

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**No. 98-2658
98-2866**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

PASTORI M. BALELE,

PETITIONER-APPELLANT,

V.

**WISCONSIN PERSONNEL COMMISSION, DEPARTMENT OF
ADMINISTRATION, DEPARTMENT OF EMPLOYMENT
RELATIONS, DIVISION OF MERIT RECRUITMENT AND
SELECTION,**

RESPONDENTS-RESPONDENTS.

APPEAL from orders of the circuit court for Dane County:
ROBERT R. PEKOWSKY and RICHARD J. CALLAWAY, Judges. *Affirmed.*

Before Eich, Roggensack and Deininger, JJ.

PER CURIAM. Pastori Balele appeals orders of the circuit court affirming decisions of the Wisconsin Personnel Commission. The issue on appeal

in both cases is whether Balele's claims are barred by the doctrine of issue preclusion. Because we conclude that Balele's claims are precluded, we affirm.¹

BACKGROUND

While the issues in these two appeals are similar, the factual and procedural backgrounds are somewhat different. We will describe the background of each appeal separately.

Case No. 98-2658

Balele is an African-American male. In 1988, he was certified but not selected for an Administrative Officer 5 (AO5) position with the Department of Administration (DOA), Division of State Agency Services. In the same year, Balele was not considered for an Administrative Officer 4 (AO4) position with the same agency. White males were selected to fill both positions.

In December 1988, Balele filed a complaint with the Personnel Commission claiming that, because he was not hired for the AO4 and AO5 positions, he had been discriminated against on the basis of national origin, race and color by the DOA and the Division of Merit Recruitment and Selection (DMRS).² In May 1991, the commission held a hearing and determined that there was no probable cause to believe that the DOA or DMRS unlawfully discriminated against Balele with respect to the AO5 position. The commission

¹ These two cases were consolidated for the purposes of decision by our order dated February 24, 1999.

² Balele's initial complaint was against the Department of Administration (DOA) and the Department of Employee Relations (DER). The case appears to always have been captioned as against the DOA and the Division of Merit Recruitment and Selection.

dismissed this part of Balele's complaint on January 24, 1992.³ The commission then held Balele's claims concerning the AO4 position in abeyance while he pursued an action in federal court.

Balele filed an action in the United States District Court for the Western District of Wisconsin in November 1992. *See Balele v. Klauser*, Case No. 92-C-841-C (W.D. Wis. Nov. 14, 1993). He filed the action against the DOA, the DMRS and several state officials, alleging discrimination based on race and national origin. He also claimed he had been retaliated against because he filed complaints with the Personnel Commission. He brought claims under 42 U.S.C. §§ 1981, 1983, 1985, 2000e, the Wisconsin Fair Employment Act, and the Wisconsin Civil Service law, ch. 230, STATS.

The district court granted partial summary judgment and concluded that it was without jurisdiction and that there was no private cause of action for Balele's state law claims under the WFEA and civil service law. The district court found that it did not have jurisdiction to hear Balele's state law claims, stating: "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." The district court also granted summary judgment to the defendants on certain of Balele's federal claims.⁴ In November 1993, the

³ Subsequently, Balele apparently filed an amended complaint in which he alleged that he had also been retaliated against for filing a complaint with the Personnel Commission.

⁴ Specifically, the court denied Balele's claims under the WFEA and the civil service law; his claims against the chairperson of the Wisconsin Personnel Commission; his claims for money damages against the DOA; his conspiracy claims under 42 U.S.C. § 1985(3); his Title VII claims against all defendants except certain individual defendants and the DOA; his claims under 42 U.S.C. §§ 1981 and 1983 against all defendants except two individual defendants relating to the AO5 position; and his claims under §§ 1981 and 1983 against all defendants except one individual defendant relating to the AO4 position.

district court determined that there was no discrimination as to the rest of Balele's claims, and entered judgment for the defendants. The United States Court of Appeals for the Seventh Circuit affirmed the decision of the district court. *See Balele v. Klauser*, 74 F.3d 1242 (7th Cir. 1996) (unpublished table decision).

After the Seventh Circuit's decision, the Personnel Commission scheduled a hearing on Balele's claims concerning the AO4 position. The DOA and DMRS moved to dismiss on the grounds that the district court's judgment precluded his complaint. The commission agreed and dismissed Balele's complaint on December 3, 1997. Balele then began a proceeding in Dane County Circuit Court seeking review of the commission's decision. By an order dated August 10, 1998, the circuit court affirmed the commission's decision that Balele's claims were precluded.⁵

Case No. 98-2866

In August and September 1993, Balele filed a complaint and amended complaint before the Personnel Commission charging the DOA, DER and DMRS with discriminating and retaliating against him when he was not hired to fill an AO2 position in 1992 and an AO1 position in 1993.⁶ Also in September 1993, Balele filed a nearly identical complaint in Dane County Circuit Court. The Personnel Commission decided to hold Balele's complaint in abeyance until the circuit court case was decided.

⁵ The commission determined that Balele's claims were barred by claim preclusion, while the circuit court addressed both claim and issue preclusion.

⁶ Balele alleged that the defendants' refusal to hire him violated 42 U.S.C. §§ 1981, 1983, 1985(3), 2000e, and the Wisconsin Fair Employment Act, by discriminating against him and other minorities, and by retaliating against him for filing his previous civil rights actions.

In October 1993, the defendants removed the circuit court case to the United States District Court for the Western District of Wisconsin. *See Balele v. Klauser*, Case No. 93-C-723-C (W.D. Wis. July 22, 1994). On July 22, 1994, the district court granted summary judgment to the defendants on the federal and state law claims. The district court found that Balele had not provided any evidence of discrimination or retaliation. In respect to Balele's claims for disparate impact, the court stated: "Although the 'burden of establishing a *prima facie* case of disparate treatment is not onerous,' plaintiff has not met that burden in this case." On January 11, 1996, the United States Court of Appeals for the Seventh Circuit affirmed the decision of the district court.⁷

In October 1996, the defendants moved to dismiss Balele's case before the Personnel Commission on the grounds that Balele's claims were precluded by the federal action. On March 26, 1997, the commission granted the defendants' motion to dismiss.⁸ The commission subsequently denied Balele's petition for rehearing.

Balele then sought review of the commission's decision in the circuit court. On October 30, 1997, the circuit court entered an order affirming the commission's decision. The court decided that Balele's claims were barred either by claim preclusion or issue preclusion.⁹ Balele appeals this order.

⁷ *Balele v. Klauser*, 74 F.3d 1242 (7th Cir. 1996) (unpublished table decision). The Seventh Circuit affirmed both federal district court cases involved in this appeal in the same order. The United States Supreme Court subsequently denied Balele's petition for certiorari.

⁸ Although the commission stated it was granting the motion on the grounds of issue preclusion, the cases on which it relied were decided on the grounds of claim preclusion.

⁹ Because this decision was never mailed to any of the parties, the circuit court vacated the order and reinstated it effective September 2, 1998.

ANALYSIS

The issue presented for appeal in both cases, is whether the doctrine of issue preclusion applies to prevent Balele from pursuing these claims. This court recently addressed the proper standard of review for cases involving issue preclusion. Certain of the factors which the circuit court must consider in deciding whether to apply issue preclusion involve questions of law which we review de novo, while other factors are matters for the exercise of discretion by the trial court. *See Ambrose v. Continental Ins. Co.*, 208 Wis.2d 346, 355-56, 560 N.W.2d 309, 313 (Ct. App. 1997).

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. *See Northern State Power Co. v. Bugher*, 189 Wis.2d 541, 550, 525 N.W.2d 723, 727 (1995). The term “issue preclusion” replaced the term “collateral estoppel.” *See id.* Summary judgment is a final and conclusive judgment for the purposes of issue preclusion. *See Precision Erecting, Inc. v. M&I Marshall & Ilsley Bank*, No. 97-3029, slip op. at 9 (Wis. Ct. App. Dec. 16, 1998, ordered published Feb. 23, 1999). Further, issue preclusion, unlike claim preclusion, does not require an identity of parties. *See Lindas v. Cady*, 183 Wis.2d 547, 558, 515 N.W.2d 458, 463 (1994).

When deciding whether to apply the doctrine of issue preclusion, courts must conduct a fundamental fairness analysis. *See Northern State Power*, 189 Wis.2d at 551, 525 N.W.2d at 727.

Courts 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 to obtain a full and fair adjudication in the initial action?

Michelle T. v. Crozier, 173 Wis.2d 681, 688-89, 495 N.W.2d 327, 330-31 (1993) (footnotes omitted).

Balele argues that the application of these factors requires that his claims before the Personnel Commission be allowed to go forward. We disagree.

In both cases, the circuit court determined that Balele's claims were barred by issue preclusion. In No. 98-2866, the circuit court did not explain how it reached this decision by applying the five factors. If a trial court fails to adequately set forth its reasoning in reaching a discretionary decision, this court will search the record for reasons to sustain the trial court's exercise of discretion. *See Long v. Long*, 196 Wis.2d 691, 698, 539 N.W.2d 462, 465 (Ct. App. 1995). We conclude in both cases that the circuit court properly determined that Balele's claims were precluded.

The issues Balele seeks to pursue in the state actions have already been litigated in the federal actions. In both cases, Balele seeks to establish that he was discriminated against on the basis of race, color and national origin when he was not hired for the positions, and that he was retaliated against for filing complaints with the Personnel Commission and in the courts. These issues are the

same issues which were decided by the federal district court in both cases. Having determined that there is an identity of issues, we next consider the five factors.

The first factor is whether Balele could have obtained review of the federal judgments. Balele not only could but did, obtain review of the district court's orders in the Seventh Circuit Court of Appeals. The Seventh Circuit affirmed the district court's orders for the reasons set forth in the district court's opinion. Specifically, as to the order in 98-2658, the Seventh Circuit concluded that Balele had not shown either discrimination or disparate impact with respect to either the AO4 or AO5 position.

The second factor is whether the question of law involves two distinct claims or intervening contextual shifts in the law. The questions of law presented in the federal actions were whether Balele was discriminated against on the basis of his race, color or national origin, when he was not appointed to the positions, and whether the defendants retaliated against Balele for filing claims with the Personnel Commission and the courts. The district court found in both cases that Balele had not established any evidence of discrimination, retaliation or disparate impact. Balele now seeks to pursue before the commission the same questions. The claims presented in the federal and state actions are not distinct and there have not been any intervening contextual shifts in the law.

The third factor is whether any significant differences in the quality or extensiveness of the proceedings between the two courts warrant relitigation of the issue. Balele had the opportunity to present his claims before the district court. He was not successful. The federal district court is certainly competent to determine whether Balele had successfully established that he had been discriminated against. There is no significant difference between the quality and

extensiveness of the proceedings which have already occurred in the federal courts and what Balele would receive in a state court proceeding.¹⁰

The fourth factor is whether the burden of persuasion has shifted so the party who is seeking preclusion had a lower burden of proof in the other proceeding. Balele asserts that he had a more difficult burden of persuasion in the district court under 42 U.S.C. § 1983 than he would have had before the Commission under the WFEA. Specifically, he asserts that under the federal statute he had to prove intentional discrimination while under the state statute, he may prove that the defendants negligently denied him the position. The authorities he cites, however, do not support this assertion. Specifically, the cases on which he relies do not discuss negligent discrimination under the Wisconsin statutes. We cannot conclude that Balele had a more difficult burden of persuasion under the federal statutes so as to warrant relitigation of the same issues before the Personnel Commission.

The fifth factor is whether matters of public policy or individual circumstances are involved which would render the application of issue preclusion to be fundamentally unfair. Balele has not asserted any compelling reason why public policy or individual circumstances would render the application of issue preclusion in either case to be fundamentally unfair. In No. 98-2658, Balele elected to pursue his federal case first. In both federal actions, he had a full and

¹⁰ In arguing against preclusion, Balele asserts in his brief that the Personnel Commission concluded that they were “less qualified” than the federal courts to decide the issue. The record does not support Balele’s assertion. The Personnel Commission did not say it was less qualified, but that it “was almost too ludicrous to suggest,” as Balele had, that the federal courts were not qualified to make the determinations it did. Balele also asserts that the district court admitted that it did not understand state personnel rules. Again, the record does not support this assertion. The district court merely noted that the state personnel rules “are difficult to understand and difficult, I’m sure, for many people to accept.”

fair opportunity to litigate his claims. The interests of judicial efficiency and protecting parties against repetitious and harassing litigation outweigh Balele's interest in relitigating his claims in state proceedings.

We thus conclude that the doctrine of issue preclusion operates to prevent Balele from pursuing these claims before the Personnel Commission. We affirm the orders of the circuit court.¹¹

By the Court.—Orders affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

¹¹ Since we conclude that Balele's claims are barred by the doctrine of issue preclusion, we do not reach the issue of whether the claims are barred by the doctrine of claim preclusion.

