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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-813**

Roger J. Day, M. D.,
Appellant,

vs.

State of Minnesota, et al.,
Respondents.

**Filed February 15, 2011
Affirmed
Shumaker, Judge**

Ramsey County District Court
File No. 62-CV-09-9604

Roger J. Day, M.D., Circle Pines, Minnesota (pro se appellant)

Lori Swanson, Attorney General, Thomas C. Vasaly, Assistant Attorney General, St. Paul, Minnesota (for respondents)

Considered and decided by Worke, Presiding Judge; Peterson, Judge; and Shumaker, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

Appellant, a physician whose license to practice was restricted by the medical licensing authority, challenges the district court's dismissal of his claims that the licensing authority unlawfully discriminated against him, committed certain torts, and engaged in other improprieties. We affirm.

FACTS

During his psychiatric residency in 1991, appellant Roger J. Day, a licensed Minnesota physician, was found guilty by a jury of criminal sexual conduct in the fourth degree, resulting from sexual contact he had with a patient as part of an alleged psychotherapeutic modality. That incident led respondent Minnesota Board of Medical Practice, the state licensing authority, to restrict Dr. Day's license and to limit his medical practice.

Although Dr. Day has never been precluded from practicing his specialty, subject to limitations, he has chosen not to do so since the board's action in 1992, and instead he has repeatedly challenged that action on many legal theories and in various forums, as highlighted below.

In his 2009 pro se lawsuit against the board and respondent State of Minnesota, from which this appeal is taken, Dr. Day sought the district court's declaratory judgment determining that the board had engaged in unlawful discrimination and reprisals in violation of the Minnesota Human Rights Act (MHRA) and the Americans With Disabilities Act (ADA); had intentionally and negligently inflicted emotional distress upon him; had defamed him; and had violated the Minnesota Government Data Practices Act (MGDPA) by falsifying information about him. Dr. Day also requested injunctive relief and money damages. The district court granted respondents' motion to dismiss all claims, ruling that Dr. Day's ADA claim is barred by res judicata; his claims of MHRA violations, defamation, and intentional infliction of emotional distress are barred by statutes of limitations; his claim of negligent infliction of emotional distress is not

actionable because respondents enjoy statutory and vicarious official immunity, and that Dr. Day cannot satisfy the essential elements of that claim; and he has failed to state a claim under the MGDPA.

After Dr. Day's felony conviction, the board ordered that his medical license was to be indefinitely restricted, subject to unconditional reinstatement upon Dr. Day's petition, a hearing thereon, and his showing that he has been rehabilitated. This order triggered an administrative contested-case proceeding during which Dr. Day and respondents stipulated to an order restricting Dr. Day's license in settlement of the case. Although Dr. Day contends that he objected to the terms of the stipulation and order and that he entered the stipulation under duress, he was represented by counsel and, relying on counsel's legal advice, chose to settle the matter.

Between the entry of the board's order in 1992 and 2007, Dr. Day attempted several times to have the board remove the restrictions on his license, to no avail. The salient facts during that period are set forth in the order in Dr. Day's federal lawsuit against respondents, and we adopt those facts and incorporate them in our decision. *Day v. Minnesota*, No. 05-2675, 2007 WL 4321999 (D. Minn. Dec. 6, 2007).

In 2005, the board found that, although some of Dr. Day's evaluators believed that he was no longer at risk for sexual misconduct, he continued to suffer from mental conditions that "will prevent him from practicing medicine with reasonable skill and safety," and, therefore, the restrictions on his license were to remain. Having received information in 2008 that Dr. Day had indicated that he would not comply with the 2005 order, the board scheduled a hearing on the issue. Dr. Day responded to the board's

requests for admissions by affirming that he did not intend to practice medicine in violation of the 2005 order, and the board withdrew its notice of hearing. Dr. Day objected to the withdrawal of the notice without some form of process, and he moved to reopen the contested-case proceeding. An administrative law judge denied his motion and, in response, Dr. Day then filed a complaint with the Minnesota Department of Human Rights (MDHR). The department dismissed the complaint on the ground that it was “time-barred,” noting that “[Dr. Day] elected to pursue his human rights claim through the court system,” and that, by doing so, he failed to file his MHRA complaint within the requisite time period. This lawsuit and appeal followed.

D E C I S I O N

Respondents moved to dismiss Dr. Day’s complaint for failure to state a claim under Minn. R. Civ. P. 12.02(e), or, in the alternative, for summary judgment. Rule 12(e) provides, in part, that

[i]f, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.

Minn. R. Civ. P. 12.02. It appears that materials outside the pleadings were presented to and not excluded by the district court when it granted respondents’ motion. Thus, our standard of review is that applicable to an appeal from summary judgment. Namely, we are to ascertain whether there exists a genuine issue of material fact and whether a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56; *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

We have carefully reviewed the record on appeal, and we conclude that neither party has indentified any material facts that have not been previously litigated and finally determined in one proceeding or another. Nor has Dr. Day shown any reason or authority that the previously determined facts are not binding upon him in this action. Thus, there are no genuine fact issues for trial, and the only question presented on appeal is whether respondents are entitled to judgment of dismissal as a matter of law on each of the legal theories Dr. Day has asserted.

Time-Barred Claims

A claim of unlawful discrimination under the MHRA must be brought as an administrative charge with the MDHR or as a civil lawsuit within one year of the alleged discriminatory conduct. Minn. Stat. § 363A.28, subd. 3 (2010). The alleged discriminatory conduct here occurred with the board's 2005 order. Dr. Day started this lawsuit in 2009. The district court properly dismissed this claim as time-barred. Although the district court suggested that the board's denial in 2007 of Dr. Day's petition for reinstatement of an unconditional license and his 2008 motion to reopen the contested-case proceeding might also be dates of the occurrence of discriminatory conduct, we disagree. The board's 2007 action, which is still beyond the one-year limitation period, simply reaffirmed the existing 2005 order. And Dr. Day's 2008 motion reached back to 1992, when the contested case was settled. Moreover, Dr. Day has not shown authority for the proposition that a person allegedly subjected to an act of unlawful discrimination can extend the statute of limitations by continuing to challenge that act in various differing procedural postures beyond the expiration of the limitations period.

The district court also dismissed Dr. Day's claim of intentional infliction of emotional distress on the ground that it was brought beyond the two-year limitation period for such claims. Minn. Stat. § 541.07(1) (2010). The claim relates to the board's action in its 2005 order. Dr. Day asserted his claim in this lawsuit in 2009. The district court correctly dismissed the claim as time-barred.

Dr. Day alleged that the board defamed him through its 2005 order. The district court ruled that this claim was time-barred because it was made in 2009, outside the two-year limitation period for such claims. *Id.* The district court's ruling was correct.

Claim Barred by Res Judicata

The district court ruled that Dr. Day's disability discrimination claim under the ADA is barred by res judicata.

Under the doctrine of res judicata, a judgment on the merits of a lawsuit is an absolute bar to the relitigation of the claims in that matter in successive lawsuits or proceedings. *Dorso Trailer Sales, Inc. v. Am. Body & Trailer, Inc.*, 482 N.W.2d 771, 773-74 (Minn. 1992). The test for determining whether successive lawsuits involve the same claims is the ascertainment of whether the actions arise from the "same operative nucleus of facts." *Nitz v. Nitz*, 456 N.W.2d 450, 451 (Minn. App. 1990).

Dr. Day alleged in this lawsuit that the board illegally discriminated against him because of a disability for which he receives state and federal benefits. This is precisely the claim he made in his federal lawsuit. *Day*, 2007 WL 4321999, at *5. He is not entitled to relitigate that claim. The district court properly dismissed the ADA claim.

Failure of Claim of Negligent Infliction of Emotional Distress

Dr. Day contends that the board's continual denial of his effort to obtain the reinstatement of his unconditional medical license amounts to negligent infliction of emotional distress, a tort that is a species of negligence. The elements of this tort include the four elements of a negligence claim, along with three additional elements. Dr. Day must show that he "(1) was within the zone of danger of physical impact [created by the board's negligence]; (2) reasonably feared for [his] own safety; and (3) suffered severe emotional distress with attendant physical manifestations." *K.A.C. v. Benson*, 527 N.W.2d 553, 557 (Minn. 1995).

The board, as the state medical licensing authority, is charged with protecting the public from the acts of physicians who cannot practice medicine safely. Minn. Stat. § 147.001 (2010). Accordingly, the board is vested with the authority to limit the license of a physician who cannot "practice medicine with reasonable skill and safety to patients by reason of . . . mental . . . condition." *Id.*; Minn. Stat. § 147.091, subd. 1(1) (2010). Although any action by the board to restrict a physician's license to practice might well cause the physician to experience emotional distress, Dr. Day has not shown how acting in accordance with its statutory duty the board could be said to have been negligent in restricting the license of a physician who, by his own admission, suffers from a mental impairment. Under no factual scenario demonstrated in or inferred from the record could Dr. Day make out a claim of negligent infliction of emotional distress. The district court properly dismissed this claim.

Improper Data Practices Claim

The district court held that the MGDPA does not create a claim for contesting the accuracy of governmental data through a district court action. We agree, and Dr. Day has not demonstrated otherwise. Thus, the district court properly dismissed this claim.

Additional Bases for Dismissal

In its 2005 order, the board concluded that Dr. Day “has not been and is not presently suitable for safe return to unsupervised practice.” Dr. Day disputed that conclusion in 2005, and he reflects that dispute in his claim that the board has violated the MHRA through discrimination and reprisal. The district court held that Dr. Day is collaterally estopped from relitigating this issue. We agree.

Collateral estoppel, or issue preclusion, bars the relitigation of issues previously litigated and decided. *Falgren v. State Bd. of Teaching*, 545 N.W.2d 901, 905 (Minn. 1996). Collateral estoppel applies to administrative agency decisions if the agency has acted in a quasi-judicial capacity. *Graham v. Special Sch. Dist. No. 1*, 472 N.W.2d 114, 115-16 (Minn. 1991). Preclusive effect will be given to an agency decision if five factors are satisfied:

- 1) the issue to be precluded must be identical to the issue raised in the prior agency adjudication;
- 2) the issue must have been necessary to the agency adjudication and properly before the agency;
- 3) the agency determination must be a final adjudication subject to judicial review;
- 4) the estopped party was a party or in privity with a party to the prior agency determination; and
- 5) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Id.

All factors have been satisfied. The dispositive issue—whether Dr. Day can safely practice medicine without restriction—is the identical issue underlying the MHRA claim and most of his other claims. It was the precise issue that necessarily was determined in 2005; Dr. Day was a party to the proceeding and was given a full opportunity to participate in the proceeding and to present his case for restoration of his unconditional license; and the board’s determination was final, subject to appellate review.

As to Dr. Day’s ADA claim, the district court held that respondents have not waived immunity from suit under Title II of the ADA. Dr. Day has not shown otherwise, nor is there anything in the record from which we could infer that respondents have waived immunity. Furthermore, in *Day v. Minnesota*, the federal district court previously addressed the issue of the abrogation of state sovereign immunity respecting Title II ADA claims. *Day*, 2007 WL 4321999, at *20. We hold that respondents are entitled to immunity from suit premised on ADA violations under the facts of this case.

Although Dr. Day alleges other improprieties by the board in its decision to restrict his license, they all relate to the same dispositive facts and legal issues related to the matters specifically addressed above, and we find no merit in them.

Affirmed.