**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**August 2, 2016**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2015AP1664** **Cir. Ct. No. 2013CV9088**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

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**ROBERT G. MONTGOMERY,**

**PLAINTIFF-APPELLANT,**

**V.**

**MILWAUKEE COUNTY,**

**DEFENDANT-RESPONDENT.**

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APPEAL from orders of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 CURLEY, P.J. Robert G. Montgomery appeals the two orders dismissing his declaratory judgment claim and his WIS. STAT. § 109.03 (2013-14)[1] wage claim. Montgomery argues that the trial court's dismissal of his declaratory judgment claim, finding it to be improper because he was not seeking anticipatory or preventative relief, is contrary to the Declaratory Judgment Act and case law. He also submits that the trial court's determination that he failed to file his wage claim within the two-year statute of limitations was error, as he contends he had to exhaust his administrative remedies with the Milwaukee County Personnel Review Board's grievance procedure before filing a § 109.03 suit. Consequently, he argues that when he filed his wage claim suit, he was within the two-year statute of limitation found in WIS. STAT. § 109.09(2)(b)3. We affirm.

## BACKGROUND

¶2 Robert G. Montgomery was employed as a House Staff Physician III for Milwaukee County House of Correction from January 27, 2003, to January 2, 2012. He was an hourly employee making $85.71 an hour. During the years 2003 until 2007, he claims he was ordered by his superior to be on-call every other week. Montgomery stated that while on-call, he received numerous telephone calls from nurses and staff at his residence to answer questions regarding inmates' medical treatment. He estimated that during this time period he received calls that resulted in 9522 on-call hours. Many of those on-call phone calls occurred, he claims, after he had completed his forty-hour shift.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶3 During the time Montgomery was employed by Milwaukee County, he spent time on active military service, the last stint starting in May 2007 and ending in September 2011.[2] Montgomery returned in September 2011 and submitted an application for retirement with the County. The retirement was effective as of January 3, 2012. After retiring in January 2012, Montgomery sent letters to his supervisors and Employee Retirement Services requesting back pay for the time he spent on call. No evidence was produced that prior to his retirement, Montgomery ever filed a time sheet, alerted a supervisor, filed a grievance, or took any other action regarding recoupment of wages he claimed he was owed for his on-call hours.

¶4 When his correspondence did not resolve the issue, nine months after his retirement, he filed a grievance with Milwaukee County to have his claims addressed by the Milwaukee County Personnel Review Board (PRB). The PRB refused to grieve the issue and dismissed his grievance claiming lack of jurisdiction, as the County had accepted his retirement application and he was no longer a County employee. Montgomery filed a certiorari action after the PBR dismissed his grievance.

¶5 Soon after he commenced his certiorari action, Montgomery filed a Claim for Damages against Milwaukee County to pursue his claims. After 120 days lapsed without Milwaukee County serving a Notice of Disallowance, Montgomery brought suit against the County.

[2] Montgomery argued in his brief that his military service made obtaining his remedy for underpayment of wages "difficult." There is no documentation to support this assertion, nor was this issue raised below.

¶6 In his initial complaint, Montgomery argued that he was entitled to compensation for his on-call hours pursuant to WIS. STAT. § 109.03, Milwaukee County General Ordinances §§ 17.01, 17.16 and 17.36, and Milwaukee County Civil Service Rule IX. As noted, previous to filing this suit, Montgomery filed a petition for certiorari review of the PRB's decision to decline jurisdiction over his grievance. As a result of the certiorari petition, the parties agreed to stay the proceedings until the certiorari action was completed.

¶7 After the certiorari action confirmed the PRB's decision, Montgomery filed an amended complaint that contained two causes of action. He renewed his wage claim based upon WIS. STAT. § 109.03 and added a claim seeking declaratory judgment relief under WIS. STAT. § 806.04. The County filed motions to dismiss both claims. The trial court dismissed Montgomery's declaratory judgment action in a written order dated May 29, 2015. The trial court noted during its oral decision that the purpose of the Declaratory Judgment Act (DJA) is to allow a court to provide an anticipatory or preventative remedy. The trial court ruled that what Montgomery sought were monetary damages rather than anticipatory or preventative relief and, as a consequence, his claim could not be maintained. The trial court ordered additional briefs seeking further explanation regarding the application of the doctrine of exhaustion of administrative remedies and withheld ruling on the County's other motion to dismiss.

¶8 Montgomery's WIS. STAT. § 109.03 wage claim action was dismissed on July 24, 2015. The trial court found, relying on ***German v. DOT***, 223 Wis. 2d 525, 589 N.W.2d 651 (Ct. App. 1998), that the wording of WIS. STAT. ch. 109 does not require an exhaustion of administrative remedies before bringing suit as there is a private cause of action. The trial court also found that the Milwaukee County grievance procedure was not meant to be an exclusive

remedy for claims. Thus, the trial court found Montgomery did not file his ch. 109 claim before the expiration of the statute of limitations. This appeal follows.

## ANALYSIS

### *1. Standard of Review.*

¶9 We review a motion to dismiss for failure to state a claim *de novo*, accepting as true the facts alleged and reasonable inferences drawn from those facts. *See* ***Town of Eagle v. Christensen***, 191 Wis. 2d 301, 311-12, 529 N.W.2d 245 (Ct. App. 1995).

### *2. The trial court properly dismissed Montgomery's declaratory judgment claim.*

¶10 Montgomery contends that the trial court's holding, in dismissing his declaratory judgment claim, that his claim was not anticipatory or preventative in nature, "is contrary to the plain language of the Uniform Declaratory Judgment Act ('DJA') and case law relative to declaratory judgment." Montgomery argues that his claims based on the Milwaukee County General Ordinances and the Milwaukee County Civil Service Rules "fall within the scope of claims that the DJA was intended to facilitate." He notes that nothing in the DJA "indicates that it is limited to anticipatory or preventative claims." For support for this position, he cherry-picks from the wording of the statute to argue that the DJA "should be 'liberally construed and administered'" and "should not be restricted if the DJA 'will terminate the controversy or remove an uncertainty.'" He also points out that the DJA permits monetary relief. Although the wording cited by Montgomery can be found in the DJA, the case law defines which actions are appropriate, and Montgomery's action is clearly banned.

¶11 The Uniform Declaratory Judgment Act can be found in WIS. STAT. § 806.04. A circuit court has discretion whether to grant or deny a declaratory judgment. *See* WIS. STAT. RULE 806.04(6) and ***State ex rel. Lynch v. Conta***, 71 Wis. 2d 662, 671, 239 N.W.2d 313 (1976), *superseded by statute on other grounds*, *see* ***State ex rel. Leuing v. City of Lake Geneva***, 2003 WI App 129, ¶5, 265 Wis. 2d 674, 666 N.W.2d 104.

¶12 The test to determine whether a declaratory judgment action is properly before the court is whether the claims are justiciable. ***Olson v. Town of Cottage Grove***, 2008 WI 51, ¶28, 309 Wis. 2d 365, 749 N.W.2d 211. The leading case on declaratory judgments is ***Loy v. Bunderson***, 107 Wis. 2d 400, 320 N.W.2d 175 (1982). ***Loy*** sets out four factors to determine whether a controversy is justiciable. The four factors are:

> (1) A controversy in which a claim of right is asserted against one who has an interest in contesting it.
>
> (2) The controversy must be between persons whose interests are adverse.
>
> (3) The party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectable interest.
>
> (4) The issue involved in the controversy must be ripe for judicial determination.

***Id.*** at 410.

¶13 Montgomery asserts that the trial court found that the first three factors were met.[3] Montgomery submits that the trial court erred in finding that

[3] The County disagrees and states the trial court never actually found that factor three had been met; rather the trial court did not "focus [its] attention" on this factor, relying primarily; on its analysis on factor four.

factor four was not met because his claim was ripe for determination.

¶14 In reaching its conclusion that declaratory judgment was inappropriate, the trial court relied on two cases, ***Lister v. Board of Regents of the University of Wisconsin System***, 72 Wis. 2d 282, 240 N.W.2d 610 (1976), and ***PRN Associates LLC v. DOA***, 2009 WI 53, 317 Wis. 2d 656, 766 N.W.2d 559, hereinafter referred to as "***PRN***." Montgomery argues that both of these cases are distinguishable from the instant case because both of the cases involved declaratory judgment actions against a state agency and thus, their holdings apply only under those circumstances. We disagree. Contrary to Montgomery's assertion, the holdings of ***Lister*** and ***PRN*** are not limited to suits against a state agency.

¶15 In ***Lister***, several former law students sought a refund from the State, claiming that they had overpaid their tuition because they had been classified as non-residents of Wisconsin. ***Id.***, 72 Wis. 2d at 288. Although much of the opinion is dedicated to a discussion of sovereign immunity, the trial court also dismissed the claim for declaratory relief, finding that such a declaration would not terminate the controversy. ***Id.*** at 288-89. The trial court further held that the plaintiffs' principal goal was to recover the amounts alleged to have been unlawfully collected as non-resident tuition. ***Id.*** at 308. The trial court declined to entertain the claim for declaratory relief on the ground that such a declaration would not settle the controversy and would be merely an advisory opinion. ***Id.*** at 305.

¶16 Our supreme court affirmed the trial court and stated that:

> The underlying philosophy of the Uniform Declaratory Judgments Act is to enable controversies of a justiciable nature to be brought before the courts for

> settlement and determination prior to the time that a wrong has been threatened or committed…. As such, the Act provides a remedy which is primarily anticipatory or preventative in nature.

***Id.*** at 307 (footnote omitted). The same logic applies in the instant case, and Montgomery's case was properly dismissed. Montgomery, after retiring, sought monetary damages for work he alleges he had already done. No anticipatory or preventative relief is sought in this action. Like the former students in ***Lister***, Montgomery seeks only monetary damages.

¶17 The ***PRN*** case arose out of a dispute over a state procurement. PRN submitted a bid, but the contract was ultimately awarded to another developer. ***Id.***, 317 Wis. 2d 656, ¶¶8-13. PRN brought suit seeking, *inter alia*, a declaratory judgment. ***Id.***, ¶19. The trial court dismissed the declaratory judgment claim for failure to state a claim upon which relief can be granted. *See* ***id.***, ¶24. In agreeing with the trial court and the court of appeals, our supreme court noted:

> Declaratory judgment provides prospective rather than remedial relief. The purpose of declaratory relief and W[IS]. S[TAT]. § 806.04, the Uniform Declaratory Judgement Act, is:
>
> > to enable controversies of a justiciable nature to be brought before the courts for settlement and determination *prior to the time that a wrong has been threatened or committed*. The purpose is facilitated by authorizing a court to take jurisdiction *at a point earlier in time than it would do under ordinary remedial rules and procedures*.
>
> Declaratory judgment "provides a remedy which is primarily anticipatory or preventative in nature."

***Id.***, ¶53 (citations omitted).

¶18 Here, Montgomery claims the "wrong" has already occurred, and he seeks monetary damages. His suit seeking declaratory relief is neither anticipatory

nor preventative. Thus, the trial court properly dismissed his declaratory judgment action.

### *3. Montgomery's wage claim was not subject to the Administrative Exhaustion Doctrine and his claim was extinguished by the statute of limitations.*

¶19 The trial court also dismissed Montgomery's wage claim brought pursuant to WIS. STAT. § 109.03. In doing so, the trial court noted that the wording of the Milwaukee County ordinance concerning grievances (MCGO § 17.207(1)) did not create an exclusive remedy for a wage claim. The trial court suggested that the wording found in the ordinance "step 5," which states the aggrieved party "may appeal to the personnel review board," strongly suggested that there is no obligation to exhaust a grievance with the PRB. In addition, the trial court found the holdings in ***German*** supported the trial court's position that § 109.03(5) creates a private right of action against an employer. Consequently, the trial court found that Montgomery had failed to bring an action within the statute of limitation found in WIS. STAT. § 109.09(2)(b)3., which sets a statute of limitation for wage claims brought under § 109.03 requiring the commencement of a suit within two years after the date on which the wages were due.

¶20 Relying principally on the holding found in ***Nodell Investment Corp. v. City of Glendale***, 78 Wis. 2d 416, 428, 254 N.W.2d 310 (1977), Montgomery contends that he was obligated to proceed with his grievance in front of the PRB before he could file suit in the trial court due to the administrative exhaustion doctrine. If we were to agree with his position, then he would escape the statute of limitation bar set forth in WIS. STAT. § 109.09(2)(b)3.

¶21 In ***Nodell***, our supreme court applied the adminstrative exhaustion doctrine when a property owner filed suit against the City of Glendale after

obtaining a building permit and submitting to the conditions imposed therein and then attacking the conditions in a judicial proceeding. ***Id.***, 78 Wis. 2d at 424-27.

¶22 After a recitation of numerous prior cases discussing the administrative exhaustion doctrine, the supreme court opined that:

> These cases set forth the general doctrine that judicial relief will be denied until the parties have exhausted their administrative remedies; the parties must complete the administrative proceedings before they come to court. The rule of exhaustion of administrative remedies is a doctrine of judicial restraint which the legislature and the courts have evolved in drawing the boundary line between administrative and judicial spheres of activity. The premise of the exhaustion rule is that the administrative remedy (1) is available to the party on his initiative, (2) relatively rapidly, and (3) will protect the party's claim of right.

***Id.*** at 424. The court went on to advise that: "Although the exhaustion requirement is sometimes expressed in absolute terms and in terms of a court's subject-matter jurisdiction, the cases demonstrate that sometimes exhaustion is required and other times not and that the rule of exhaustion has numerous exceptions." ***Id.*** at 424-25 (footnote omitted). Later, the court wrote "[o]ur court and federal and state courts have been willing to assume jurisdiction of a case, notwithstanding a party's failure to exhaust administrative remedies, where the court finds that the reasons supporting the exhaustion rule are lacking." ***Id.*** at 425-26.

¶23 Montgomery has also cited ***Beaudette v. Eau Claire County Sheriff's Department***, 2003 WI App 153, 265 Wis. 2d 744, 668 N.W.2d 133, for support of his position that the statute of limitations did not run as he was obligated to exhaust the grievance procedure before bringing a WIS. STAT. ch. 109 wage claim.

¶24 In ***Beaudette***, several recently retired Sheriff's Department workers sued for retroactive pay. ***Id.***, 265 Wis. 2d 744, ¶¶5-6. The workers retired after the collective bargaining agreement had expired but before the new agreement was entered. ***Id.***, ¶¶4-5. The new agreement increased their wages. ***Id.***, ¶4. The effective date for the new agreement predated their retirements. ***Id.*** The County refused to pay them and the union filed a grievance on their behalf. ***Id.***, ¶5. However, the personnel director wrote a letter to the union representative stating that the former employees did not have standing to grieve the matter. ***Id.*** Thereafter, the former employees commenced a WIS. STAT. ch. 109 wage claim. ***Beaudette***, 265 Wis. 2d. 744, ¶6. The department argued that the employees failed to exhaust their administrative remedies under the collective bargaining agreement, as they should have sought arbitration, and that their wage claim was barred by the statute of limitations, among other defenses. ***Id.*** The trial court ruled in favor of the former employees. ***Id.***, ¶7.

¶25 On appeal, this court advised that: "Grievance and arbitration procedures included in a collective bargaining agreement are presumed to be exclusive remedies unless the parties to the agreement expressly agree that they are not." ***Id.***, ¶10. However, we noted that there are exceptions to this rule. ***Id.*** One of the exceptions is when the employer repudiates the contractual remedies when it anticipatorily rejects those remedies. ***Id.***, ¶¶10, 12. This occurred in ***Beaudette*** when the personnel director wrote the union representative stating that the former employees had no standing. *See* ***id.***, ¶13. This procedure was contrary to the agreement's language dealing with the issue of the agreement's applicability, and it resulted in the department repudiating the collective bargaining agreement. *See* ***id.***, ¶¶13-14. As a consequence, the former employees were relieved of the duty to exhaust their administrative remedies. ***Id.***, ¶15.

¶26 Next, this court in ***Beaudette*** tackled the argument that the former employees' claim was barred by the statute of limitations. *See* ***id.***, ¶16. We noted that "[i]nterpreting the statute of limitations presents a question of law that is reviewed independently of the [trial] court." ***Id.*** The parties proposed different dates for when the claim accrued. ***Id.***, ¶¶17-18. This court resolved this dispute by stating that "'[a] cause of action accrues when there exists a claim capable of enforcement, a suitable party against whom it may be enforced, and a party with a present right to enforce it.'" *See* ***id.***, ¶19 (citation omitted). The date of the repudiation by the personnel director was determined to be the date the claim accrued. ***Id.*** The court observed that the former employees filed their wage claim action within two years and 120 days (120 days was tolled) of that date. ***Id.***, ¶16.

¶27 Montgomery submits that pursuant to the holdings in ***Beaudette***, he was obligated to pursue the exclusive administrative remedy of filing a grievance and the date that his claim accrued was on January 22, 2013, when the PRB announced its decision that Montgomery did not have standing because he was no longer an employee.

¶28 We disagree. First, Montgomery was not operating under a collective bargaining agreement. Therefore, the presumption that grievance procedures found in collective bargaining agreements are exclusive remedies does not apply. Second, the trial court correctly determined that the Milwaukee County grievance procedure is not an exclusive administrative remedy and that Montgomery had ample time to file his WIS. STAT. ch. 109 wage claim. Finally, Montgomery filed his grievance nine months after he retired. Given this length of time, it would appear that the grievance procedure was an afterthought.

¶29 Applying the reasons for the administrative exhaustion doctrine, we note that here the pursuit of a remedy through the PBR was neither rapid (Montgomery retired on January 3, 2012, and the PRB decision is dated January 22, 2013) nor did it protect Montgomery's claim of right. Moreover, the ***German*** case clearly held, "the presumption that an administrative remedy is exclusive does not apply if there is a legislative expression to the contrary." *See* ***id.***, 223 Wis. 2d at 538. The court stated that we will not presume that an administrative remedy is exclusive in the face of statutory language expressly providing a private right of action. *See* ***id.*** at 539. The Milwaukee County administrative rule does not compel an aggrieved party to file a grievance with the PRB. Thus, the County ordinance was not intended as an exclusive administrative remedy. Moreover, WIS. STAT. ch. 109 gives an employee a private right of action.

> Each employe[e] shall have a right of action against any employer for the full amount of the employe[e]'s wages due on each regular pay day as provided in this section and for increased wages as provided in s. 109.11(2), in any court of competent jurisdiction. An employe[e] may bring an action against an employer under this subsection without first filing a wage claim with [DWD] under s. 109.09(1).

***German***, 223 Wis. 2d at 535 (citing WIS. STAT. § 109.03(5); fourth set of brackets in ***German***). This wording strongly suggests an employee has an immediate right to sue for wages when the wages are not paid on a regular payday. Montgomery did not need to file a grievance to recover his wages. Consequently, the two-year statute of limitations bars his claim.

¶30 For the reasons stated, the trial court's orders are affirmed.

*By the Court.*—Orders affirmed.

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