

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UNPUBLISHED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.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting summary disposition to defendant. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff worked for defendant as an assistant project manager. He sought leave pursuant to the Family and Medical Leave Act (FMLA), 29 USC 2601 *et seq.*, in order to undergo elective surgery in hopes of ameliorating his epilepsy. Defendant deemed plaintiff eligible for such leave, and indicated that he would be reinstated after taking it. However, shortly after plaintiff returned to work, he was terminated, ostensibly for legitimate business reasons.

Plaintiff filed suit under the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.*, and then added a claim under the FMLA. Defendant removed the case to federal district court, which dismissed the federal claim on the grounds that (1) plaintiff was not an eligible employee for purposes of the FMLA,¹ and (2) plaintiff had failed to show that defendant's stated business reasons for the dismissal were mere pretext. *Dobrowski v Jay Dee Contractors, Inc.*, Civil No. 07-13267 (ED Mich, June 3, 2008). Specifically, the district court concluded, "Defendant would not have retained Plaintiff if he had not taken medical leave," and, "Even if Plaintiff established his status as an eligible employee, he could not establish a causal

¹ See 29 USC 2611(2)(B)(ii) (excepting from the definition of "eligible employee" one "who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50").

connection between his FMLA leave and being laid off.” The court expressly declined to decide the PWDCRA claim, and remanded this case to the circuit court.

On remand, the trial court expressed disagreement with the federal court’s conclusion that plaintiff could not adequately show that the legitimate business reasons defendant put forward for terminating him were mere pretext, but deferred to that court’s determination nonetheless, citing the doctrine of collateral estoppel. Because an element of the PWDCRA claim was thus defeated, the trial court granted summary disposition in an order dated September 9, 2008.

The Sixth Circuit Court of Appeals affirmed the federal case on the ground that plaintiff was not an eligible employee for purposes of the FMLA, but expressly declined to reach the district court’s alternative basis for granting summary judgment. *Dobrowski v Jay Dee Contractors, Inc*, 571 F3d 551, 554 (CA 6, 2009). The district court’s conclusion that plaintiff could not prove that defendant’s putative business reasons for terminating plaintiff were pretext thus stands undisturbed.

Plaintiff presents authority for the proposition that, where a federal court expressly declines to exercise jurisdiction over a state claim, res judicata does not prevent adjudication of the state claim. However, the doctrine at work in this instance is collateral estoppel. Res judicata bars relitigation of claims or defenses that were, or could have been, raised in earlier litigation. See *Wayne Co v Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998). Collateral estoppel bars relitigation of an issue that was in fact decided in earlier litigation. See *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006).

This Court has adopted a position of cooperation with determinations from federal courts. In *VanVorous v Burmeister*, 262 Mich App 467, 473; 687 NW2d 132 (2004), the plaintiff brought a suit in federal district court claiming her son’s Fourth Amendment right to be free from excessive force was violated. When the district court dismissed the plaintiff’s claim, it concluded that the defendants’ conduct was reasonable or, at the very least, the result of a reasonable mistake. *Id.* at 482. When the plaintiff later filed a suit in Michigan claiming intentional infliction of emotional distress, this Court noted her burden to show the defendants’ conduct was extreme and outrageous. *Id.* Because the conduct element of the plaintiff’s intentional infliction of emotional distress claim, namely objective reasonableness, was “based on the identical question of fact litigated in the district court,” this Court concluded that collateral estoppel barred that intentional infliction of emotional distress claim. *Id.*; see also *Stamp v City of Flint*, unpublished opinion per curiam of the Court of Appeals, issued February 12, 2009 (Docket No. 208459).

Michigan courts have applied preclusion broadly in other contexts. In *Beyer v Verizon N, Inc*, 270 Mich App 424, 435-436; 715 NW2d 328 (2006), the Court recognized that preclusion doctrines operate in connection with state litigation following decisions in federal court.

In this case, the trial court did not declare that the whole PWDCRA claim was precluded by the adjudication of the FMLA claim, but instead determined that an issue decided in the federal claim was fatal to the state claim. The trial court correctly recognized that it was applying the doctrine of collateral estoppel. The trial court likewise correctly recognized that

preclusion doctrines operate in connection with state litigation following decisions in federal court. *Beyer, supra* at 428-429.

The applicability of collateral estoppel is a question of law, calling for review de novo. *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996). “Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding.” *Leahy, supra* at 530, citing 1 Restatement Judgments, 2d, § 27, p 250.

“To be necessarily determined in the first action, the issue must have been essential to the resulting judgment; a finding upon which the judgment did not depend cannot support collateral estoppel.” *Bd of Co Comm’rs v Schultz*, 205 Mich App 371, 377; 521 NW2d 847 (1994). For the purposes of collateral estoppel, the question arises whether an alternate, but independently sufficient, basis for a judgment is deemed necessary to a decision. In this case, the federal district court dismissed plaintiff’s claims on the alternative bases that he was not an eligible employee for purposes of FMLA and he failed to demonstrate that defendant’s legitimate business reason for termination was mere pretext. The federal courts are divided regarding preclusion in this situation. See *Jean Alexander Cosmetics, Inc v L’Oreal USA, Inc*, 458 F3d 244 (CA 3, 2006).

According to 1 Restatement Judgments, § 68, comment n, courts should extend preclusion to each alternative basis:

Where the judgment is based upon the matters litigated as alternative grounds, the judgment is determinative on both grounds, although either alone would have been sufficient to support the judgment. [*Jean Alexander, supra* at 251.]

The Second, Third, Seventh, Ninth, and Eleventh Circuits extend preclusion to alternate, but independently sufficient, bases for a judgment. *Gelb v Royal Globe Ins Co*, 798 F2d 38, 45 (CA 2, 1986); *Jean Alexander, supra*; *Magnus Elecs, Inc v La Republica Argentina*, 830 F2d 1396, 1402 (CA 7, 1987); *In re Westgate-California Corp*, 642 F2d 1174, 1176-1177 (CA 9, 1981); *DeWeese v Town of Palm Beach*, 688 F2d 731, 734 (CA 11, 1982).

Extending preclusion to alternative bases furthers the purposes of collateral estoppel by promoting judicial economy by preventing previously litigated issues from being relitigated. The Third Circuit noted, “Courts routinely decide cases on multiple grounds . . . it would be curious to conclude that none of these findings were necessary to the judgment for purposes of collateral estoppel.” *Jean Alexander, supra* at 253.

Opponents to extending preclusion to each alternative basis argue that an alternative basis may not have been as carefully or rigorously considered as it would have had it been necessary to the result. *Jean Alexander, supra* at 253. However, the Third Circuit rejected this argument. *Id.* It stated independently sufficient findings are not incidental or immaterial. It further stated, “it is reasonable to expect that such a finding is the product of careful judicial reasoning.” *Id.* In addition, the Third Circuit noted that the requirement that a finding be “actually litigated” assures that the finding would have been addressed by the parties and carefully deliberated by the court. *Id.* at 254.

According to 2 Restatement, Judgments, § 27, comment i, courts should not extend preclusion to either alternative holding because such holdings are, “by definition, [n]ot ‘necessary’ to a judgment:”

[I]f 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.

The Tenth and Fifth Circuits refuse to extend preclusion to alternative holdings. *Turney v O’Toole*, 898 F2d 1470, 1472 n 1 (CA 10, 1990); *Hicks v Quaker Oats Co*, 662 F2d 11158, 1168 (CA 5, 1981).

The Fourth Circuit generally declines to apply collateral estoppel to alternative findings of a prior court. *Tuttle v Arlington County School Bd*, 195 F3d 698, 704 (CA 4, 1999). However, it has carved out an exception to this general rule when the alternative finding is fully litigated. *Ritter v Mt. St. Mary’s College*, 814 F2d 986, 993-994 (CA 4, 1987); *Boston v Stobbe*, 586 F Supp 2d 574 (D SC, 2008).

The Sixth Circuit has not adopted either Restatement Rule. Rather, it has held 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 purpose of issue preclusion.” *Nat’l Satellite Sports v Eliadis*, 253 F2d 900, 910 (CA 6, 2001).

We conclude that the First Restatement Rule represents the better-reasoned rule because it is consistent with the purposes of collateral estoppel. Thus, we hold that collateral estoppel extends to alternate grounds for a prior decision.

Among the elements that a claimant under the PWDCRA must prove is that the employer imposed an adverse employment action in response to the disability. See *Peden v Detroit*, 470 Mich 195, 205; 680 NW2d 857 (2004). In this case, the adverse employment action was plaintiff’s termination upon his return from medical leave. Accordingly, 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. The trial court properly deferred to that federal determination, and therefore properly granted defendant’s motion for summary disposition.

The dissent places great emphasis on the fact that the Sixth Circuit affirmed the federal district court’s order dismissing plaintiff’s FMLA claim, but specifically declined to address the district court’s alternative ground for granting summary judgment. Had the Sixth Circuit issued its opinion before the trial court addressed collateral estoppel in its decision in September 2008, the federal district court’s determination that plaintiff failed to demonstrate that defendant’s legitimate business reason for pretext would not have been conclusively established. *Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Michigan Transp Auth*, 437 Mich 441, 453-454; 473 NW2d 249 (1991). However, the appeal of the federal district court’s decision was pending in the Sixth Circuit at the time of the trial court’s decision in this matter. In the federal courts, a final judgment retains its preclusive effect while an appeal of the judgment is pending. *Erebia v Chrysler Plastic Products Corp*, 891 F2d 1212, 1215 n 1 (CA 6, 1989); see 18A Wright, Miller, & Cooper, Federal Practice & Procedure, Nature of Judgment,

§ 4433 (noting that a “second judgment may become conclusive even though it rested solely on a judgment that was later reversed”). Moreover and importantly, This Court “must apply federal claim-preclusion law in determining the preclusive effect of a prior federal judgment.” *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380-381; 596 NW2d 153 (1999). Thus, 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.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Kurtis T. Wilder