

STATE OF MICHIGAN
COURT OF APPEALS

PAUL COUSINO,

Plaintiff-Appellant,

v

BOARD OF EDUCATION OF THE UTICA
COMMUNITY SCHOOLS, UTICA
COMMUNITY SCHOOLS, and UTICA
COMMUNITY SCHOOLS SCHOOL DISTRICT,

Defendants-Appellees.

UNPUBLISHED

January 12, 2001

No. 216770

Macomb Circuit Court

LC No. 98-002133-CL

Before: McDonald, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

On December 11, 1998 the Macomb Circuit Court issued an order granting summary disposition to defendants Board of Education of the Utica Community Schools, Utica Community Schools, and Utica Community Schools School District. Plaintiff Paul Cousino had sued defendants for violating the Michigan Persons With Disabilities Civil Rights Act, MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*, and Michigan public policy by wrongfully discharging plaintiff from his tenured teaching position. Plaintiff appeals as of right. We affirm.

I

Plaintiff contends that the trial court erred in finding that the State Tenure Commission decision was binding on the trial court. We disagree.

Plaintiff argues that *Porter v Royal Oak*, 214 Mich App 478; 542 NW2d 905 (1995), which holds that collateral estoppel bars reconsideration of factual issues determined by a prior grievance or arbitration hearing, should not apply to bar his civil rights claim. Plaintiff contends that the plain language of *Porter* states only that it applies to grievance and arbitration hearings and is therefore inapplicable in this case because it does not specifically state that it also applies to tenure commission hearings.

In *Porter*, we said that relitigation is precluded when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding. *Porter, supra* at 485. Although *Porter* specifically extended this rule to grievance

and arbitration hearings, collateral estoppel is applicable to any adjudicatory administrative hearing, provided certain criteria are met:

It is established law in this state that the doctrines of res judicata and collateral estoppel apply to administrative determinations which are adjudicatory in nature, where a method of appeal is provided, and where it is clear that it was the legislative intention to make the determination final in the absence of an appeal. [*Senior Accountants v Detroit*, 399 Mich 449, 457-458; 249 NW2d 121 (1976) (citations omitted).]

The commission hearing was adjudicatory, provided for an appeal, and was intended by the Legislature to be final unless a successful appeal was filed. Therefore, collateral estoppel applies in this case, barring further consideration of the commission's decision.

Plaintiff also claims that collateral estoppel should not apply because he did not have an opportunity to fully litigate all of his claims at the earlier proceeding. We disagree.

Collateral estoppel bars the relitigation of issues previously decided when such issues are raised in a subsequent suit by the same parties based on a different cause of action. In order for collateral estoppel to apply, the same ultimate issues underlying the first action must be involved in the second action, and the parties must have had a full opportunity to litigate the ultimate issues in the first action. [*VanDeventer v Michigan Nat'l Bank*, 172 Mich App 456, 463; 432 NW2d 338 (1988) (citation omitted).]

The issue involved in the Tenure Commission action was whether plaintiff was qualified to teach. It was determined that he was not. To be successful in a person with disabilities action, plaintiff must establish that he is able to perform the particular job. MCL 37.1103(b)(i); MSA 3.55(b)(i)¹; *Rollert v Dep't of Civil Service*, 228 Mich App 534, 537; 579 NW2d 118 (1998). Plaintiff's ability to teach is the factual issue on which both his original claim and his current appeal are based. Therefore, the same issue underlies both actions, and plaintiff had the opportunity in the Tenure Commission to fully litigate the issue.

Summary disposition of all or part of a claim or defense may be granted when,

[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. [MCR 2.116(C)(10).]

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Id.* The commission's decision settled the factual issues in favor of defendants; therefore,

¹ Currently MCL 37.1103(d)(i); MSA 3.55(d)(i).

the trial court's grant of defendants' motion for summary disposition, based on its determination that plaintiff's claim was not factually supported, was not erroneous.

II

Plaintiff contends that the trial court erred by ruling that the Whistle-Blowers' Protection Act's ninety-day statute of limitations barred his retaliatory discharge claim from further consideration, and granted summary disposition for defendants. We disagree.

Summary disposition may be granted where a claim is barred because of the expiration of a statute of limitations before commencement of the action. MCR 2.116(C)(7). A claim under the Whistleblowers' Protection Act must be brought within ninety days of the alleged misconduct. MCL 15.363; MSA 17.428(3). Plaintiff was terminated by order of the hearing referee on January 2, 1996. Plaintiff filed his Whistleblowers' Protection Act claim on May 18, 1998. We find that the trial court was correct in dismissing plaintiff's retaliatory discharge claim because the ninety-day statute of limitations had long since expired.

Affirmed.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald