

State of Wisconsin



Labor and Industry Review Commission

Charles L. McKnight, Sr.
Complainant

Milwaukee Public Schools
Respondent

ERD Case No. CR201201667

Fair Employment Decision¹

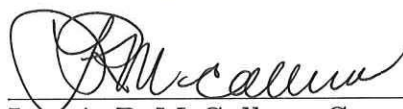
Dated and Mailed:

APR 19 2018

The decision of the administrative law judge (copy attached) is **affirmed**. Accordingly, the complaint in this matter is dismissed with prejudice based on the doctrine of issue preclusion.

By the Commission:


Georgia E. Maxwell, Chairperson


Laurie R. McCallum, Commissioner


David B. Falstad, Commissioner

¹ **Appeal Rights:** See the green enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the Labor and Industry Review Commission as a respondent in the petition for judicial review.

Appeal rights and answers to frequently asked questions about appealing a fair employment decision to circuit court are also available on the commission's website, <http://lirc.wisconsin.gov>.

Procedural Posture

This case is before the commission to consider the complainant's allegation that the respondent discriminated in employment against him on the basis of race, sex, age and disability, and terminated his employment in retaliation for filing a complaint of discrimination, in violation of the Wisconsin Fair Employment Act (hereinafter WFEA). An administrative law judge for the Equal Rights Division of the Department of Workforce Development issued a decision and order dismissing the complaint prior to hearing, on the grounds that the complaint was barred by the doctrine of issue preclusion. The complainant filed a document with the Equal Rights Division that was accepted as a timely filed petition for review by the commission.

The commission has considered the complainant's petition and the positions of the parties, and based on its review the commission agrees with the decision of the administrative law judge, and it adopts that decision as its own.

Memorandum Opinion

Procedural History – The commission has reviewed the lengthy Procedural Background set out in the decision of the administrative law judge dated October 27, 2017, and incorporates it herein by this reference. The core elements of the Procedural Background are: 1) that the complainant filed a charge and an amended charge with the U.S. Equal Employment Opportunity Commission (EEOC) alleging discrimination and retaliation in violation of federal civil rights laws; 2) that the complainant received a dismissal notice from the EEOC informing him that the EEOC investigated his allegations and was unable to conclude that the information it obtained had established a violation of the relevant statutes; 3) that the complainant filed a lawsuit in U.S. District Court making the same allegations he had made before the EEOC; 4) that the court granted a motion for summary judgment filed by the employer, and dismissed the lawsuit; 5) that the complainant then requested and obtained an investigation by the state Equal Rights Division (ERD), which resulted in a determination by the ERD that there was no probable cause to believe that the employer had violated the WFEA; and 6) that the complainant appealed the no-probable-cause determination to an administrative hearing, and the administrative law judge dismissed the complaint prior to hearing on the grounds that it was barred by the doctrine of issue preclusion.

Discussion – The purpose of issue preclusion is to limit relitigation of issues that have been actually litigated in a previous action. *Lindas v. Cady*, 183 Wis. 2d 547, 558, 515 N.W.2d 458 (1994). It is applied in the interest of judicial efficiency and finality, and to protect against repetitious litigation. *Michelle T. v. Crozier*, 173 Wis. 2d 681, 688, 495 N.W.2d 327 (1993). The Wisconsin Supreme Court has adopted the following statement of the doctrine made by the U.S. Supreme Court:

[O]nce an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.

Paige K.B. ex rel. Peterson v. Steven G.B., 226 Wis. 2d 210, 219, 594 N.W.2d 370 (1999), quoting *Montana v. United States*, 440 U.S. 147, 153. 99 S.Ct. 970, 59 L.Ed.2d 210 (1979).

The party asserting issue preclusion has the burden of establishing: 1) that the issue was actually litigated and determined in the prior proceeding by a valid judgment and the determination was essential to the judgment; and 2) that applying issue preclusion comports with principles of fundamental fairness.²

Actually litigated

The prior proceeding in this case was the federal court action brought by the complainant. In that federal court action, the determination was made that the complainant's discharge from employment was not based on discriminatory animus or a retaliatory motive on the part of the respondent. That determination was essential to the court's judgment that the complainant had failed to show sufficient evidence of a violation of federal discrimination laws to overcome a dismissal of his complaint by summary judgment.

The complainant argued to the administrative law judge that his case in federal court was not actually litigated because he did not know how to proceed in court to respond to the employer's motion for summary judgment. The administrative law judge properly rejected this argument. The fact that the complainant was without legal counsel and did not understand how to present evidence to the court was immaterial to whether the case was actually litigated.³ The material question was whether the court decided liability after affording the parties an opportunity to present factual assertions on the merits of the complainant's claims. That is what happened in the court's consideration of the respondent's motion for summary judgment. The fact that that liability was decided by summary judgment did not mean it was not actually litigated. The summary judgment process gave the complainant the opportunity to present evidence in order to show that material facts were in dispute as to the respondent's liability, but he failed to do so, and the court decided against him on the merits of his claims. A summary judgment "is

² *Aldrich v. LIRC*, 2012 WI 53, ¶¶ 97-98, 341 Wis. 2d 36, 71, 814 N.W.2d 433.

³ Seventh circuit case law cited by the employer on this point (Reply Brief to ALJ) was persuasive:

Pro se parties are not held to the same standards as a trained lawyer, and the pleadings and other submissions are more liberally construed; however, application of the rules applies the same to all parties, regardless of representation. *See, McInnis v. Duncan*, 697 F.3d 661, 665 (7th Cir. 2012); *Greer v. Bd. Of Educ. Of City of Chicago*, 267 F.3d 723, 727 (7th Cir. 2001); *see also, Morris v. IBM Glob. Servs.*, No. 04 C 0130, 2005 WL 83336, at 1 (N.D.Ill. Jan. 14, 2005). Furthermore, as the Seventh Circuit Court of Appeals has even more pointedly said, "the idea that litigating pro se should insulate a litigant from application of the collateral estoppel doctrine...is absurd." *DeGuelle v. Camilli*, 724 F.3d 933, 938 (7th Cir. 2013).

sufficient to meet the requirement of a conclusive and final judgment.”⁴ Issues decided by summary judgment have been considered actually litigated for purposes of applying issue preclusion.⁵

Fundamental fairness

The application of issue preclusion must comport with principles of fundamental fairness. In *Banty v. Dings Co. Magnetic Group*, ERD Case Nos CR200803382 & CR200903205 (LIRC July 31, 2012), the commission summarized this requirement, as set out in *Aldrich v. LIRC*, 2012 WI 53, 341 Wis. 2d 36, 71, 814 N.W.2d 433:

The central goal of the “fundamental fairness” analysis is to protect the rights of all parties to a full and fair adjudication of all issues involved in the action. The decision should be made with special attention to guarantees of due process which require that a person must have had a fair opportunity procedurally, substantively and evidentially to pursue the claim before a second litigation will be precluded. *Aldrich*, 2012 WI 53, ¶ 109.

Courts have generally looked to these five factors to decide whether the “fundamental fairness” test is met:

- (1) Could the party against whom preclusion is sought have obtained review of the judgment as a matter of law;
- (2) Is the question one of law that involves two distinct claims or intervening contextual shifts in the law;
- (3) Do significant differences in the quality or extensiveness of proceedings between two courts warrant relitigation of the issue;
- (4) Have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; and
- (5) Are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Aldrich, 2012 WI 53, ¶ 110. No single factor is dispositive, and the final decision must rest on a “sense of justice and equity.” The five factors are not exhaustive or exclusive. The weight given to each factor is discretionary. 2012 WI 52, ¶ 111-112.

⁴ *DePratt v. West Bend Mut. Ins. Co.*, 113 Wis. 2d 306, 310-11, 334 N.W.2d 883 (1983).

⁵ *Estate of Rille v. Physicians Ins. Co.*, 2007 WI 36, ¶ 48, 300 Wis. 2d 1, 24, 728 N.W.2d 693; *Aldrich v. LIRC*, 2012 WI 53, ¶¶ 97-98, 341 Wis. 2d 36, 71, 814 N.W.2d 433.

The five factors listed above point to the conclusion that applying issue preclusion in this case comports with fundamental fairness. First, the complainant had a legal right to obtain a review of the federal district court's judgment in the Seventh Circuit Court of Appeals.

Second, the complainant's claims in court were not distinct from the claims he asserted before the ERD, and were not affected by intervening contextual shifts in the law. Although the complainant stated that he believed that federal and state law were quite different in the areas of disability and age discrimination, he did not explain what he thought those differences were, or how they might have led to different outcomes in the two forums. While it is true that state and federal statutory provisions on age discrimination are not identical, under both it is necessary for the employee to prove, by direct or indirect means, that the employer took some adverse action against him or her that was motivated by the employee's age. In this case, the court found that the complainant, by failing to answer the respondent's requests for admissions or proposed findings of fact, and by failing to offer any evidence of his own, conceded that his termination was not motivated by his race, sex or age. Likewise, there are differences in language between the federal Americans with Disabilities Act and the disability provisions of the WFEA. Nevertheless, under both it is necessary for the complainant to identify and prove a disability, to prove that the employer had some knowledge of that disability, and to prove that the employer took an adverse action based on that disability. In this case, the court accepted the respondent's unopposed proposed findings of fact that the complainant had a work restriction due to gout that expired years before the adverse actions he alleged in his complaint; that the respondent's manager for human resources never received any subsequent requests for accommodation; that there was no evidence showing that the complainant had a physical disability in performing the essential duties of his work assignments at any time from November 9, 2005 to the date of his discharge in 2012; and that the complainant's allegation that he had gout was not considered in any relevant decision-making, nor was it material to his misconduct. If the determinations of fact by the court are given preclusive effect, it is apparent that the complainant's claims, including his age and disability claims, would not be viable under the WFEA.

Third, there were no significant differences between the tribunals in the quality or extensiveness of their proceedings. In *Aldrich*, the Wisconsin Supreme Court found that the quality and extensiveness of summary judgment proceedings "was at least equal to the quality and extensiveness of the proceedings that would unfold at the Wisconsin ERD." *Aldrich, supra*, ¶ 115.

Fourth, an equivalent burden of persuasion on the complainant existed in both the state and federal forums.

Fifth, there are no other circumstances that would render application of issue preclusion fundamentally unfair. The complainant argued to the administrative law judge that he has been denied an investigation of his claims, but, as the administrative law judge pointed out, both the EEOC and the ERD investigated his

complaints and found insufficient substantiation of his allegations. He argued that he be given the chance to present his facts without worrying about federal rules and technicalities, but it was his choice to litigate his claim in federal court, and, as noted above, a pro se litigant in federal court is not excused from a later application of the principle of issue preclusion simply because he failed to understand or follow the court's rules of procedure.

The complainant's petition for review by the commission consists mostly of an extended quote from Wis. Stat. § 111.31, the declaration of policy from the WFEA. The petition does not add substantively to the arguments the complainant made to the administrative law judge. The commission concludes that the complainant had a fair opportunity procedurally, substantively and evidentially to pursue his discrimination claims in federal court and that he actually litigated them, and that the court, in dismissing them, determined crucial issues of fact adversely to him. The determination of those issues has made it impossible for the complainant to succeed in his complaint under the WFEA. The commission therefore affirms the dismissal of his complaint.

cc: Complainant
Respondent, Attn: James Gorton
Clarence P. Nicholas, Representative for Complainant
Robin A. Pederson, Attorney for Respondent

STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT
EQUAL RIGHTS DIVISION

Charles L. McKnight, Sr.
10554 West Fountain Avenue, Apt. 700
Milwaukee, Wisconsin 53224
Complainant

vs.

Re-issued
**DECISION ON A MOTION TO DISMISS
and MEMORANDUM OPINION**
ERD Case No. CR201201667

Milwaukee Public Schools
5225 West Vliet Street
Milwaukee, Wisconsin 53208
Respondent

PROCEDURAL BACKGROUND

In April of 2012, the Complainant, Charles L. McKnight, Sr., filed a complaint with the U.S. Equal Employment Opportunity Commission ("EEOC") alleging that Milwaukee Public Schools ("MPS") had discriminated against him on the basis of race, sex, age, and disability in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), and the Americans With Disabilities Act ("ADA"), with regard to the termination of his employment. In an amended complaint filed with the EEOC in May of 2012, McKnight added the claim that MPS had also terminated him in retaliation for filing a race discrimination complaint, in violation of Title VII.

Pursuant to a work-sharing agreement between the EEOC and the Wisconsin Equal Rights Division ("ERD"), McKnight's complaint, as amended, was cross-filed with the ERD, alleging that the Respondent's conduct also constituted race, sex, age, and disability discrimination and retaliation in violation of the Wisconsin Fair Employment Act ("WFEA"), §§ 111.31-111.395, Wis. Stats.

Since McKnight's complaint was initially filed with the EEOC, that agency investigated this case first; meanwhile, the ERD placed this case into abeyance status, pending further action by the EEOC.

On September 14, 2012, the EEOC issued a "Dismissal and Notice of Rights" to the Complainant. The notice informed the Complainant that the EEOC was dismissing his complaint and explained that "based upon its investigation," it was "unable to conclude that the information obtained establishes violations of the statutes." The notice also informed the Complainant of his right to file a lawsuit based on his complaint under federal law within 90 days of his receipt of the notice.

On December 7, 2012, McKnight filed a lawsuit in U.S. District Court, *McKnight v. Milwaukee Public Schools*, Case No. 12-C-1245 (E.D. Wis.). In his federal complaint, which he filed pro se, McKnight made the same allegations of race, sex, age, and disability discrimination and retaliation that he had originally alleged in his EEOC complaint.

On January 7, 2015, U.S. Magistrate Judge William E. Callahan dismissed McKnight's federal complaint after granting MPS's motion for summary judgment, as will be discussed further below.

In the meantime, following the EEOC's dismissal of the case, McKnight asked the ERD to conduct an independent investigation of his claims, and the case was transferred to the ERD for further processing.

In January of 2015, after the court dismissed McKnight's federal lawsuit, the ERD proceeded to conduct an investigation into the Complainant's claims of discrimination and retaliation under the WFEA.

On August 14, 2015, after completing its investigation, an ERD investigator issued an Initial Determination finding "no probable cause" to believe that the Respondent had discriminated or retaliated against the Complainant, in violation of the WFEA, as alleged in his complaint.

On September 14, 2015, the Complainant appealed the Initial Determination.

On October 2, 2015, the ERD sent the parties a notice informing them that the Complainant's ERD complaint had been certified to a hearing on the issue of probable cause. The case was subsequently assigned to the undersigned Administrative Law Judge ("ALJ") to schedule the matter for hearing.

On August 16, 2016, the ALJ conducted a pre-hearing telephone conference in this matter. During the pre-hearing conference, the Respondent stated its intention to file a motion to dismiss McKnight's ERD complaint based on the doctrine of issue preclusion, arguing that the allegations in his ERD complaint had already been litigated in the federal court case cited above. The ALJ then established a schedule setting deadlines for the filing of Respondent's motion; for the Complainant's brief in response to the motion; and for the Respondent's reply brief. These deadlines were subsequently confirmed in a Pre-hearing Report & Scheduling Order that the ALJ issued on September 14, 2016.

On September 29, 2016, the Respondent filed a "Motion to Dismiss Due to Issue and Claim Preclusion," along with a supporting memorandum of law and supporting documentation.

On November 16, 2016, the ALJ granted the Complainant an extension on the original due for his brief in response to the motion to November 30, 2016.

On November 30, 2016, the Complainant did file a submission. However, rather than file a brief in opposition to the Respondent's motion, he filed a Motion for Summary Judgment against the Respondent. In an email to the parties dated December 13, 2016, the ALJ explained that the

ERD does not have a procedure for summary judgments and that she would not entertain his motion. However, the ALJ granted the Complainant another extension, allowing him to file a response to the Respondent's motion to dismiss by December 28, 2016.

The Complainant did not file a brief by December 28, 2016.

On February 24, 2017, the ALJ sent a letter to the parties summarizing recent communications from the parties regarding the case. For reasons explained in that letter, the ALJ once again granted the Complainant an extension of time to file a brief in response to the Respondent's motion to dismiss, extending his deadline to March 24, 2017.

On March 23, 2017, the Complainant filed a brief in response to the Respondent's Motion to Dismiss. However, since it appeared that the brief was missing one or more pages, the ALJ gave the Complainant the opportunity to re-file his brief. On March 30, 2017, the Complainant filed a complete copy of his brief.

On April 17, 2017, the Respondent filed a reply brief in response to the Complainant's submission.

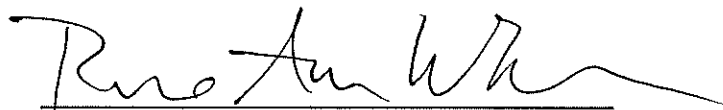
For reasons discussed below in the attached Memorandum Opinion, the ALJ now makes the following:

ORDER

That the Respondent's motion to dismiss is hereby granted and that ERD Case No. CR201201667 is hereby dismissed with prejudice, based on the doctrine of issue preclusion.

Dated at Milwaukee, Wisconsin

OCT 27 2017



Rose Ann Wasserman
Administrative Law Judge

MEMORANDUM OPINION

For reasons discussed below, the ALJ has determined that the Complainant's ERD complaint must be dismissed under the doctrine of issue preclusion. This determination is based on a number of decisions that have issued by the Labor & Industry Review Commission ("LIRC"), the agency that hears appeals of ERD decisions, in cases involving situations similar to the one presented here. The two lead cases on this issue are *Banty v. Dings Co. Magnetic Group* (LIRC, July 31, 2012), and *Balele v. PDQ Food Stores, Inc.* (LIRC, June 18, 2015).¹ In both *Banty* and

¹ In more recent decisions, LIRC has continued to follow the approach that it took in *Banty* and *Balele*. See,

Balele, LIRC held that the complainant's claims were barred under the doctrine of issue preclusion.

I. *Banty v. Dings Co. Magnetic Group*.

In *Banty*, the complainant filed a race discrimination complaint with the ERD. Before his case went to hearing, Banty filed an action in federal district court in which he made essentially the same allegations that he had made in his ERD complaint. The ERD case was placed in abeyance while the federal case proceeded. The federal lawsuit was dismissed after the court granted the respondent's motion for summary judgment. LIRC noted that court issued "a 17-page decision, making extensive findings of fact, and discussing and disposing of the complainant's claims in detail."

After Banty's federal case was dismissed, the respondent asked the ERD to dismiss Banty's ERD complaint based on the doctrine of claim preclusion. The ALJ granted the respondent's motion but did so based on *issue* preclusion, rather than *claim* preclusion.² The ALJ's decision was appealed to LIRC, which affirmed the dismissal of Banty's ERD complaint, agreeing that the doctrine of issue preclusion barred Banty from re-litigating his case before the ERD.

In its decision in *Banty*, LIRC explained that the determination of whether issue preclusion applies in a particular case involves the two-step analysis set forth in *Aldrich v. LIRC*, 2012 WI 53, 341 Wis.2d 36, 814 N.W.2d 433.³ The first step is determining whether the issues alleged in the ERD complaint were "actually litigated and determined" in the prior proceeding and "whether the determination was essential to the judgment," citing *Aldrich*, 2012 WI 53, ¶ 97. As LIRC noted in *Banty*, the "actually litigated" requirement does not require a trial; rather, "an issue decided on summary judgment may satisfy the elements of issue preclusion." *Aldrich*, 2012 WI 53, ¶¶ 99-100.

To determine whether the issues were "actually litigated and determined" in the federal action requires "comparing the specific factual issues addressed in the [federal action] and [those] in the action [at the ERD] which is sought to be precluded." Based on the situation presented in *Banty*, LIRC concluded that the issues in the federal case and the ERD case were the same and that the issues were "actually litigated and determined" in the federal action:

The allegations made in the complaints in the ERD matters involved here, were all specifically made in the federal court complaint, and they were specifically addressed in, and determined in, the federal court's decision [on the respondent's motion for summary judgment]. The federal court's decision clearly addressed and determined the critical issue of whether the adverse actions taken by the respondent were shown to have been motivated by bias because of the complainant's race or his having filed a previous complaint.

If the first step is satisfied, the analysis then moves to the second step, which involves determining

e.g., *Puent v. Croell Redi-Mix* (LIRC, August 7, 2017).

² In *Banty*, LIRC noted that "pursuant to *Aldrich v. LIRC*, 2008 WI App 63, 310 Wis. 2d 796, 751 N.W. 2d 666 (2008), *claim* preclusion cannot be applied to block [an ERD] claim under the WFEA based on a decision [made] in federal court under Title VII."

³ The decision of the Supreme Court in *Aldrich* is known as "*Aldrich II*," to distinguish it from an earlier *Aldrich* decision issued by the Court of Appeals (see Footnote 3, above), which is known as "*Aldrich I*."

whether the application of issue preclusion in a particular case comports with principles of "fundamental fairness." As LIRC explained (emphasis added),

[t]he central goal of the "fundamental fairness" analysis is to protect the rights of all parties to a full and fair adjudication of all issues involved in the action. The decision should be made with special attention to guarantees of due process which require that a person must have had a fair opportunity procedurally, substantively and evidentially to pursue the claim before a second litigation will be precluded. Aldrich, 2012 WI 53, ¶ 109.

To determine whether issue preclusion comports with "fundamental fairness," the courts have generally considered the following five factors:

(1) Could the party against whom preclusion is sought have obtained review of the judgment as a matter of law;

(2) Is the question one of law that involves two distinct claims or intervening contextual shifts in the law;

(3) Do significant differences in the quality or extensiveness of proceedings between two courts warrant relitigation of the issue;

(4) Have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; and

(5) Are matters of public policy and individual circumstances involved that would render the application of [issue preclusion] to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Banty, citing *Aldrich*, 2012 WI 53, ¶ 110. With regard to the five factors, LIRC that "[n]o single factor is dispositive," that "[t]he five factors are not exhaustive or exclusive," and that "[t]he weight given to each factor is discretionary, citing *Aldrich*, 2012 WI 53 ¶ 111-112." Applying the five factors to the specific circumstances presented in *Banty*, LIRC concluded that the application of issue preclusion comported with the notion of "fundamental fairness."

With regard to the third factor, LIRC held that the "quality extensiveness of proceedings" of the summary judgment proceedings in federal court were "at least equal to the quality and extensiveness of the proceedings that would unfold at the Wisconsin ERD."

With regard to the fifth factor, i.e., whether there were any matters of public policy and individual circumstances involved that would make application of issue preclusion fundamentally unfair, LIRC noted the following (emphasis added):

While *Banty* did not end up having a full hearing on the merits in federal court, it must again be borne in mind that that fact that the matter was disposed of on summary judgment does not per se preclude application of issue preclusion. ..[F]ederal ... summary judgment procedures generally allow for the possibility of discovery, the obtaining and submission of affidavits by witnesses, and other formal means to obtain and present evidence.

Based on the above, LIRC held in *Banty* that "the conditions for the application of issue

preclusion" were all met, barring the re-litigation of the complainant's claims before the ERD.

II. Balele v. PDQ Food Stores, Inc.⁴

In the *PDQ* case, Balele initially filed his complaint with the EEOC alleging that PDQ had discriminated against him on the basis of age, sex, and race, and retaliation. The EEOC dismissed the case and notified Balele of his right to file a lawsuit based on the allegations in his EEOC charge.

In February of 2013, Balele commenced an action against PDQ in Dane County Circuit Court. The allegations of discrimination contained in his court complaint were essentially the same as those contained in his EEOC complaint. In March of 2013, on PDQ's motion, the action was removed to federal court. After extensive written discovery, PDQ filed a motion for summary judgment. The court granted the motion and dismissed Balele's case. Balele appealed the court's decision, but his appeal was unsuccessful. After the dismissal of his federal case, Balele asked the ERD to investigate the complaint that he had filed with the EEOC, which had been cross-filed with the ERD.

In December of 2014, the ERD issued an order dismissing Balele's ERD complaint on the grounds that "the allegations in the complaint have been previously dismissed by a federal court." After Balele appealed the dismissal, the case was assigned to an ALJ to rule on the appeal. Relying on LIRC's ruling in *Banty*, the ALJ affirmed the dismissal of Balele's complaint based on issue preclusion. Balele appealed the ALJ's decision to LIRC.

On appeal, LIRC noted that the case involved circumstances similar to those in *Banty*, in that a federal district court had

adjudicated a set of allegations of discrimination by way of a ruling granting summary judgement to the respondent, and the complainant sought to have those same allegations adjudicated by the [ERD]. The question presented in *Banty* was whether this was barred by issue preclusion. The same question is presented here, and [LIRC] is persuaded that the answer is also the same.

LIRC then applied the same two-step analysis that it had applied in *Banty*. As already discussed, the first step is whether "the issue or fact was actually litigated and determined in the prior proceeding by a valid judgment in a previous action," and LIRC held that the first step of the analysis "clearly supports the application of issue preclusion." In addition to noting that the allegations of discrimination were the same in both the ERD complaint and the federal complaint, LIRC stated the following:

The evidence regarding those allegations was put before the court in the form of an extensive record submitted in connection with the motion for summary judgement. [The federal judge] granted the summary judgment to the respondent, resolving the factual and legal issues presented by the complainant's complaint; the resolution of those issues by way

⁴ LIRC's decision in *Balele v. PDQ* was affirmed by the Wisconsin Court of Appeals in an unpublished decision issued on May 8, 2016. That decision was appealed to the Wisconsin Supreme Court, which denied Balele's petition for review on September 13, 2016.

of summary judgement satisfies the requirement that the issues be "actually litigated." [citing *Aldrich*, 2012 WI 53].

LIRC noted that the federal judge's decision in *Balele* was "lengthy and detailed" with regard to the evidence that had been presented on summary judgment, and that the court had determined that Balele had presented "no evidence to show that he was discriminated against because of his age, sex, or race." LIRC then applied the second step of the two-part analysis, considering whether the application of issue preclusion would comport with the principles of "fundamental fairness," and LIRC concluded that it did. With regard to the third and fifth factors, LIRC noted the following:

- *"There were no significant differences in the quality or extensiveness of the proceedings between the federal district court and the ERD."*
- *"There were no matters of public policy and individual circumstances involved making issue preclusion unfair; it is clear that Balele had adequate opportunity and incentive to adjudicate."*

Based on the above, LIRC concluded in *PDQ* that the requirements for issue preclusion were met and that Balele was therefore barred from re-litigating his allegations before the ERD.

III. McKnight's claims against MPS.

A. "Actually Litigated"

As discussed above, the first prong of the two-part test for issue preclusion is whether the claims before the ERD were "actually litigated" in the earlier court proceeding. In this case, the ALJ has concluded that they were, since all of the claims alleged in the ERD complaint (i.e., race, sex, age, disability and retaliation) were specifically addressed and determined by the court in its 17-page decision.

In his brief, the Complainant made two arguments as to why his claims were *not* "actually litigated" in federal court, but both of those arguments must be rejected. First, he argued that because he was not represented by counsel in federal court, he did not know how to properly litigate his case, and, as a result, did not present evidence in opposition to the Respondent's summary judgment motion. However, the fact that the Complainant was pro se and failed to present evidence to the court is immaterial to whether the matter was "actually litigated." As the Respondent stated on pp. 2-3 of its reply brief:

Pro se parties are not held to the same standards as a trained lawyer, and their pleadings and other submissions are more liberally construed; however, application of the rules applies the same to all parties, regardless of their representation. See, *McInnis v. Duncan*, 697 F.3d 661, 665 (7th Cir. 2012), [other citations omitted] ... Furthermore, as the [7th Circuit] has even more pointedly said, "the idea that litigating pro se should insulate a litigant from application of the collateral estoppel doctrine [another name for doctrine of issue preclusion] ... is absurd." *Deguella v. Camilli*, 724 F.3d 933, 938 (7th Cir. 2013). Here, the fact that McKnight was pro se in the federal action should be of no consequence in determining whether issue preclusion should apply to his claims before the ERD.

The Complainant also argued that his claims were not "actually litigated" in federal court because his case "summarily ended" without his claims ever having received a "full and fair investigation" (Brief at p. 2), but that statement is simply not true. Contrary to his assertion that his claims were never investigated, his claims were actually investigated *twice*, first by the EEOC and then by the ERD. Both the EEOC and the ERD concluded that there was "no probable cause" to believe that discrimination or retaliation had occurred as alleged in the complaint, but that does not mean that they did not conduct "full and fair" investigations. While the ALJ cannot comment on the EEOC's investigation (as she is not privy to the EEOC's internal investigative documents), the ERD appears to have conducted an extensive investigation, as reflected in the detailed findings that the investigator made in her Initial Determination on each of the Complainant's claims.

B. "Fundamental Fairness"

The second step of the analysis is whether the application of issue preclusion would comport with principles of "fundamental fairness." As LIRC explained in *Barty* (emphasis added):

[t]he central goal of the "fundamental fairness" analysis is to protect the rights of all parties to a full and fair adjudication of all issues involved in the action. The decision should be made with special attention to guarantees of due process which require that a person must have had a fair opportunity procedurally, substantively and evidentially to pursue the claim before a second litigation will be precluded. Aldrich, 2012 WI 53, ¶ 109. [emphasis added].

In this case, the Complainant asserts that it would be fundamentally unfair to deprive him of the opportunity to have his claims litigated at an ERD hearing, but he failed to analyze his situation in terms of the five factors discussed in *Barty* and *Balele*. Rather, he simply asserts the following:

I would submit that dismissing my ERD case without even an investigation is not just or equitable. How is it just or equitable to never get a definitive decision from an investigator? How is it just or equitable to have my case dismissed [by the federal court] without any consideration to *my* facts, and then learn that I cannot even try to have my facts heard at the [ERD]? The Judge that ruled on my case in Federal Court did not even hear my side of the story. That is all I want. I humbly request that you give me the chance to present my facts without worrying about Federal Rules and technicalities. I believe I have been discriminated against, and I would like to be heard. Justice and equity would be better served by allowing my claims to be investigated (Complainant's brief at pp. 2-3).

Those arguments must also be rejected. First, the Complainant incorrectly asserts his claims were not investigated. As already discussed, his claims were actually investigated by both the EEOC and the ERD.

Second, the Complainant's assertion that he should be allowed to proceed without having to "worry" about "Federal Rules and technicalities" is simply not an acceptable basis for failing to apply the doctrine of issue preclusion. Even though Complainant is without counsel, he is still subject to the rule of law, whether in a federal court proceeding or in an administrative hearing before the ERD. The Complainant also seems to be under the mistaken impression that he would not have to worry about any rules or "technicalities" at an administrative hearing before the ERD. Although ERD hearings may be easier to navigate than federal court proceedings,

there are still a variety of procedural and evidentiary rules that apply to such hearings.⁵

Third, the Complainant's statement that the federal judge never heard his evidence ignores the fact that the only reason the judge never heard his evidence was because the Complainant failed to present any.⁶ When deciding the question of "fundamental fairness," the question is whether the a complaint had the *opportunity* to pursue his or her claims in a prior proceeding. In this case, the Complainant clearly had the opportunity to pursue his claims in the prior proceeding, but he failed to take advantage of that opportunity.

Based on the above discussion, the ALJ has determined that the application of issue preclusion is appropriate in this case. As the Respondent explained at the end of its reply brief,

McKnight is not entitled to continue litigation in another forum merely because he was not pleased with the result in a prior forum and would like another opportunity to press his case. The weight of the law is in favor of dismissal because ... his claims have already been litigated and decided by a court of law. His claims should be dismissed by application of issue preclusion so that MPS may gain the reasonable benefit of finality of judgement to claims it has already defended itself against.

cc: Complainant
Respondent, Attn: James Gorton
Clarence P. Nicholas, Representative for Complainant
Robin A. Pederson, Attorney for Respondent

⁵ The rules that apply to ERD hearings under the WFEA include but are not limited to the ERD's rules of practice (Chapter DWD 218 of the Wisconsin Administrative Code), and the Wisconsin Administrative Procedures Act (Chapter 227 of the Wisconsin Statutes).

⁶ In his decision, Judge Callahan noted that McKnight did not submit a response to MPS's Statement of Material Facts, nor did he submit his own statement of additional material facts, which meant that the facts submitted by MPS were deemed admitted. Judge Callahan also noted that when serving its motion for summary judgement, MPS "apprised McKnight of the need to file his own affidavits, declarations, or other admissible documentary evidence of contradictory factual assertions so as to avoid the court accepting as true [MPS's] properly supported proposed facts" (Court decision at pp. 3-4).