IN THE COURT OF APPEALS OF IOWA

No. 2-786 / 12-0597
Filed October 31, 2012

GLEN MCMICHEAL,
Plaintiff-Appellant,

vs.

MIDAMERICAN ENERGY CO.
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Glen McMicheal seeks review of the district court ruling on MidAmerican Energy Co.'s motion for summary judgment. **REVERSED AND REMANDED.**

Brooke Timmer and Whitney Judkins of Fiedler & Timmer, P.L.L.C., Urbandale, for appellant.

Frank Harty and Debra L. Hulett of Nyemaster Goode, P.C., Des Moines, for appellee.

Heard by Potterfield, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

Glen McMicheal seeks review of the district court ruling on MidAmerican Energy Co.'s motion for summary judgment, which dismissed McMicheal's retaliatory discharge claim, denied summary judgment as to McMicheal's age discrimination claim,[1] and struck McMicheal's claim for punitive damages. Because res judicata principles do not bar McMicheal's retaliatory discharge claim, we reverse and remand.

I. Background Facts and Proceedings.

Glen McMicheal was employed by MidAmerican Energy Co. ("MidAmerican") as a gas journeyman for thirty-seven years. He was a member of the International Brotherhood of Electrical Workers, Local 499 ("the Union"). He responded to gas emergencies and performed gas-delivery work, and mostly worked alone. McMicheal was injured on the job on September 10, 2009. He suffered from carpal tunnel in his left hand and reported the injury for purposes of workers' compensation. He was placed on light-duty.

MidAmerican conducted an investigation after McMicheal's supervisor discovered that he had gone home for the day without first reporting to her.[2] They determined that Global Positioning System (GPS) data from McMicheal's work truck did not match the data he reported to MidAmerican regarding his work locations and times. On six days during the month of April 2010, McMicheal was

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[1] McMicheal dismissed his age discrimination claim on March 28, 2012, thus rendering the district court ruling of December 21, 2011, a final ruling subject to appeal.

[2] MidAmerican asserts that the supervisor had previously instructed McMicheal that he was not to go home without reporting that he had completed his work. McMicheal denies that he was ever given that direction.

home during periods for which he sought compensation. McMicheal denied any wrongdoing, asserting that other gas servicemen had the same practice. MidAmerican fired McMicheal on May 21, 2010, alleging that he went home during work hours contrary to directions from his supervisor and submitted false time sheets.

McMicheal filed a petition alleging MidAmerican fired him in retaliation for suffering a workplace injury, reporting a workplace injury, and for filing a workers' compensation claim. He alleged the termination violated public policy of the State of Iowa. He also filed a civil rights complaint with the Iowa Civil Rights Commission (ICRC) alleging MidAmerican discriminated against him on the basis of age. After receiving a right-to-sue letter from the ICRC, McMicheal amended his petition to add the allegation of age discrimination.

The Union also filed a grievance regarding McMicheal's termination. The grievance proceeded to arbitration.[3] The arbitrator's jurisdiction was limited to interpretation of the collective bargaining agreement (CBA) and to application of its provisions to the grievance under consideration. The issue presented for resolution, as articulated by the arbitrator in her decision, was "[w]hether [McMicheal] was discharged for just cause and, if not, what is the appropriate remedy."

The Union did not litigate McMicheal's retaliatory discharge claim or offer evidence that he was fired because he engaged in activities protected by Iowa

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[3] McMicheal was not a party to the arbitration proceeding between the Union and MidAmerican. He did not have an attorney to represent his personal interests, which may have differed from those of the union.

public policies and workers' compensation law. Although a former MidAmerican manager was present at the arbitration hearing, the Union did not call him to testify that other servicemen were allowed to go home when their orders were completed, which may have supported McMicheal's current argument of disparate treatment.[4]

Article V, section 1.1 of the CBA provides in part that an employee may grieve and if necessary arbitrate, "any dispute concerning the interpretation or application of the alleged breach of the provisions of this Agreement." Article IV, section 1.1 of the CBA also provides: "The Company and the Unions will not discriminate against any employee because of race, sex, national origin, age, religion, sexual orientation, disability or veteran status, in accordance with applicable state and federal laws."

On February 14, 2011, the arbitrator issued a written award denying the Union's grievance and concluding that MidAmerican had "just cause" as defined in the collective bargaining agreement to terminate McMicheal. The arbitrator concluded that McMicheal's actions in submitting falsified time sheets during times that he was at home rather than on the job constituted "deliberate dishonesty." Neither party appealed the award, which was confirmed by the district court on August 29, 2011.

In this action, MidAmerican filed a motion for summary judgment of McMicheal's claims, arguing that the arbitration decision precluded McMicheal

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[4] Presenting such evidence would not have been in the interest of the Union as a whole. Later, after McMicheal advanced the argument of disparate treatment in his retaliation claim, MidAmerican conducted an investigation of other servicemen which led to two additional terminations and a retirement.

from litigating his retaliatory discharge and age discrimination claims in district court. The district court concurred with respect to the retaliatory discharge claim, finding *Woodruff v. Associated Grocers of Iowa, Inc.*, 364 N.W.2d 215 (Iowa 1985) dispositive. Summary judgment was denied on the age discrimination claim. McMicheal subsequently filed an interlocutory appeal, which was denied. McMicheal then voluntarily dismissed his age discrimination claim, rendering the district court ruling a final judgment subject to appeal.

II. Standard of Review.

We review the district court's ruling on summary judgment for correction of errors at law. *Mueller v. Wellmark, Inc.*, 818 N.W.2d 244, 253 (Iowa 2012). Summary judgment is proper if, when evidence is viewed in the light most favorable to the non-moving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

III. Discussion.

A. Res judicata—claim preclusion.

The doctrine of res judicata encompasses both claim and issue preclusion. *Pavone v. Kirke*, 807 N.W.2d 828, 835 (Iowa 2011). Claim preclusion bars further litigation after a valid and final judgment to prevent claims from being tried "piecemeal." *Id.* at 835-36. Claim preclusion may prevent subsequent litigation on matters the parties did not litigate in the first claim. *Id.* at 835. However,

> [t]o establish claim preclusion a party must show: (1) the parties in the first and second action are the same parties or parties in privity, (2) there was a final judgment on the merits in the first action, and (3) the claim in the second suit could have been fully and fairly

> adjudicated in the prior case (i.e., both suits involve the same cause of action).

Id. at 836. Absence of any element is fatal to a claim preclusion defense. *Id.*

McMicheal contends he was not a party to the arbitration, was not represented by his own counsel, and had no authority to control the issues raised or evidence presented in the proceeding. MidAmerican argues *Woodruff* created an exception to the identity requirement by finding that a union's representation of an employee's interests satisfies that element of the claim preclusion analysis. However, we find this to be an overstatement of the *Woodruff* case. There was no discussion in the *Woodruff* decision of whether the identity-of-the-parties element was satisfied by the union's representation of the plaintiff.

Even if McMicheal was considered a party in privity with the Union to satisfy the party identity element, his retaliation claim was not adjudicated on the merits in the arbitration proceeding. Article V, section 1.1 of the CBA provides that the grievance procedure applies "to any dispute concerning the interpretation or application of the alleged breach of the provisions of this Agreement." Accordingly, the jurisdiction of the arbitrator was limited to her interpretation of the CBA and application of its provisions to the grievance presented by the Union. McMicheal's current claim is a common law tort claim not identified as within the scope of the CBA. Thus, his retaliation claim could not have been fully and fairly adjudicated in the arbitration. We conclude MidAmerican's defense of claim preclusion must fail.

B. Res judicata—issue preclusion.

Issue preclusion is a form of res judicata intended to prevent litigants from suffering the "vexation of relitigating identical issues with identical parties or those persons with a significant connected interest to the prior litigation . . . ." *Employers Mut. Cas. Co. v. Van Haaften*, 815 N.W.2d 17, 22 (Iowa 2012). A party asserting issue preclusion must establish four elements:

> "(1) the issue in the present case must be identical, (2) the issue must have been raised and litigated in the prior action, (3) the issue must have been material and relevant to the disposition of the prior case, and (4) the determination of the issue in the prior action must have been essential to the resulting judgment."

Id. (quoting *Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 104 (Iowa 2011)). MidAmerican's defense of issue preclusion fails on each element.

The issues are not identical. The issues decided in arbitration must be identical to the issues presented in the pending action for issue preclusion to apply. *Westegard v. Davis Cnty. Cmty. Sch. Dist.*, 580 N.W.2d 726, 728 (Iowa 1998). The arbitrator determined whether or not MidAmerican had just cause to terminate McMicheal under the CBA. The issue now before the court is whether McMicheal's injury and application for workers' compensation benefits were determining factors in MidAmerican's decision to fire him. To prove retaliatory discharge, McMicheal must prove that his claim for workers' compensation benefits was the determining factor, or "tip[ped] the scales decisively one way or the other" in MidAmerican's decision to terminate his employment. *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682, 686 (Iowa 1990) (concluding that

filing a workers' compensation benefits claim need not be the main reason behind the decision to terminate, just a determinative factor that tips the scales).

McMicheal's retaliation claim was not raised or litigated in the prior proceeding. The arbitrator determined MidAmerican had just cause as defined in the CBA. However, her ruling did not consider whether the evidence establishing just cause was the actual motivation for McMicheal's termination, whether the alleged reason for termination was a pretext for retaliatory motives, or whether the workers' compensation claim was the determinative factor in MidAmerican's decision to terminate McMicheal. In fact, whether MidAmerican engaged in illegal retaliation was not material or relevant to whether it had just cause to fire McMicheal under the CBA. "[J]udgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action." Restatement (First) of Judgments § 68 (1942). Thus, res judicata principles do not bar McMicheal's claim.

C. Woodruff.

MidAmerican asserts, and the district court agreed, that the *Woodruff* decision is dispositive of McMicheal's claim. We find *Woodruff* is not binding precedent upon our facts. Our supreme court has observed:

> It is true that the rule of stare decisis does not make a finding of facts in one case a binding precedent in another case between other litigants, because the finding of facts is always dependent upon the particular evidence in the particular case. The rule of stare decisis does make the pronouncement of the law, and that only, a binding precedent until overruled in all future cases to which it is fairly applicable. Whether it be applicable in a particular case

> may be dependent upon the facts as found under the evidence in *that* case.

Coulthard v. McFerrin, 190 N.W.940, 941 (Iowa 1922).

The facts presented in *Woodruff* are similar to the case at bar.[5] In both cases, jurisdiction of the arbitrator was limited to interpretation and application of the provisions of the CBA. However, it is unclear whether the CBA at issue in *Woodruff* contained provisions controlling resolution of a dispute over allegations of retaliatory discharge. Here, there were no provisions in the CBA between the Union and MidAmerican which related to or prohibited the discharge of employees in violation of the public policy of the State. The CBA covers the subject of discrimination due to disability, but not discrimination for filing a workers' compensation claim.

The *Woodruff* Court held that an arbitration award is res judicata when a party challenges the arbitration award "because of some evidence that existed but the party did not bring before the arbitrator," citing policy in support of "quick resolution and final results." 364 N.W.2d at 217. Unlike the plaintiff in *Woodruff*, McMicheal does not challenge the arbitrator's finding on the question of just

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[5] The plaintiff was fired and his union arbitrated whether or not he was terminated for "just cause" due to dishonesty. The plaintiff subsequently filed a petition challenging the arbitration decision and claiming wrongful discharge in retaliation for whistle-blowing. During the arbitration, the union did not present evidence suggesting Woodruff had been fired in retaliation for whistle-blowing rather than for misconduct. The Plaintiff argued the issue of whistle-blowing was not before the arbitrator and was thus not res judicata on that issue. The court disagreed, stating: "If we permitted a party who has arbitrated a dispute to challenge the result because of some evidence that existed but the party did not bring before the arbitrator, we would erode the policy of quick resolution and final results." *Woodruff*, 364 N.W.2d at 217.

cause. Instead, he seeks only to have a different issue resolved in district court, an issue outside the scope of the arbitrator's subject matter jurisdiction.

A claim of retaliatory discharge under state law requires a "purely factual" inquiry into both the "conduct of the employee and the conduct and motivation of the employer." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988) (finding application of an employee's state tort remedy was not preempted by the Labor Management Relations Act because interpretation of the collective bargaining agreement was not required). Such an inquiry "does not turn on the meaning of any provisions of a collective-bargaining agreement." *Id.* Because McMicheal's state law claim can be resolved without interpreting the CBA, it is independent of the agreement. *See id.* Moreover, because his retaliation claim cannot be resolved solely by interpreting and applying the provisions of the CBA, it could not have been reviewed and adjudicated by the arbitrator.

In *Woodruff*, the court focused on the validity of the arbitration decision. There is no suggestion that the court performed either issue or claim preclusion analysis, nor did it consider the factors later outlined in *Lingle*. *Woodruff* is not dispositive of the case at bar because it does not address the precise issue before our court. *Westegard*, 580 N.W.2d at 728 (concluding that a prerequisite for issue preclusion is that the issue must be precisely the same issue presented in the earlier action). The reasons supporting the arbitrator's just cause finding may have been the predominant factor in MidAmerican's decision to terminate McMicheal, but that is not the precise issue raised here—whether McMicheal's

filing of a workers' compensation claim was a determinative factor or "tipped the scales" in MidAmerican's decision to terminate McMicheal.

Iowa's public policy favoring arbitration is not implicated, as McMicheal's claim for retaliatory discharge has never been arbitrated. In fact, his claim could not have been arbitrated because it fell outside the scope of the CBA, and thus, outside the scope of the arbitrator's jurisdiction.

IV. Conclusion.

McMicheal's retaliatory discharge claim is not barred by res judicata as a result of the arbitration award finding just cause for termination. Resolution of the claim does not require interpretation of any provision of the CBA. *Woodruff* is not binding precedent upon us because McMicheals's claim is dependent upon the specific facts of this action. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.