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See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
FILED: 08/24/2010
RUTH WILLINGHAM,
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BY: GH

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

KENYON CARLSON,) 1 CA-CV 09-0479
)
Plaintiff-Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 28, Arizona Rules
ARIZONA DEPARTMENT OF ENVIRONMENTAL) of Civil Appellate
QUALITY; STEVE OWENS, in his) Procedure)
capacity as Director of Department)
of Environmental Quality, ARIZONA)
STATE PERSONNEL BOARD; and CLAUDIA)
SMITH, STANLEY LUBIN, and JIM)
THOMPSON, in their capacity as)
members of the Arizona State)
Personnel Board,)
)
Defendants-Appellants.)
)

Appeal from the Superior Court in Maricopa County

Cause No. LC2008-000607-001 DT

The Honorable Robert C. Houser, Judge

AFFIRMED

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I R V I N E, Presiding Judge

¶1 This is an administrative appeal. The Arizona Department of Environmental Quality ("ADEQ"), its director, Steve Owens ("Owens"), the Arizona State Personnel Board ("the Board"), and its members challenge the superior court's determination that res judicata bars the litigation of Kenyon Carlson's ("Carlson") employment discharge under a new legal theory.¹ For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Carlson, an ADEQ Environmental Program Supervisor, worked for the State of Arizona between November 1991 and April 1, 2004. Starting in 1999, Carlson headed a unit responsible for monitoring environmental data to ensure ADEQ's ability to enforce compliance with regulatory standards.

¶3 Kathleen Gustafson ("Gustafson") joined the Department in November 2000 as an administrative assistant. Carlson provided Gustafson with assignments and wrote her performance

¹ The Board members are Claudia Smith, Stanley Lubin, and Jim Thompson. The Board and its members join in the briefs filed by ADEQ and Owens pursuant to Rule 13(f) of the Arizona Rules of Civil Appellate Procedure.

reviews. Gustafson and Carlson eventually began a consensual romantic relationship and lived together between July 2001 and July 2002. Both Gustafson and Carlson lied about the nature of their relationship.

¶14 After their romantic relationship ended, Carlson loaned Gustafson more than \$25,000. When Carlson demanded payment, Gustafson blocked him on her residential e-mail account. Carlson then e-mailed Gustafson at work on December 7, 2003, stating that because she "had chosen this direction," he saw no reason to continue working toward her promotion. He left a substantially similar telephone message for Gustafson in January 2004.

¶15 ADEQ decided to transfer Gustafson to a general services suite, where she would devote all of her time to different assignments under Joe McDonald's supervision, effective January 2004. When J.J. informed Gustafson of the decision, she called him a "rotten son of a bitch" and told him to "shove it." Gustafson then informed ADEQ management on January 22, 2004, that Carlson was sexually harassing her. ADEQ commenced an investigation and placed Carlson on administrative leave. Meanwhile, Gustafson received no discipline and left ADEQ shortly after her transfer.

¶16 ADEQ subsequently issued a Notice of Charges of Misconduct, pursuant to Arizona Administrative Code ("A.A.C.")

R2-5-803(A), stating it was considering discharging Carlson for cause as outlined in Arizona Revised Statutes ("A.R.S.") section 41-770 (2004) and "Department of Administrative Personnel Rule" R2-5-501 (Standards of Conduct). The document, dated March 17, 2004, lists the specific charges and explanations as:

1. You and Kathleen Gustafson, Administrative Assistant I, had a consensual romantic relationship, which ended. You were aware that Ms. Gustafson was interested in promoting or moving to a different position within ADEQ. You have, at various times, discussed possible positions for Ms. Gustafson with Joe McDonald, including positions in the lab that you supervised. These positions were frozen. The performance planners and appraisals you prepared for Ms. Gustafson indicate that with your encouragement, she was attempting to increase her knowledge and skills in the lab.

On December 3, 2003, after learning that Ms. Gustafson had blocked you from sending e-mail to her personal e-mail account, you sent an e-mail message from your ADEQ e-mail address to her ADEQ e-mail address, stating, in part: "Well, now that you have chosen this direction, I see no reason to continue working for your promotion.["] (Attachment 5 incorporated by reference.)

2. You called Kathleen Gustafson and said, pursuant to a recorded message later transcribed, in part: "I would have put all that work into [sic] if I would have had the relationship with you, yes, okay, I admit that, but I'm not willing to do that now ...". (Attachment 6 incorporated by reference.)

¶17 ADEQ served Carlson with a notice of dismissal ("the Notice") terminating his employment on April 1, 2004 "for 'cause' as outlined in ARS Section 41-770 and Arizona Department of Administration Personnel Rule R2-5-501, Standards of Conduct." In the Notice, ADEQ (1) identified the same facts in the Notice of Charges of Misconduct, (2) stated that Carlson acted in violation of "the Department's Sexual Harassment Policy (Attachment 3) and of the Director's 9/15/03 e-mail (Attachment 4)" with respect to his relationship with Gustafson; and (3) advised Carlson that he had a right to appeal.

¶18 Carlson filed an unsuccessful appeal to the Board pursuant to A.R.S. § 41-785(A) (Supp. 2009). At the ensuing hearing, Carlson introduced evidence that he had not engaged in unwelcome sexual conduct with Gustafson and had not injured her employment opportunities. The hearing officer agreed, but nevertheless upheld the dismissal on the grounds that Carlson had violated the Standards of Conduct for state employees set forth in A.A.C. R2-5-501(B)(1), (B)(3) and (C)(2) by: (1) lying about his relationship with Gustafson, and (2) creating a conflict of interest and giving money to Gustafson. See A.A.C. R2-5-501(B)(1) (maintaining high standards of honesty, integrity, and impartiality); R2-5-501(B)(3) (conducting self in a manner not bringing discredit or embarrassment to the State); R2-5-501(C)(2) (not permitting self to be placed under a

personal obligation that could lead a person to expect official favor). The hearing officer reasoned that the Board consequently had cause to dismiss Carlson under these standards pursuant to A.R.S. § 41-770.

¶9 After Carlson unsuccessfully objected to the hearing officer's Findings of Fact, Conclusions of Law, and Recommendations and having lost his appeal to the Board, Carlson filed a complaint for administrative review in Maricopa County Superior Court pursuant to A.R.S. §§ 12-901 to 913 (2003) and 41-785(F) (Supp. 2009). The superior court affirmed the Board's decision and this court reversed in *Carlson v. Ariz. State Pers. Bd.*, 214 Ariz. 426, 153 P.3d 1055 (App. 2007). We held that the Board had violated Carlson's due process rights by upholding his dismissal on grounds not stated in his dismissal notice. *Id.* at 432, ¶¶ 20-21, 153 P.3d at 1061. This court then vacated the superior court's decision and remanded for further proceedings consistent with our opinion. *Id.* at 433, ¶ 26, 153 P.3d at 1062.

¶10 On remand, the superior court vacated its prior judgment, reversed the Board's decision, and entered a final judgment that Carlson be reinstated with back pay. The court's June 19, 2007 judgment states: "The Final Decision of the Arizona State Personnel Board dated December 20, 2004, is not supported by the substantial evidence and is contrary to law,

arbitrary, capricious and an abuse of discretion." The judgment does not provide for further proceedings before the Board.

¶11 On or about July 3, 2007, the ADEQ served Carlson with a second Notice of Charges alleging new legal authority for terminating his employment, including A.A.C. R2-5-501(B)(1), (3), and (C)(2), but still relying on Carlson's conduct with Gustafson. ADEQ then provided Carlson with a notice of dismissal dated July 25, 2007. Carlson unsuccessfully appealed the determination to the Board.

¶12 Carlson next appealed to the superior court. He contended that res judicata precluded ADEQ from terminating his employment in 2007 based upon facts arising out of his 2004 termination. Briefing ensued. In response, ADEQ stated: "In his March 20, 2004 response, Mr. Carlson essentially admitted to all of the misconduct regarding *his unprofessional relationship with Ms. Gustafson for which he was later dismissed on July 25, 2007.*" (Emphasis added.)

¶13 The superior court ultimately held that res judicata barred ADEQ from terminating Carlson's employment based upon facts known and admitted at the time of his 2004 dismissal. The only difference, the court found, was that the 2004 termination was based upon an alleged violation of the sexual harassment policy, and the 2007 termination was based upon the violation of standards of conduct.

¶14 In its judgment filed on June 4, 2009, the superior court again reinstated Carlson to his position and awarded back pay, retirement, and other benefits from the date of termination to the date of reinstatement, as well as costs. This timely appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-913 and -2101(B) (2003).

DISCUSSION

¶15 ADEQ contends that res judicata does not bar its second dismissal of Carlson. The application of res judicata is a question of law we review de novo. See generally *Phoenix Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 240, 934 P.2d 801, 804 (App. 1997) (explaining that collateral estoppel is an issue of law).

¶16 The res judicata doctrine "will preclude a claim when a former judgment on the merits was rendered by a court of competent jurisdiction and the matter now in issue between the same parties or their privies was, or might have been, determined in the former action." *Hall v. Lalli*, 194 Ariz. 54, 57, ¶ 7, 977 P.2d 776, 779 (1999). The rule applies to administrative proceedings. *Gilbert v. Bd. of Med. Exam'rs*, 155 Ariz. 169, 174, 745 P.2d 617, 622 (App. 1987), *superseded by statute on other grounds as noted in Goodman v. Samaritan Health Sys.*, 195 Ariz. 502, 508 n.7, ¶ 25, 990 P.2d 1061, 1067 n.7 (App. 1999).

¶17 Arizona deviates from the transactional approach to res judicata employed by most courts and the Restatement (Second) of Judgments and follows the more restrictive same evidence test. See *Phoenix Newspapers*, 188 Ariz. at 240-42, 934 P.2d at 804-06; see also *E.C. Garcia & Co. v. Ariz. State Dep't of Revenue*, 178 Ariz. 510, 520, 875 P.2d 169, 179 (App. 1993); see generally 2A Ariz. Practice, Civil Trial Practice § 29.4 (Daniel J. McAuliffe & Shirley J. Wahl, eds. 2d ed. 2001). The question is whether "the evidence needed to sustain the second action would have sustained the first action." Restatement of Judgments § 61 (1942), cited in *Pettit v. Pettit*, 218 Ariz. 529, 532, ¶ 8, 189 P.3d 1102, 1105 (App. 2008).

¶18 ADEQ argues that the reversal was based only upon a deficient notice, not on the merits, and thus res judicata does not apply to bar the second dismissal under a new legal theory. Carlson counters that the parties presented evidence concerning his pre-2004 dismissal conduct with Gustafson before the administrative law judge. The Board relied upon some of this evidence of improper but non-sexually harassing conduct in sustaining Carlson's first dismissal.

¶19 On remand, the superior court entered a new signed judgment specifically identifying "[t]he Final Decision of the Arizona State Personnel Board" as "not supported by the substantial evidence" and "contrary to law, arbitrary,

capricious and an abuse of discretion." The Board had specifically ruled that Carlson's termination was supported by the evidence on alternative grounds. This judgment specifically rejecting the Board's analysis--the basis for dismissal on alternative grounds--as a final appealable order. See A.R.S. § 12-2101(B). No party has appealed.²

¶20 This second judgment, entered on remand from this court and finding the Board's action not supported by substantial evidence, is res judicata on the merits of the controversy. See *Day v. Estate of Wiswall*, 93 Ariz. 400, 402, 381 P.2d 217, 219 (1963) (explaining that the judgment is conclusive as to every point decided and as to every point raised by the record that could have been decided). The same parties appeared in both proceedings and in the same capacities. The basis for the dismissal described in the second notice was known to ADEQ at the time of the initial dismissal but not alleged as a termination basis. ADEQ conceded that Carlson's unprofessional relationship with Gustafson was the misconduct "for which he was later dismissed on July 25, 2007."

¶21 The parties are bound by the judgment entered on remand, and the arguments in their briefs concerning the merits

² Moreover, no party moved to amend the judgment pursuant to Rule 60 of the Arizona Rules of Civil Procedure.

of the dismissal are waived. See *In re Marriage of Zale*, 193 Ariz. 246, 249, ¶ 12, 972 P.2d 230, 233 (1999) (holding that a decree absolute in its terms is an adjudication of the merits and creates a bar to further litigation). Although ADEQ contends no bar exists to litigating an issue not concerning deficient notice, such as the violation of the standards of conduct, that contention misses the mark. The second judgment provides for no further proceedings before the Board and states that no substantial evidence supported the Board's determination on the standards of conduct grounds. Accordingly, that issue has been adjudicated against ADEQ and further litigation is barred. See *Pettit*, 218 Ariz. at 532-33, ¶¶ 8-9, 189 P.3d at 1105-06 (holding that *res judicata* bars litigation of a paternity issue previously resolved in a divorce action).

¶22 Therefore, we affirm the superior court's ruling reversing the Board's order dismissing Carlson for a second time. See *id.* This decision obviates the need to reach the parties' remaining arguments concerning estoppel, the alleged violation of Carlson's due process rights, waiver, ADEQ's more favorable treatment of Gustafson, the alleged violation of A.R.S. § 41-770(C), and arbitrary and capriciousness action.

CONCLUSION

¶23 We affirm the superior court's judgment. In addition, we award Carlson his costs and attorneys' fees on appeal

pursuant to A.R.S. § 12-348(A)(5) (2003) and subject to his compliance with Rule 21(c) of the Arizona Rules of Civil Appellate Procedure.

_____/s/_____
PATRICK IRVINE, Presiding Judge

CONCURRING:

_____/s/_____
PHILIP HALL, Judge

_____/s/_____
PATRICIA A. OROZCO, Judge