. HARVEY*, 2005 WI 43, ¶¶19, 23, 279 Wis.2d 520, 529-31, 694 N.W.2d 879:

The doctrine of claim preclusion provides that a final judgment on the merits in one action bars parties from relitigating any claim that arises out of the same relevant facts, transactions, or occurrences. When the doctrine of claim preclusion is applied, a final judgment on the merits will ordinarily bar all matters "which were litigated or which might have been litigated in the former proceedings." . . .

In effect, the doctrine of claim preclusion determines whether matters undecided in a prior lawsuit fall within the bounds of that prior judgment. [Citations and footnotes omitted.]

The key language in this quotation is the reference to matters "which might have been litigated in the former proceedings."

The recent decision in *ALDRICH V. LABOR AND INDUSTRY REVIEW COMMISSION*, APPEAL NO. 2007 AP2026 , (CT. APP., 3/18/2008), explains how the claim preclusion doctrine must be applied to Ms. Carr's pending appeal before the WERC. The *ALDRICH* decision cites *PARKS V. CITY OF MADISON*, 171 Wis.2d 730, 738, 492 N.W.2d 365 (CT. APP. 1992) for the proposition that "when a federal court declines jurisdiction over state claims, or would clearly have declined jurisdiction had they been asserted, a later action on the state claims in state court is not barred by the doctrine of claim preclusion." *ALDRICH*, ¶7. The decision goes on to quote the following paragraph from § 26 of *RESTATEMENT (SECOND) OF JUDGMENTS (1982)*:

The general rule of [claim preclusion] is largely predicated on the assumption that the jurisdiction in which the first judgment was rendered was one which put no formal barriers in the way of a litigant's presenting to a court in one action the entire claim including any theories of recovery or demands for relief that might have been available to him under applicable law. When such formal barriers in fact existed and were operative against a plaintiff in the first action, it is unfair to preclude him from a second action in which he can present those phases of the claim which he was disabled from presenting in the first.

Aldrich had litigated a claim of sex and age discrimination against her employer, Best Buy, in federal court. She subsequently sought to pursue a complaint of age and sex discrimination, arising from the same personnel actions, with the Equal Rights Division of the Wisconsin Department of Workforce Development, alleging violation of the Wisconsin Fair Employment Act. Best Buy moved to dismiss, asserting the complaint was barred by the doctrine of claim preclusion. The Court of Appeals held that claim preclusion did not apply because Aldrich could not have litigated her Wisconsin Fair Employment Act claims in federal court. The exclusive forum for asserting such a claim is the Equal Rights Division. See also *STAATS V. COUNTY OF SAWYER*, 220 F.3d 511, 515-16 (7<sup>TH</sup> CIR. 2000).

Thus, if the Commission has exclusive jurisdiction to rule on Carr's just cause claim, then, pursuant to *ALDRICH* and *STAATS*, claim preclusion does not apply and DOC's motion to dismiss must be denied. We conclude that the Commission does have exclusive jurisdiction over that claim.

State civil servants with permanent status in class may only be discharged "for just cause." Sec. 230.34(1)(a), Stats. For those employees in a collective bargaining unit that has a bargaining agreement in effect, "the determination of just cause . . . shall be governed by the provisions of the collective bargaining agreement." Sec. 230.34(1)(ar), Stats. For those employees without a bargaining agreement, an allegation "that the [discharge] decision was not based on just cause" is filed with the Commission. Sec. 230.44(1)(c), Stats. "Where the legislature enacts an administrative scheme to enforce a statute, the administrative mechanism is presumed exclusive unless there is an affirmative legislative indication of the contrary." *GERMAN V. WISCONSIN DEPT. OF TRANSP., DIV. OF STATE PATROL*, 2000 WI 62, 235 Wis.2d 576, 612 N.W.2d 50, *CITING BOURQUE V. WAUSAU HOSP. CENTER*, 145 Wis.2d 589, 594, 427 N.W.2d 433 (CT. APP. 1988). DOC has failed to point to any legislative indication that the statutory scheme in Sec. 230.44(1)(c), Stats., is not the exclusive means to obtain a just cause review of the discharge of a State civil service employee with permanent status in class and whose position is not covered by a collective bargaining agreement.<sup>5</sup>

Accordingly, even though Carr's just cause claim arises out of the same transaction as the pertinent federal court claims, we are convinced that the federal court would have lacked jurisdiction to rule on it. It follows that her just cause claim is not precluded by the final judgment in the federal court proceedings.

### **Issue Preclusion**

In contrast to a "claim," which can be precluded as long as it could have been litigated, an "issue" can be precluded only if it was actually litigated. While one principal purpose of claim preclusion is to encourage consolidation of claims and comprehensiveness of judgments, the purpose of issue preclusion is narrowly focused on repose: i.e., limiting the same factual or legal issues from being revisited once they have been decided.

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<sup>5</sup> In contrast, the WERC lacks exclusive jurisdiction over prohibited practice claims that arise under the State Employment Relations Act (SELRA), Sec. 111.84, Stats. Such claims could fall within the federal court's supplemental jurisdiction and, whether or not brought in that forum, could be precluded by a final decision therein. SEE, *STATE OF WISCONSIN (METHU)*, DEC. NO. 30808-B (WERC, 1/06).

Issue preclusion requires a two-step analysis: the first step is whether the issue was actually litigated and decided in the prior proceeding and whether the determination was essential to a valid judgment. This first step is a question of law. *IN RE ESTATE RILLE EX REL. RILLE*, 2007 WI 36, ¶¶36-37, 728 N.W.2D 693. If this step is satisfied, the second question is whether, based on a set of five factors, preclusion would be consistent with principles of fundamental fairness. *Id.*, ¶38.

A. Step One: Issues Actually Litigated and Decided

Respondent appears to view Appellant's just cause claim as an "issue" as well as a "claim" and urges us to apply issue preclusion as well as claim preclusion principles to dismiss Appellant's case entirely. However, the federal court made it clear that it was not deciding the just cause issue: "Whether or not the DOC should have terminated Carr's employment is not for the court to decide. Title VII is meant to guard against unlawful discrimination, not to protect against mere unfairness." Decision and Order at 38 (citations omitted). "Unfairness" is the very essence of just cause. Thus, it is clear from the court's decision itself that the fundamental issue of just cause, as such, was not actually litigated or decided in the federal court case.

While just cause remains to be litigated, there are many factual and legal sub-issues within the framework of a just cause case. Most pertinently, "just cause" can encompass notions of discrimination and/or lack of due process, as well as other forms of unfairness. For example, in this case, the Respondent might lack just cause for terminating Ms. Carr if the evidence showed that she had been treated differently than other similarly-situated employees, unless that difference in treatment were explained by other circumstances. Respondent might also have lacked just cause if the evidence showed that Respondent had denied Ms. Carr various basic procedural protections. As it happens, Ms. Carr does appear to contend that she was disparately treated based upon race, disability, and/or retaliation and that she was denied due process in the form of a meaningful pre-termination hearing. The question arises, therefore, whether Ms. Carr should be precluded from asserting these specific contentions given what the federal court has determined on those issues.

In its brief, Respondent argues that the issues of race discrimination, disability discrimination, and retaliation were each actually litigated and decided in Carr's federal suit and therefore ought not to be part of the proceedings in the instant case. We agree that all three of these issues were expressly determined in the court's decision granting summary judgment. As to the due process issue, Carr herself acknowledges that the court's decision encompassed her claim as to the adequacy of the pre-termination hearing. Thus, as to the first prong of the issue preclusion analysis, we have little trouble concluding that the issues of race discrimination, retaliation, and adequacy of the pre-termination hearing have been litigated and determined in the prior court proceeding.

It is less transparent whether Ms. Carr's disability discrimination contention has been "actually decided" within the meaning of the first prong of the issue preclusion analysis. According to the court's ruling: "Ms. Carr has offered neither facts nor argument to support

any ADA claim or any state law claim. Such being the case, the court concludes that she is abandoning such claims and they will therefore be dismissed.” DECISION AND ORDER ON SUMMARY JUDGMENT (Callahan, Magistrate, July 21, 2004), at 46. The RESTATEMENT (SECOND) OF JUDGMENTS indicates that an abandoned issue is still an issue that has been “actually litigated”.

When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated within the meaning of this Section.

RESTATEMENT (SECOND) OF JUDGMENTS § 27, COMMENT (D). The Reporter’s Note to the foregoing Comment goes on to explain: “[I]t is indicated in this Comment that an issue may be litigated and determined if the party with the burden of proof on that issue fails to introduce any evidence with respect to it or introduces evidence but fails to sustain his burden.” Accordingly, because Carr’s disability claim was not withdrawn, we deem it nevertheless to have been litigated and decided by the court.

#### B. Step Two: Fundamental Fairness

The second step in deciding whether to apply issue preclusion to the issues of race discrimination, disability discrimination, retaliation, and the adequacy of the pre-termination proceeding is to determine, based on the following five factors, if application of the doctrine would be consistent with fundamental fairness:

- (1) could the party against whom preclusion is sought, as 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, 495 N.W.2D 327 (1993). Factors 1, 2, 4, and 5 of the analysis are questions of law. PRECISION ERECTING, INC. V. M & I MARSHALL & ILSLEY BANK, 224 WIS.2D 288, 305, 592 N.W.2D 5 (CT. APP. 1998). It is not necessary that each factor be satisfied, but rather that, after considering all the factors in combination and degree, it is fair to conclude that the issue has been subject to fair and adequate litigation. JENSEN V. MILWAUKEE MUTUAL INSURANCE CO., 204 WIS.2D 231 (CT. APP. 1996) (not all factors favored the defendant, but, overall, preclusion was appropriate against the plaintiff).

The materials submitted by the parties make it clear that Ms. Carr was represented by legal counsel during the relevant federal proceeding which arose from the identical discharge action that is the subject of the present appeal. Ms. Carr had a right to obtain review of the court's ruling and she exercised that right. The federal proceeding and the present appeal involve closely related claims and the federal court's conclusions are reflected in a 47-page decision that carefully analyzed the submissions of the parties. There has been no change in the applicable legal context since the federal court's decision and we are unable to identify any public policy or individual circumstances that would make application of the issue preclusion doctrine inappropriate. We find no fundamental unfairness, therefore, in precluding the further litigation of the four pertinent issues based upon Factors 1, 2, 4, or 5.

The third factor, however, relating to the burden of proof, is more troublesome. A party may be allowed to relitigate an issue that was decided adversely in an earlier case, if there is a difference in the burdens of proof between the two cases such that the outcome could go her way in the second case even though it went against her in the first. A familiar example is the O.J. Simpson murder case. Even though the jury in the criminal trial found Simpson not guilty, based upon the extremely high standard of "beyond a reasonable doubt," the Goldman family was allowed to relitigate in a civil proceeding, where the burden of proof was lower, the factual issue of whether Simpson was responsible for Ronald Goldman's death. Thus it is generally inappropriate to apply issue preclusion if the burden of proof on the losing party in the first action was higher than it is in the second action. *JENSEN V. MILWAUKEE MUT. INS. CO.*, 204 WIS.2D AT 239.

In a just cause case, as here, the burden of persuasion rests on the Department of Corrections. The appointing authority must prove to a reasonable certainty, by the greater weight of credible evidence, that the discharge was for just cause. *HIGGINS V. WIS. RACING BD.*, CASE NO. 92-0020-PC (PERS. COMM. 1/11/94). In contrast, as the district court noted in its July 21, 2004 decision and order granting summary judgment in Case No. 02-C-0331, "[a]t all times, the plaintiff carries the burden of persuading the finder of fact that the employer intentionally discriminated against the plaintiff on the basis of the plaintiff's protected status." *DECISION AND ORDER AT 34 (CITATION OMITTED)*. A comparable burden existed for Carr's retaliation theory and the court also observed that she had the burden of proof as to her argument that the pre-termination hearing was inadequate. *DECISION AND ORDER AT 45.*<sup>6</sup>

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<sup>6</sup> In its brief, Respondent argued that as the moving party in the federal court proceeding, it had satisfied the burden to show there was no genuine issue of material fact and that it was entitled to judgment as a matter of law. Respondent contrasted this "high burden" with "Carr's burden of proving discrimination and retaliation [which] does not change in a WERC proceeding." Respondent's argument is misplaced, as Carr retained the burden of persuasion as to her race discrimination and retaliation claims in federal court, even at the point the court was addressing Respondent's motion for summary judgment. The court quoted the following language from *CELOTEX CORP. V. CATRETT*, 477 U.S. 317, 322 (1986): "[T]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *DECISION AND ORDER AT 32*.

At first blush, therefore, it would seem that, because Carr has a significantly easier burden of proof in the instant case, her failure to meet her burden in the earlier federal case ought not to be held against her here. On careful consideration, however, that conclusion is not persuasive. While the Department has the ultimate burden of persuading us that it had a sound and fair basis for terminating Carr's employment, it does not follow that the Department must therefore establish *ab initio* the negative propositions that it did not discriminate by race or disability and/or did not retaliate. Rather, Carr reasonably would be expected to raise and support such propositions, even in a just cause case, before the Department would be expected to counter them. Since Carr has already had these propositions determined against her in federal court, it is appropriate to allow these specific issues – which are sub-issues in the instant case – to remain in repose.<sup>7</sup>

Accordingly, to the extent Carr's just cause claim rests upon the three issues identified by the Respondent that were already decided by the federal court – i.e., race discrimination, disability discrimination and retaliation, she is precluded from pursuing those issues. The Commission further applies the issue preclusion doctrine to the due process argument Carr pursued in federal court. Even though Respondent's current motion does not specifically reference the pre-termination hearing due process issue that Carr also pursued in federal court, Carr's brief itself recognizes the fact that the court ruled on that issue. However, Carr is free to raise other issues of unfairness or mistreatment in connection with her termination and, as always, the Department bears the burden of demonstrating that it had a valid and sufficient basis for terminating her employment.

The parties will be contacted for the purpose of scheduling a prehearing conference.

Dated at Madison, Wisconsin, this 13<sup>th</sup> day of August, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

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<sup>7</sup> A discrimination theory advanced by the employee in a discharge case is akin to an affirmative defense. Pursuant to *CAPITOL INDEM. CORP. V. ST. PAUL FIRE & MARINE INS. CO.*, 357 F. SUPP. 399 (W.D. WIS. 1972), the burden of establishing an affirmative defense rests upon the defendant.