

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 26, 2009

David R. Schanker
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2008AP578
2008AP579
STATE OF WISCONSIN**

**Cir. Ct. Nos. 2007SC11421
2007SC11422**

**IN COURT OF APPEALS
DISTRICT IV**

MATHEW E. LEVIN,

PLAINTIFF-APPELLANT,

V.

GASS & RIEGERT AUTO COMPLEX, INC.,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Dane County:
MARYANN SUMI, Judge. *Reversed and cause remanded for further
proceedings.*

¶1 HIGGINBOTHAM, P.J.¹ Mathew E. Levin moves for reconsideration of our decision affirming the circuit court’s order dismissing two wage claim cases against his employer for alleged nonpayment of overtime and vacation pay,² *Levin v. Gass & Riegert Auto Complex, Inc.*, Nos. 2008AP578, 2008AP579, unpublished slip op. (WI App Nov. 20, 2008). The court concluded that Levin failed to exhaust his administrative remedies before filing the instant action in small claims court. We grant Levin’s motion for reconsideration and conclude that Levin was not required to exhaust available administrative remedies before filing his wage claim action in circuit court under WIS. STAT. § 109.03(5).³ We therefore conclude that the circuit court erred in precluding Levin’s state court claims under the doctrine of exhaustion of administrative remedies and reverse the circuit court’s order dismissing Levin’s small claims complaint and remand for further proceedings.

¶2 The following background facts are taken directly from our previous decision. Matthew Levin is a former employee of Gass & Riegert Auto Complex Inc. (“Gass”). In mid-2007, Levin filed a complaint with the State of Wisconsin

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² Levin brought separate wage claim actions in Dane County Circuit Court Case Nos. 2007SC11421 and 2007SC11422. We have consolidated these cases for disposition.

³ WISCONSIN STAT. § 109.03(5) provides, as pertinent:

Each employee shall have a right of action against any employer for the full amount of the employee’s wages due on each regular pay day as provided in this section and for increased wages as provided in s. 109.11(2), in any court of competent jurisdiction. An employee may bring an action against an employer under this subsection without first filing a wage claim with the department under s. 109.09(1)....

Department of Workforce Development (DWD) alleging that Gass owed him vacation and overtime pay. On August 14, 2007, DWD issued a decision letter denying Levin's claim and informing him that he could submit further information regarding his work status to challenge the determination.

¶3 About a week later, Levin responded to the DWD letter, but did not provide proof requested by the investigator disputing his employment status or occupational classification. Levin also failed to supply information proving that Gass was in violation of its own policy regarding vacation pay for terminated employees. DWD reiterated its denial of Levin's claim in a letter dated August 27, 2007. The letter informed Levin that he could request administrative review of the determination in writing before September 5, 2007. Levin did not request a review of that determination.

¶4 On October 3, 2007, Levin filed a claim for the same overtime and vacation pay with the Dane County Small Claims Court. That case was dismissed. Levin filed a timely demand in the circuit court for a trial de novo. Dane County Circuit Court Judge Maryann Sumi dismissed Levin's case for failure to exhaust administrative remedies. Levin appeals.

¶5 In his original brief, Levin argued that the circuit court erred in dismissing his claims for failure to exhaust his administrative remedies because his request for a trial de novo required the circuit court to hold a trial on his claim. In *Levin*, Nos. 2008AP578 and 2008AP579, unpublished slip op. ¶5, we rejected this argument. Levin does not move for reconsideration of that decision. We therefore do not address it.

¶6 In his motion for reconsideration, Levin argues that under WIS. STAT. § 109.03(5) he is not required to exhaust his administrative remedies before

suing his employer in state court to recover wages he asserts he is due. We agree that, under the plain language of § 109.03(5), Levin has a direct private cause of action against his employer for wages he alleges is due him, and that the statute expressly does not require him to first file a wage claim with the DWD before pursuing his remedies in court. The question this case presents, however, is once an employee invokes the administrative process under WIS. STAT. § 109.09(1),⁴ must the employee exhaust his administrative remedies before suing his employer in state court under § 109.03(5).

⁴ WISCONSIN STAT. § 109.09(1) reads as follows:

The department shall investigate and attempt equitably to adjust controversies between employers and employees as to alleged wage claims. The department may receive and investigate any wage claim which is filed with the department, or received by the department under s. 109.10(4), no later than 2 years after the date the wages are due. The department may, after receiving a wage claim, investigate any wages due from the employer against whom the claim is filed to any employee during the period commencing 2 years before the date the claim is filed. The department shall enforce this chapter and ss. 66.0903, 103.02, 103.49, 103.82, 104.12 and 229.8275. In pursuance of this duty, the department may sue the employer on behalf of the employee to collect any wage claim or wage deficiency and ss. 109.03(6) and 109.11(2) and (3) shall apply to such actions. Except for actions under s. 109.10, the department may refer such an action to the district attorney of the county in which the violation occurs for prosecution and collection and the district attorney shall commence an action in the circuit court having appropriate jurisdiction. Any number of wage claims or wage deficiencies against the same employer may be joined in a single proceeding, but the court may order separate trials or hearings. In actions that are referred to a district attorney under this subsection, any taxable costs recovered by the district attorney shall be paid into the general fund of the county in which the violation occurs and used by that county to meet its financial responsibility under s. 978.13(2)(b) for the operation of the office of the district attorney who prosecuted the action.

¶7 This case requires us to interpret WIS. STAT. §§ 109.03(5); 109.09(1); and 109.11(1) and (2). Statutory interpretation is a question of law subject to de novo review. *Sands v. Whitenall Sch. Dist.*, 2008 WI 89, ¶14, 312 Wis. 2d 1, 754 N.W.2d 439. Whether an employee is required to exhaust his administrative remedies before filing a private cause of action under WIS. STAT. § 109.03(5) is a question of law, which we review de novo.

¶8 We are mindful of the principles governing the doctrine of exhaustion of administrative remedies in resolving the dispute in this case. “Generally, when a statute sets forth a procedure for review of administrative action and court review of an administrative decision, this remedy is exclusive and must be employed before other remedies are used.” *Metz v. Veterinary Examining Bd.*, 2007 WI App 220, ¶12, 305 Wis. 2d 788, 741 N.W.2d 244. “The exhaustion doctrine is typically applied when a party seeks judicial intervention before completing all the steps in the administrative process.” *Id.*, ¶13. However, the presumption that the administrative remedy is exclusive “does not apply if there is a legislative expression to the contrary.” *German v. DOT*, 223 Wis. 2d 525 538, 589 N.W.2d 651 (Ct. App. 1998). Where there is a statutory right to a private cause of action, we do not presume that the administrative remedy is exclusive. *Id.* at 539.

¶9 We conclude, based on the statutory scheme set out in Chapter 109, that the administrative remedies available under WIS. STAT. § 109.09 and § 109.11(1) and (2) are not exclusive. We first observe that WIS. STAT. § 109.03(5) provides a private cause of action to employees seeking to enforce wage claims against employers. Thus, we do not presume that the administrative remedies provided by WIS. STAT. §§ 109.09(1) and 109.11(2)(b) are exclusive. We also observe that there is no provision in ch. 109 that either expressly or

implicitly requires an employee to exhaust administrative remedies before pursuing a wage claim action in court.

¶10 Perhaps more compelling is the fact that Chapter 109 provides various administrative, civil, and criminal provisions and remedies that “protect employees through a plethora of administrative and court remedies for employees to settle disputes and collect their wages.” *Hubbard v. Messer*, 2003 WI 145, ¶25, 267 Wis. 2d 92, 673 N.W.2d 676. It is apparent that the legislature intended to provide more than one remedy to employees seeking to enforce wage claims.

¶11 The penalties statute, WIS. STAT. § 109.11, supports our conclusion that an employee is not required to exhaust administrative remedies before filing a wage claim in court. Specifically, § 109.11(2)(a) provides an incentive to employees to seek the DWD’s assistance in enforcing their wage claims and to complete that process before filing a wage claim action in circuit court. By doing so, a circuit court may award an employee not only wages owed and unpaid, but also an additional 50% of those wages. Subsection (b) of § 109.11(2) permits a circuit court to grant double damages to an employee who waits to file a wage claim in court until after the DWD has completed its investigation and all efforts to settle or compromise the matter have been exhausted.

¶12 We recognize that, by providing greater damages for administrative claims, the legislature has signaled a strong preference for the administrative resolution of these disputes. *See Hubbard*, 267 Wis. 2d 145, ¶27. Nonetheless, the fact that the legislature indicated a preference for an administrative solution does not mean it intended to require an employee to exhaust the administrative process before seeking a remedy in court. Indeed, the existence of these incentives suggests that the legislature did not intend for the administrative

remedies under that statute to be exclusive. An incentive to complete the administrative process would be unnecessary if the legislature required an employee to exhaust administrative remedies before pursuing court action.

¶13 In addition, the language in WIS. STAT. § 109.11(2)(a), that an employee who commences a wage claim action in state court “*before the department has completed its investigation* under s. 109.09(1) and its attempts to compromise and settle the wage claim,” implies that an employee may indeed pull out of the administrative process before it is completed and file a wage claim in court. *Id.* (emphasis added).

¶14 In sum, we conclude that the administrative remedies in Chapter 109 are not exclusive and that under WIS. STAT. § 109.03(5) an employee is entitled to file a wage claim in circuit court before the administrative process has been exhausted. Consequently, we conclude that the circuit court erred in dismissing Levin’s wage claim. We therefore reverse the circuit court’s order dismissing Levin’s small claims complaint and remand for further proceedings.

By the Court.—Orders reversed and cause remanded for further proceedings.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

