

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 12, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2417

Cir. Ct. No. 2015CV1701

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

PASTORI M. BALELE,

PETITIONER-APPELLANT,

V.

**LABOR AND INDUSTRY REVIEW COMMISSION, PDQ FOOD STORES,
INC. AND DEPARTMENT OF WORKFORCE DEVELOPMENT/EQUAL RIGHTS
DIVISION,**

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: JOHN
W. MARKSON, Judge. *Affirmed.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Pastori Balele appeals a circuit court order that affirmed a decision of the Labor and Industry Review Commission (LIRC)

dismissing Balele's Equal Rights Division (ERD) complaint against PDQ Food Stores, Inc. Balele contends that LIRC wrongfully dismissed his complaint based on issue preclusion. We conclude that issue preclusion applied to bar Balele's complaint in this case. We affirm.

¶2 In December 2012, Balele filed a discrimination complaint with the United States Equal Employment Opportunity Commission (EEOC), alleging discrimination based on race, sex, national origin, retaliation, and age. The EEOC dismissed Balele's complaint and notified Balele of his right to sue.

¶3 Balele's discrimination complaint was cross-filed with the Wisconsin Department of Workforce Development, Equal Rights Division (ERD). ERD informed Balele that ERD would not act on the complaint until EEOC completed its processing of the complaint because the complaint was filed first with the EEOC.¹

¶4 In February 2013, Balele filed a state discrimination action against PDQ in the circuit court. In March 2013, PDQ removed the action to federal court. The federal court granted PDQ summary judgment on Balele's discrimination claim.

¹ Balele contends that ERD falsely asserted that Balele filed his complaint first with the EEOC. Balele points out that he had submitted a discrimination complaint first to ERD in November 2012, but that ERD refused to accept the complaint for filing at that time based on its interpretation of an administrative order. However, Balele has not explained how the order of the filing impacts the outcome of this case. We do not address this issue further.

We note also that, at the time ERD informed Balele that it would not act on Balele's complaint until EEOC processed it first, EEOC had actually already issued its decision dismissing the complaint. Again, this fact appears inconsequential to the outcome of this case.

¶5 In December 2014, ERD proceeded with its investigation of Balele’s complaint. ERD then dismissed Balele’s complaint on grounds the same allegations of discrimination had been dismissed by the federal court. Balele appealed to an administrative law judge, who affirmed ERD’s decision. Balele then petitioned for review with LIRC, and LIRC affirmed. Balele sought certiorari review in the circuit court, and the court affirmed LIRC’s decision. Balele appeals.

¶6 In an appeal of a circuit court decision affirming an administrative agency’s ruling, we review the decision of the agency, not the circuit court. *Target Stores v. LIRC*, 217 Wis. 2d 1, 11, 576 N.W.2d 545 (Ct. App. 1998). We independently review LIRC’s decision as to whether issue preclusion applies. *See Aldrich v. LIRC*, 2012 WI 53, ¶96, 341 Wis. 2d 36, 814 N.W.2d 433.

¶7 “The first step in the analysis of issue preclusion is to ‘determine whether the issue or fact was actually litigated and determined in the prior proceeding by a valid judgment in a previous action and whether the determination was essential to the judgment.’” *Id.*, ¶97 (quoted source omitted). If that step is satisfied, we turn to the second step, which requires us to “determine whether applying issue preclusion comports with principles of fundamental fairness.” *Id.*, ¶98 (quoted source omitted). Our fundamental fairness analysis includes consideration of the following factors: (1) whether the party against whom issue preclusion is sought could have obtained review of the judgment as a matter of law; (2) whether the issue presents a question of law that involves distinct claims or intervening contextual shifts in the law; (3) whether there are significant differences in the quality or extensiveness of the proceedings as between the two cases; (4) whether the burdens of persuasion have shifted such that the party seeking issue preclusion has a higher burden of persuasion in the second case; and

(5) whether there are matters of public policy or individual circumstances involved that render the application of issue preclusion fundamentally unfair. *Id.*, ¶110.

¶8 Balele argues that issue preclusion does not apply to bar his ERD complaint.² He contends that the question of whether PDQ discriminated against him was not actually litigated and decided in the federal case because the court refused to accept Balele’s motion for summary judgment under a court order barring Balele’s filings unless Balele paid outstanding court costs and certified that the filing was not frivolous. However, despite the limitations on Balele’s filings in federal court, the issue of whether PDQ discriminated against Balele was actually litigated and determined on summary judgment. *See id.*, ¶100 (“An issue decided on summary judgment may satisfy the elements of issue preclusion.”). The federal court granted summary judgment to PDQ on Balele’s discrimination claim after considering arguments and evidence submitted by both parties.³ The court determined that Balele had produced no evidence to show that PDQ discriminated against him. The court’s determination on the issue of whether PDQ discriminated against Balele was essential to the court’s judgment. Accordingly, the first step in our issue preclusion analysis is satisfied.

¶9 Turning to the second step in our issue preclusion analysis, we consider whether fundamental fairness supports preclusion. Balele contends, first,

² We decline to address the arguments in Balele’s brief that are insufficiently developed or unsupported by legal authority. *See State v. Petit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). We also do not consider Balele’s arguments that are based on factual assertions that are unsupported by citation to the record. *See Tam v. Luk*, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990).

³ Balele does not dispute that his claims of discrimination were the same in his federal case and this case.

that he was unable to obtain review of the federal court judgment as a matter of law because of the court order barring Balele's filings. However, the district court order was not a blanket prohibition on Balele obtaining review. Rather, it required Balele to pay outstanding court costs and certify that his filing was not frivolous to obtain review. Thus, Balele could have obtained review had he satisfied the federal court's filing requirements under the prior court order. This factor weighs in favor of applying issue preclusion.

¶10 Balele also contends that there was an intervening contextual shift in the law. However, rather than identifying any difference between his state and federal discrimination claims or any development in the law between the time of the federal decision and this case, Balele argues that: (1) the federal court's decision adverse to Balele must mean that the legal standards for discrimination are different between federal and state court; (2) the order disallowing Balele's filings in federal court until he paid his court costs and certified that the filing was not frivolous altered the procedure in federal court as compared to ERD; and (3) the federal court judgment was void because the court order barring Balele from filing in the federal court deprived the federal court of jurisdiction to hear the case. However, we are not persuaded that these assertions establish a contextual shift in the law for purposes of issue preclusion analysis. *See id.*, ¶¶119-144 (providing by way of example that new United States Supreme Court case law resolving a previously unsettled dispute among the federal courts constituted a contextual shift in the law). Moreover, the fact that Balele was barred from filing his case in the federal court as an initial matter did not affect PDQ's right to remove the action to federal court or deprive the federal court of jurisdiction to hear the case. *See In re Skupniewitz*, 73 F.3d 702 (7th Cir. 1996).

¶11 Next, Balele argues that there are significant differences in the quality or extensiveness of the proceedings between the two cases, again relying on the court order requiring Balele to pay court costs and certify that his pleadings are not frivolous. Balele argues that the quality and extensiveness of the proceedings in federal court were insufficient because Balele could not file offensive motions. Again, we are not persuaded. The federal court allowed Balele to file responses to PDQ's motions, including a summary judgment response with supporting material. We discern no significant difference in the quality or extensiveness of the proceedings between the two cases.

¶12 Balele also contends that the burdens of persuasion have shifted because, in an ERD action, Balele would not be restricted by the federal court order limiting Balele's filings. However, as we have explained, Balele was allowed to submit argument and evidence to oppose PDQ's motion for summary judgment on Balele's discrimination claim, and thus Balele had a full opportunity to introduce any evidence to support his claim of discrimination. Moreover, the order restricting Balele's filings did not effect the underlying burden of persuasion in a discrimination action, which would be the same in both cases. *See Puetz Motor Sales, Inc. v. LIRC*, 126 Wis. 2d 168, 172-73, 376 N.W.2d 372 (Ct. App. 1985).

¶13 Finally, Balele contends that there are matters of public policy or individual circumstances involved that render the application of issue preclusion fundamentally unfair. Balele argues that the federal court order restricting Balele's filings violated public policy by allowing only PDQ to file offensive motions and preventing Balele from obtaining review of his federal case with the Seventh Circuit; that the wrongful actions by PDQ violated public policy against discrimination; and that the federal court proceedings were against public policy

because the court limited Balele's access to discovery and the federal judge was biased against Balele. He contends that these are unique circumstances that render issue preclusion fundamentally unfair. We disagree. As to the restrictions on Balele's filings in federal court, Balele could have chosen to meet the conditions for filing at any time. As to Balele's claims of wrongful conduct by PDQ, we do not reach the merits of those claims; Balele cannot circumvent the application of issue preclusion by arguing the merits of the issue that is precluded. Finally, we discern no violation of public policy in the federal proceedings.

¶14 For the reasons set forth above, we conclude that the fundamental fairness factors support application of issue preclusion in this case. Accordingly, we affirm the circuit court order dismissing Balele's petition for a writ of certiorari challenging LIRC's decision.⁴

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

⁴ Because we affirm on issue preclusion grounds, we do not reach Balele's arguments as to the merits of his discrimination claim.

