IN THE COURT OF APPEALS OF IOWA

No. 8-335 / 07-1495
Filed June 11, 2008

JEFFREY GEORGE,
Plaintiff-Appellant,

vs.

D.W. ZINSER COMPANY,
Defendant-Appellee.

Appeal from the Iowa District Court for Linn County, James H. Carter, Senior Judge.

Employee appeals from a district court ruling dismissing his petition that asserted claims of retaliatory discharge and unpaid wages against his former employer. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Matthew J. Reilly of White & Johnson, P.C., Cedar Rapids, for appellant.

Charles A. Blades of Scheldrup Blades Schrock Sand Aranza, P.C., Cedar Rapids, for appellee.

Considered by Miller, P.J., and Vaitheswaran and Eisenhauer, JJ.

MILLER, P.J.

Jeffrey George appeals from a district court ruling dismissing his petition that asserted claims of retaliatory discharge and unpaid wages against his former employer, D.W. Zinser Company. We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND FACTS AND PROCEEDINGS.

On January 18, 2007, George filed a complaint with the Iowa Division of Labor Services (Division), alleging his employer, D.W. Zinser, violated provisions of Iowa's Occupational Safety and Health Act (IOSHA), Iowa Code chapter 88 (2007). His complaint arose out of alleged violations he witnessed when performing lead abatement jobs for the company in September and October 2006. The Division investigated George's complaint and inspected the workplace between January 24 and 29. On February 8, 2007, the Division issued citations to D.W. Zinser for multiple violations of IOSHA.

In March 2007, George filed another complaint with the Division under Iowa Code section 88.9(3), claiming D.W. Zinser terminated his employment on January 25, 2007, in retaliation for notifying the Division of the company's violations of IOSHA. He also filed a petition in district court on March 12, 2007, against D.W. Zinser, which in separate counts alleged the same retaliatory discharge claim as well as a wage payment claim under section 91A.8.

A discrimination investigator for the Division investigated George's section 88.9(3) complaint and determined it should be dismissed. George appealed the dismissal. The investigator's decision was affirmed by the interim labor commissioner. The commissioner found that George, along with other

employees, was laid off from D.W. Zinser on January 12, 2007, before he filed a complaint with the Division regarding the company's violations of IOSHA, thus precluding his retaliatory discharge claim. George did not seek judicial review of the commissioner's decision.

After learning that George's complaint was dismissed by the Division, D.W. Zinser filed a motion to dismiss his petition in district court. In its brief in support of the motion, the company argued section 88.9(3) provides the exclusive remedy for pursuing retaliation claims under IOSHA. It additionally argued George failed to exhaust his administrative remedies, and the agency's denial of his claim precluded him from relitigating the issue in district court. George resisted the motion to dismiss and asserted it should be treated as a motion for summary judgment because it relied on matters outside of the pleadings. The district court agreed and considered the motion to dismiss as if it were a motion for summary judgment. The court concluded the "final adjudicatory decision of an administrative agency is entitled to res judicata effect as if it were the judgment of a court" and dismissed the petition.

George appeals. He claims the district court erred in concluding the doctrine of res judicata barred his retaliatory discharge and wage payment claims against D.W. Zinser.[1]

II. SCOPE AND STANDARDS OF REVIEW.

[1] George also claims the provisions of section 88.9(3) are not exclusive, and he may bring a private cause of action for retaliatory discharge in violation of that section. *See Kohrt v. MidAmerican Energy Co.*, 364 F.3d 894, 902 (8th Cir. 2004) (predicting our supreme court would conclude an employee could bring a common law cause of action premised on a violation of public policy as declared in sections 88.1 and 88.9(3)). Because our conclusion regarding the res judicata issue is determinative, we need not and do not address this claim.

The motion to dismiss in this case relied on matters outside the pleadings, which ordinarily may not be considered by a court in ruling a motion to dismiss for failure to state a claim upon which relief may be granted. *Turner v. Iowa State Bank & Trust Co.*, 743 N.W.2d 1, 4-5 (Iowa 2007) (declining to address a defense of res judicata raised in a motion to dismiss that relied on matters outside the pleadings). *But see Troester v. Sisters of Mercy Health Corp.*, 328 N.W.2d 308, 311 (Iowa 1982) (recognizing in "limited situation[s]," where a motion to dismiss relies on matters outside the pleadings, "the proper procedure is to treat the motion as one for summary judgment"). However, because the parties and the court treated the motion to dismiss as a motion for summary judgment, we do likewise. *See, e.g., Moore v. Vanderloo*, 386 N.W.2d 108, 111 (Iowa 1986) (treating, as the parties and the court did, a motion for summary judgment as a motion to dismiss); *see also Stotts v. Eveleth*, 688 N.W.2d 803, 812 (Iowa 2004) (treating a motion to dismiss as a motion for summary judgment to conserve judicial resources).

Appellate review of a ruling on a motion for summary judgment is for correction of errors at law. *Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673, 677 (Iowa 2004). Summary judgment is appropriate when there "is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3); *Smidt v. Porter*, 695 N.W.2d 9, 14 (Iowa 2005). The party moving for summary judgment has the burden to prove the facts are undisputed. *Estate of Harris*, 679 N.W.2d at 677. When a motion for summary judgment is made and properly supported, the opposing party may not rest upon the mere allegations or denials of his pleadings

but must set forth specific facts showing the existence of a genuine issue for trial. Iowa R. Civ. P. 1.981(5); *Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 299 (Iowa 1996). The court views the facts in a light most favorable to the nonmoving party. *Howell v. Merritt Co.*, 585 N.W.2d 278, 280 (Iowa 1998).

III. MERITS.

Res judicata is a generic term that includes the doctrines of claim preclusion and issue preclusion. *Bennett v. MC # 619, Inc.*, 586 N.W.2d 512, 516 (Iowa 1998). "When used in the sense of claim preclusion, res judicata means that further litigation on the claim is barred." *Id.* "When used in the sense of issue preclusion, res judicata means that further litigation on a specific issue is barred." *Id.* Although the district court did not specify which doctrine it relied on in dismissing George's petition, we believe the doctrine of claim preclusion applies to bar relitigation of the retaliatory discharge claim in this case.

The general rule of claim preclusion provides that "[a]n adjudication in a prior action between the same parties on the same claim is *final* as to all issues that could have been presented to the court for determination." *Id.* at 517. A second claim will likely be barred by claim preclusion where the acts complained of and the recovery demanded are the same or where the same evidence will support both actions. *Spiker v. Spiker*, 708 N.W.2d 347, 353 (Iowa 2006). A plaintiff is not entitled to a second day in court by alleging a new ground of recovery for the same wrong. *Id.* However, claim preclusion does not apply "unless the party against whom preclusion is asserted had a 'full and fair opportunity' to litigate the claim or issue in the first action." *Id.* (citation omitted).

The administrative proceedings and the district court proceedings involved the same parties and the same retaliatory discharge claim based on section 88.9(3), which provides, in relevant part, that "[a] person shall not discharge or in any manner discriminate against an employee because the employee has filed a complaint or instituted or caused to be instituted a proceeding under or related to this chapter. . . ." George argues, however, that claim preclusion does not apply to bar his retaliatory discharge claim in district court because he "did not have a full and fair opportunity to litigate the claim" due to deficiencies in the administrative process.[2] He asserts he was not afforded a hearing, and he was not able to engage in discovery, question witnesses, respond to evidence and arguments presented by D.W. Zinser, or present adequate evidence on his own behalf in those proceedings.

An adjudication by an administrative entity can have a preclusive effect in a judicial proceeding. *City of Johnston v. Christenson*, 718 N.W.2d 290, 298 (Iowa 2006); *see also* Restatement (Second) of Judgments § 83(1) (1982) ("[A] valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court."). For the administrative determination to have a preclusive effect in a judicial proceeding, the proceedings resulting in the

[2] George also argues there was not a valid and final judgment on his claim because the agency's decision dismissing his complaint was simply a decision to not pursue a claim in district court on his behalf. Section 88.9(3) states, "If, upon investigation, the commissioner determines that the provisions of this subsection have been violated, the commissioner shall bring an action in the appropriate district court against the person." Thus, the commissioner must determine whether section 88.9(3) was violated before it can decide whether to bring a claim in district court on the employee's behalf. *See also* Iowa Admin. r. 875-9.3(4). The commissioner dismissed George's complaint due to his determination that George did not establish a violation of section 88.9(3). We therefore reject this argument.

determination must have entailed essential elements of adjudication, including: (1) adequate notice to persons who are to be bound by the adjudication; (2) the right of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties; (3) a formulation of issues of law and fact in terms of the application of rules; (4) a rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered; and (5) such other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question. *Bennett*, 586 N.W.2d at 517 (citing Restatement (Second) of Judgments § 83(2)(a)-(e)). We believe the administrative proceedings in this case encompassed the above-listed essential elements of adjudication despite the deficiencies alleged by George.

Upon receipt of George's complaint alleging a violation of section 88.9(3), an investigator for the Division notified D.W. Zinser of the complaint and requested "a full and complete written account of the facts and a statement of [the company's] position." *See* Iowa Code § 88.9(3) (stating upon receipt of the complaint, the commissioner shall conduct an investigation to determine whether section 88.9(3) was violated). The investigator interviewed employees of D.W. Zinser and reviewed documents provided by the company. George also provided the investigator with a list of witnesses and recordings of voicemails and conversations he had with the president of the company. After completing its investigation, the Division notified the parties of its decision to dismiss the

complaint. *See id.* (requiring notification of complainant of commissioner's decision).

George appealed, and his complaint was reviewed by the commissioner. The commissioner's decision affirming the investigator's dismissal set forth the issue presented by George's complaint, the relevant facts discovered during the investigation, and the applicable standard under the administrative rules to determine whether section 88.9(3) was violated. *See, e.g.,* Iowa Admin. r. 875-9.4. That decision conclusively determined that George did not establish he was discharged in retaliation for reporting unsafe working conditions to the Division. As previously noted, George did not seek judicial review of the agency's decision.

In light of the foregoing, we conclude that all of the elements of adjudicatory procedure described in subsection (2)(b)-(e) of section 83 of the Restatement (Second) of Judgments were available in the proceedings before the Division to determine whether George was discharged in violation of section 88.9(3). *See Bennett*, 586 N.W.2d at 519. The Division was "deciding issues through a procedure substantially similar to those employed by courts and was thus engaged in adjudication." *Id.* Because George did not seek judicial review, the commissioner's decision became final. *Id.* We therefore conclude he did have a full and fair opportunity to litigate the retaliatory discharge claim in the administrative proceedings in this case. The decision the commissioner reached on George's retaliatory discharge claim was accordingly conclusive and binding under the principles of res judicata. *Id.* Thus, the district court was correct in dismissing the retaliatory discharge claim.

However, we do not believe the principles of res judicata barred George's section 91A.8 unpaid wages claim. In addition to the retaliatory discharge claim, in a separate count George's district court petition alleged that D.W. Zinser failed to pay him wages in violation of the Iowa Wage Payment Collection Law, chapter 91A. D.W. Zinser did not assert any basis for dismissal of this claim in its motion or supporting documents urging dismissal of George's petition. Nor did D.W. Zinser advance any argument on appeal in support of the court's dismissal of the unpaid wages claim. We conclude that D.W. Zinser did not establish that either claim preclusion or issue preclusion is applicable to the unpaid wages claim.[3]

The issue before the Division in the administrative proceedings was limited to whether George was discharged in violation of section 88.9(3). George did not raise the issue of unpaid wages in those proceedings. *See Grant v. Iowa Dep't of Human Servs.*, 722 N.W.2d 169, 174 (Iowa 2006) (stating in order for issue preclusion to apply "the issue must have been raised and litigated in the

[3] Despite his contrary position in district court, George suggests that we should review the court's ruling on the wage payment issue under the standard of review for a motion to dismiss. We note we would reach the same conclusion regardless of whether we review the court's ruling under the standard for a motion to dismiss or the standard for a motion for summary judgment.

If we review the motion as a motion to dismiss, our review is limited to the well-pled facts of the petition. *Turner*, 743 N.W.2d at 3. Viewing those facts in the light most favorable to George, we cannot conclude the petition reveals no right of recovery under any state of facts as to the unpaid wages claim. *Rees v. City of Shenandoah*, 682 N.W.2d 77, 79 (Iowa 2004) (noting under notice pleading, nearly every case will survive a motion to dismiss). The petition does not contain any of the necessary facts or documents to support D.W. Zinser's position that the wage payment claim is barred by the doctrine of res judicata. *See Turner*, 743 N.W.2d at 4-5.

If we review the motion as a motion for summary judgment, we conclude D.W. Zinser did not meet its burden to show there is no genuine issue of material fact and that it is entitled to judgment as a matter of law on its res judicata defense to George's unpaid wages claim given the motion's silence as to that claim. *See Moser v. Black Hawk County*, 300 N.W.2d 150, 151 (Iowa 1981) ("The movant has the burden to show there is no genuine issue as to any material fact and that he or she is entitled to judgment on the merits as a matter of law.").

prior action"). Nor do we believe he could have raised the section 91A.8 unpaid wages claim in the section 88.9(3) proceedings before the Division. *See Spiker*, 708 N.W.2d at 353 ("The rule [of claim preclusion] applies not only as to every matter which was offered and received to sustain or defeat the claim or demand, *but also as to any other admissible matter which could have been offered for that purpose.*").

In considering complaints filed under section 88.9(3), the labor commissioner is limited to determining whether a violation of that subsection, which prohibits discharge or discrimination against an employee who exercises rights afforded to him under IOSHA, occurred. Complaints filed under chapter 91A for failure to pay wages, on the other hand, require the commissioner to consider "whether wages have not been paid [by an employer] and may constitute an enforceable claim." Iowa Code § 91A.10(1). Chapter 91A provides its own mechanism for enforcement of its provisions regarding payment of wages to an employee. *See* Iowa Code §§ 91A.8, .10. We therefore conclude the district court erred in finding the doctrine of res judicata precluded George's section 91A.8 unpaid wages claim.

IV. CONCLUSION.

We conclude the district court was correct in dismissing the retaliatory discharge claim under the principles of res judicata. However, we do not believe that doctrine barred George's section 91A.8 unpaid wages claim. We accordingly reverse the court's ruling dismissing the unpaid wages claim and remand for further proceedings. We affirm the remainder of the court's ruling.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.