

**EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN**

Jerry M Blizzard)
6814 Winstone Dr)
Madison WI 53711)
)
Complainant)
)
vs.)
)
Auto Glass Specialists)
PO Box 259506)
Madison WI 53725-9506)
)
Respondent)

**HEARING EXAMINER'S
DECISION AND ORDER ON
MOTION TO DISMISS**

Case No. 20022147

BACKGROUND

Jerry Blizzard maintains that the Respondent, Auto Glass Specialists (AGS), discriminated against him based upon his disability when AGS terminated his employment. Blizzard held several positions with AGS before having been fired, including technician, supervisor, general manager and store manager. Blizzard became store manager when the company eliminated the general manager position. Store managers were responsible for maintaining productivity and they commonly supervised technicians and customer service representatives.

Blizzard experienced declining revenue growth in 2000, but District Manager Michael Connolly still rated his performance favorably the following year. However, more was expected, and Blizzard anticipated receiving special operating guidelines from Connolly. Before Connolly issued those guidelines, Blizzard took short-term medical leave for sleep apnea.

Connolly discussed the situation with David Gaspar, Director of Human Resources. Connolly was concerned that the Complainant was showing poor leadership and decision-making abilities. Connolly and Gaspar decided that the Complainant would require some discipline. They reasoned that termination was possible, should the Complainant continue performing below expectations.

While the Complainant was away, Quality Assurance Manager Karen Hitchcock discovered that management problems were threatening special quality assurance awards that were critically important for marketing purposes. With the Complainant unavailable, Connolly appointed several temporary store managers and found that productivity was improving dramatically. Connolly informed Gaspar and

recommended that when Blizzard returned from medical leave, the company should impose strict operating instructions and temporarily suspend him without pay.

The Complainant returned several days later, but was not immediately disciplined. Management was busy conducting internal audits, and Connolly was still finalizing a disciplinary letter for the Complainant. At the same time, company executives were meeting to discuss failing store managers. The Complainant was effectively terminated during this meeting.

Gaspar informed the Complainant that performance and leadership problems, unacceptable audit results, poor inventory management and unprofessionalism were the reasons for his termination. Gaspar also noted that productivity and revenue had increased during his absence. AGS also terminated Michael Connolly and another store manager, citing leadership problems and numerous audit failures.

On November 28, 2001 Blizzard filed a complaint with the Wisconsin Department of Workforce Development, Equal Rights Division, alleging that AGS had violated the Wisconsin Family and Medical Leave Act (FMLA) by terminating his employment because he took short-term medical leave. An Equal Rights Officer issued an Initial Determination finding no probable cause to believe the Respondent committed the alleged violation. The Complainant appealed the Initial Determination. A probable cause hearing followed. An Administrative Law Judge affirmed the Initial Determination, likewise finding that Blizzard had not established probable cause to believe the Respondent terminated his employment for taking medical leave. Blizzard did not appeal that decision.

On July 24, 2002 Blizzard filed a complaint with the Madison Equal Opportunities Commission, alleging that AGS discriminated against him because he was physically disabled. The Complainant asserted that the reasons given for his termination were disingenuous, and that other store managers, similarly situated, had received better treatment. For its part, AGS denies the allegations and contends that Blizzard was fired solely for unsatisfactory performance.

After investigating the complaint, an EOC Investigator found probable cause to believe AGS discriminated against the Complainant. After the matter was certified for public hearing, AGS moved for dismissal, arguing that because the Equal Rights Division found no probable cause to believe the Complainant was terminated for exercising his rights under the Wisconsin FMLA, his complaint with the Equal Opportunities Commission was procedurally barred.

Issue preclusion, also called collateral estoppel, forecloses relitigation of issues that were fully litigated in previous proceedings involving the same parties. Amber J.F. vs. Richard B., 205 Wis.2d 510,

512, 557 N.W.2d 84, 87 (1996). Issue preclusion requires actual litigation of an issue that was necessary to the outcome of the first action. Northern States Power Co. v. Bugher, 189 Wis.2d 541, 550, 525 N.W.2d 723, 727 (1995). In contrast, claim preclusion establishes that final judgment between the parties is conclusive for all subsequent actions between the same parties, regarding all matters which were, or which could have been, litigated in the proceeding from which the judgment arose. Amber J.F. v. Richard B., 205 Wis.2d at 516, 557 N.W.2d at 86. The burden of establishing that issue preclusion should be applied rests upon the party seeking its benefit. Flowers v. DHSS, 81 Wis.2d 376, 389, 260 N.W.2d 727, 734-35 (1978).

In Michelle T. v. Crozier, 173 Wis.2d 681, 688-89, 495 N.W.2d 327, 330-31 (1993), the Wisconsin Supreme Court identified five different circumstances under which issue preclusion will not apply: (1) review of the underlying judgment was unavailable to the party against whom preclusion is sought; (2) the question is one of law involving distinct claims; (3) significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue; (4) the burdens of persuasion have shifted, such that the party seeking preclusion had a lower burden of persuasion in the preceding action; or (5) matters of public policy and/or individual circumstances are 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 proceeding. See also Masko v. City of Madison, 265 Wis.2d 442, 448-49, 665 N.W.2d 391, 394 (Wis. Ct. App. 2003). This five-part test is rooted in guarantees of due process which require that the party against whom preclusion is sought must have had an opportunity—procedurally, substantively and evidentially—to fully pursue the underlying claim. Amber J.F. v. Richard B., 205 Wis.2d at 520, 557 N.W.2d at 88.

The Respondent argues that each of the Michelle T. factors weighs against the Complainant. The critical issues have been decided, the Respondent contends, and neither procedural differences, nor policy reasons, nor individual circumstances render the application of collateral estoppel fundamentally unfair.

The Complainant asserts that the Equal Rights Division did not consider several important issues, including: (1) whether he was disabled, within the meaning of the Equal Opportunities Ordinance; (2) whether his disability affected his performance, including his sales numbers and management ability; (3) whether the Respondent had any legitimate, nondiscriminatory reasons for terminating his employment; and (4) whether the Respondent discriminated against him *based upon his disability*, which question the Complainant distinguishes from the sole issue before the ERD—whether the Respondent terminated his employment for taking medical leave. Thus, the parties' major disagreement is about whether the Complainant had sufficient opportunity in earlier proceedings to present all aspects of his discrimination claim.

The Hearing Examiner finds, after reviewing the record, that some evidence of discrimination on the basis of disability was excluded from the ERD proceedings. Some aspects of the discrimination claim *were* permitted into the record, but major arguments about whether the Complainant was disabled and how the Complainant was affected, including arguments about his overall performance and his ability to meet specific requirements, were not. As the Complainant observes, the Respondent successfully opposed his attempt to gather evidence concerning its knowledge of his sleep disorder, taking the position that questions about whether the Complainant was disabled, why the Complainant took medical leave, and whether the Respondent knew about his condition were irrelevant. Specifically, the Respondent asserted, through its attorney, Michelle Intrater, that “these ADA questions” do *not* overlap with the FMLA issue. Those questions may have been irrelevant then, but the issue was different—retaliation for taking medical leave, rather than discrimination based on disability. The EOC must determine whether the Respondent fired the Complainant because he was physically disabled or perceived as being disabled. Simply stated, the issue has changed.

The Respondent argues that the Complainant still had every opportunity to attack the legitimacy of the stated reasons for his termination. In other words, the Complainant was not prevented from arguing that his termination was unfair—that the Respondent was merely concealing an illegitimate motive. With all due respect, the Hearing Examiner disagrees. Because the Complainant was prevented from developing any evidence that his employer knew about his sleep disorder, the Complainant was prevented from arguing that the Respondent was, instead of accommodating his disability, “faulting” him for performance issues that were linked to his medical condition. If the Complainant can show that the Respondent chose not to accommodate his disability, the legitimate, business-related reasons that the Respondent advanced in earlier proceedings will not necessarily be dispositive.

The Hearing Examiner confronted a similar situation in Pesselman v. Thomas Link d/b/a Bellevue Apartments, MEOC Case No. 20021153 (Ex.Dec. 5/26/2005). In Pesselman v. Link, the Respondent sought to preclude the Complainant from pursuing a claim of discrimination based upon his arrest record because the Complainant had, the Respondent argued, already litigated the critical issue: whether the Respondent evicted the Complainant from his apartment because the Complainant had been arrested. The Hearing Examiner denied the motion to dismiss because the Complainant was prevented in earlier proceedings from introducing any evidence, whatsoever, related to his discrimination claim. In this case, the ERD was required to decide whether AGS terminated the Complainant for taking medical leave, not whether the Complainant was disabled, whether the Respondent knew about the disability or perceived that the Complainant was disabled, or whether the Respondent “faulted” the Complainant for performance problems that were linked to his medical condition. Although the Hearing Examiner hereby denies the

Hearing Examiner's Decision and Order
on Motion to Dismiss
Case No. 20022147
Page 5

Motion to Dismiss, the Respondent may, as warranted, move to exclude individual aspects of the Complainant's discrimination claim based upon the earlier litigation.

ORDER

The Hearing Examiner denies the Respondent's Motion to Dismiss. Further proceedings consistent with this decision will be scheduled by separate cover.

Signed and dated this 18th day of July, 2005.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

CEB:15