

STATE OF MICHIGAN
COURT OF APPEALS

DANIEL DOBROWSKI,

Plaintiff-Appellant,

v

JAY DEE CONTRACTORS, INC.,

Defendant-Appellee.

UNPUBLISHED

January 26, 2010

No. 288206

Wayne Circuit Court

LC No. 06-622380-CZ

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

GLEICHER, J. (*dissenting*).

I respectfully dissent. In my view, the federal court's conclusions regarding the causation element of plaintiff's claim under the Family and Medical Leave Act (FMLA), 29 USC 2601 *et seq.*, do not preclude this Court's consideration of the merits of plaintiff's lawsuit premised on a violation of Michigan's Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.*

In August 2006, plaintiff commenced a PWDCRA action in the Wayne Circuit Court. Plaintiff asserted that he suffered from epilepsy, and that in violation of the PWDCRA defendant terminated plaintiff's employment after he underwent surgery during an approved medical leave. In July 2007, plaintiff added a claim under the FMLA. Defendant promptly removed the action to federal court, citing federal question jurisdiction, 28 USC 1331, and invoking the federal court's supplemental jurisdiction, 28 USC 1367.

In August 2007, the United States District Court for the Eastern District of Michigan, Judge Lawrence P. Zatkoff, declined to exercise supplemental jurisdiction over plaintiff's PWDCRA claim and remanded it to the Wayne Circuit Court. In June 2008, Judge Zatkoff granted summary judgment of plaintiff's FMLA claim, holding that because defendant employed fewer than 50 employees within 75 miles of plaintiff's worksite, plaintiff did not qualify as an "eligible employee" for purposes of the FMLA. 29 USC 2611(2)(B)(ii). In his written opinion, Judge Zatkoff additionally rejected plaintiff's argument that equitable estoppel precluded defendant from denying plaintiff's eligibility under the FMLA.

After concluding that plaintiff had failed to state a claim under the FMLA, Judge Zatkoff proceeded to consider whether "[e]ven if Plaintiff were able to demonstrate that he was an eligible employee under an equitable-estoppel theory, he would still ... be entitled to relief on his claims." Judge Zatkoff found that defendant would have terminated plaintiff's employment even

had plaintiff not taken a medical leave. Next, Judge Zatkoff additionally considered whether plaintiff could show that he endured a retaliatory action for exercising his rights under the FMLA, applying the burden shifting framework established in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). Judge Zatkoff reasoned that defendant had set forth a legitimate business reason for plaintiff's termination: "Defendant sets forth 'lack of work' as its legitimate business reason for Plaintiff's termination because the project was slowing down when Plaintiff took his medical leave. Defendant's position is supported by the fact that it laid off several other employees."¹

Plaintiff appealed to the United States Court of Appeals for the Sixth Circuit, *Dobrowski v Jay Dee Contractors, Inc*, 571 F3d 551 (CA 6, 2009). The Sixth Circuit observed, "All now agree that [plaintiff] was not in fact eligible for FMLA protection Instead, the dispute centers on whether Jay Dee's statements that Dobrowski was being given FMLA leave now bind the defendant under the doctrine of equitable estoppel such that we should treat him as entitled to the Act's protections." *Id.* at 554. The Sixth Circuit then embarked on a comprehensive equitable estoppel analysis, and ultimately held that plaintiff had failed to demonstrate his detrimental reliance on defendant's misstatement of FMLA eligibility. *Id.* at 554-557. The Sixth Circuit never considered the alternative grounds for dismissing plaintiff's FMLA case discussed by Judge Zatkoff.

Here, the majority holds that "the federal district court's conclusion that plaintiff could not show that there was a connection between his termination and his having taken medical leave is fatal, because of operation of collateral estoppel, to his PWDCRA claim." *Ante* at 7. In my view, this Court should not afford preclusive effect to Judge Zatkoff's legal conclusion that defendant established a legitimate business reason for plaintiff's termination because that aspect of Judge Zatkoff's decision was unnecessary to his grant of summary judgment. In *Lumley v Univ of Michigan Bd of Regents*, 215 Mich App 125, 132; 544 NW2d 692 (1996), this Court explained, "Collateral estoppel bars the relitigation of issues previously decided in a first action when the parties to the second action are the same; where the second action is a different cause of action, the bar is conclusive regarding issues actually litigated in the first action *and essential to the judgment.*" (Emphasis added). Judge Zatkoff's determination of the reason for plaintiff's termination simply does not qualify as essential to the federal court's judgment. That the Sixth Circuit never reached this issue confirms that the district court's conclusions were not necessary to uphold summary judgment of plaintiff's FMLA claim. For this reason alone, I would reverse the circuit court.²

¹ Judge Zatkoff's written opinion does not address the evidence, if any, plaintiff introduced in response to defendant's submission of a legitimate business reason for its employment action.

² I note that Judge Zatkoff's rulings regarding causation and legitimate business reasons for plaintiff's termination would not be given preclusive effect in the Sixth Circuit. In *Nat'l Satellite Sports, Inc v Eliadis, Inc*, 253 F3d 900, 910 (CA 6, 2001), the Sixth Circuit explained that "where ... one ground for the decision is clearly primary and the other only secondary, the secondary ground is not 'necessary to the outcome' for the purposes of issue preclusion." Indisputably, the statutory language of the FMLA and equitable estoppel principles constituted
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Even assuming that Judge Zatkoff's FMLA causation analysis qualified as essential or necessary to his opinion, two further bases support my conclusion that Judge Zatkoff's decision does not preclude a jury's consideration of plaintiff's PWDCRA claim. Section 27 of the Restatement of Judgments, 2d, entitled, "Issue Preclusion," explains, "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." The comments to § 27 include two provisions that strongly counsel against affording Judge Zatkoff's opinion preclusive effect. Comment *i*, subtitled, "Alternative determinations by court of first instance," cautions, "If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone." Consistent with comment *i*, Judge Zatkoff's alternative determinations concerning the legal sufficiency of plaintiff's FMLA claim do not conclusively preclude the circuit court's consideration of the merits of plaintiff's PWDCRA claim.

Furthermore, comment *o* to § 27 of the Restatement of Judgments, 2d, subtitled "Effect of an appeal," sets forth the following:

If a judgment rendered by a court of first instance is reversed by the appellate court and a final judgment is entered by the appellate court (or by the court of first instance in pursuance of the mandate of the appellate court), this latter judgment is conclusive between the parties.

If the judgment of the court of first instance was based on a determination of two issues, either of which standing independently would be sufficient to support the result, and the appellate court upholds both of these determinations as sufficient, and accordingly affirms the judgment, the judgment is conclusive as to both determinations. ...

If the appellate court upholds one of these determinations as sufficient but not the other, and accordingly affirms the judgment, the judgment is conclusive as to the first determination.

If the appellate court upholds one of these determinations as sufficient and refuses to consider whether or not the other is sufficient and accordingly affirms the judgment, the judgment is conclusive as to the first determination. [Emphasis added].

Once the Sixth Circuit rendered its decision, the scenario contemplated in the final paragraph of comment *o* came to pass. Because the Sixth Circuit upheld only one ground for Judge Zatkoff's dismissal of plaintiff's FMLA action and did not consider whether legitimate business reasons existed for plaintiff's termination, only the equitable estoppel ground for dismissal of the FMLA claim should be precluded from further consideration.

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the primary grounds for Judge Zatkoff's dismissal of plaintiff's FMLA claim.

In *Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Michigan Transit Auth*, 437 Mich 441, 453-454; 473 NW2d 249 (1991), our Supreme Court applied the essence of comment *o* by adopting the following excerpt from 1B Moore, Federal Practice, ¶ 0.416(2), p 518:

“A judgment affirmed on appeal has conclusive effect, but if the appellate court affirms on grounds that differ from those relied upon by the lower court, the conclusiveness of the judgment as *res judicata* and as collateral estoppel are governed by the appellate decision. Thus *if the trial court rests its judgment on two grounds, each of which is independently adequate to support it, the judgment is conclusive as to both; but i(f) the appellate court affirms on one ground without passing on the other, the second ground is no longer conclusively established under the collateral estoppel doctrine.*” [Emphasis added].

Although our Supreme Court has not specifically adopted § 27 of the Restatement of Judgments, 2d, its holding in *Amalgamated Transit* is entirely consistent with the letter and the spirit of comment *o*. In my view, *Amalgamated Transit* constitutes controlling authority in this case, which the majority erroneously disregards.³ Furthermore, many authorities agree that comment *o* sets forth an appropriate rule. Wright, Miller & Cooper’s *Federal Practice & Procedure* observes with regard to comment *o*, “As to matters passed over by the appellate court ... preclusion is not available on the basis of the trial-court decision. This result is supported by the fact that the appellate choice of grounds for decision has made unavailable appellate review of the alternative grounds.” C. Wright, A. Miller, and E. Cooper, 18 Fed Prac & Proc, § 4421. And “[i]t is a well-established principle of federal law that if an appellate court considers only one of a lower court’s alternative bases for its holding, affirming the judgment without reaching the alternative bases, only the basis that is actually considered can have any preclusive effect in subsequent litigation.” *Niagara Mohawk Power Corp v Tonawanda Band of Seneca Indians*, 94 F3d 747 (CA 2, 1996).

Finally, I disagree with the majority’s conclusion that “the Sixth Circuit’s ruling in this matter is of no import in determining whether the trial court erred with regard to the case before us.” *Ante* at 7. Plaintiff filed his Sixth Circuit appeal on June 3, 2008, and the appeal remained pending when the Wayne Circuit Court granted defendant summary disposition on September 5, 2008. Collateral estoppel “bars relitigation of issues when the parties had a full and fair opportunity to litigate those issues in an earlier action. A decision is final when all appeals have been exhausted or when the time available for an appeal has passed.” *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006) (citations omitted). Contrary to the majority’s view that the Sixth Circuit’s ruling on appeal “is of no import in determining whether the circuit court erred,” *id.*, the Sixth Circuit’s decision is critical for two reasons. First, as discussed *infra*, it conclusively demonstrates that Judge Zatkoff’s finding of legitimate business reasons for plaintiff’s termination was not necessary to his decision. Second, the circuit court clearly erred

³ The majority’s survey of issue preclusion in the federal courts is interesting but unnecessary, given the governing holding in *Amalgamated Transit*.

by ruling on defendant's summary disposition motion before the Sixth Circuit decided plaintiff's federal appeal. As this Court explained in *Leahy*, a decision lacks preclusive effect until "all appeals have been exhausted or when the time available for an appeal has passed." *Id.* Accordingly, the circuit court erred in two respects, by prematurely considering the claim-preclusive nature of Judge Zatkoff's decision rather than waiting for the Sixth Circuit's ruling, and by improperly granting summary disposition on the merits.

In *Gelb v Royal Globe Ins Co*, 798 F2d 38, 44 (CA 2, 1986), the Second Circuit aptly observed, "Appellate review plays a central role in assuring the accuracy of decisions." Here, no appellate court has reviewed Judge Zatkoff's summary determinations regarding causation or that legitimate business reasons supported plaintiff's termination. In my view, the majority has elevated finality over fairness and economy over exacting review. I thus would reverse the circuit court's grant of summary disposition concerning plaintiff's PWDCRA claim.

/s/ Elizabeth L. Gleicher