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Preclusive Effect of Administrative Decisions in Wrongful Dismissal Suits

Henry H. Perritt Jr.
IIT Chicago-Kent College of Law, hperritt@kentlaw.iit.edu

PRECLUSIVE EFFECT OF ADMINISTRATIVE DECISIONS IN WRONGFUL DISMISSAL SUITS

Henry H. Perritt, Jr.*

When the article by Gerard J. Rehel (herein, p. 5) was selected as winner of the 1984 Law Student Essay Contest, the Editors called his Law Professor to express congratulations on Mr. Rehel's success, to verify Mr. Rehel's compliance with the contest rules, to solicit suggested topics for the 1985 Contest, and to invite the professor to submit the product of his own research in administrative law. Professor Perritt responded with the following:

In the last ten years, state courts have been innundated with cases involving a concept that ALJs long have dealt with: wrongful dismissal. A rule developed during the Industrial Revolution, that "employees at will" could be dismissed for any reason or for no reason, and accordingly could not succeed in a civil suit seeking damages for their termination. Beginning in the 1930's Congress and state legislatures enacted statutes prohibiting discrimination based on race, sex, age or retaliation for participating in a regulatory proceeding such as an unfair labor practice investigation. These statutes were enforced administratively, resulting in adjudicatory hearings before ALJs in many cases. But until about 1974, the only non-statutory protections against arbitrary or wrongful dismissal were those contained in collective bargaining agreements, which cover only about a quarter of the workforce; and those contained in individually negotiated contracts of employment, which are few in number and usually involve only highly compensated executives. Now about two-thirds of the states permit previously unprotected employees to recover damages for dismissal under certain circumstances.

My treatise, Employee Dismissal Law and Practice,[1] released last Spring by John Wiley and Sons, analyzes the wrongful dismissal phenomenon in some detail, in both its common-law and statutory aspects. This article considers the interaction between administrative agency decisions and wrongful dismissal lawsuits under the res judicata doctrine. The doctrine of res judicata is important to wrongful dismissal plaintiffs and defendants because of the multiple sources of legal right and multiple forums usually involved in employee dismissals.

* Professor of Law, Villanova University, Former Deputy Under Secretary of Labor. Member of the bar, Virginia, Pennsylvania, District of Columbia, United States Supreme Court.

1 Hereinafter cited as "Treatise."

A good example of what employers sometimes call the "many bites at the apple" problem is found in Olguin v. Inspiration Consolidated Copper Co.[2] Mr. Olguin was a welder who claimed he was fired for protesting safety violations and for union activity. He filed a retaliatory discharge complaint with the federal Mine Safety and Health Administration, an unfair labor practice charge alleging retaliatory dismissal with the NLRB, a grievance under his collective bargaining agreement, and a lawsuit in state court for wrongful dismissal including both tort and contract counts.

In such cases, it is inevitable that one forum will decide its case before the other forums decide theirs. Then the question is presented: what effect should the first decision have on subsequent litigation? This is the broad question of res judicata.

The article begins by summarizing the basic common-law concepts for wrongful dismissal. Then it reviews the res judicata doctrine and its components: bar, merger and collateral estoppel. The article then considers the application of these concepts to three common situations involving decisions by administrative agencies. In the first situation, a statutory claim of discrimination or infringement of constitutional rights — or certain facts essential to such a claim — has been adjudicated by a state administrative agency and then one of the parties brings a state or federal court claim. In the second situation, a wrongful dismissal suit is brought after an unemployment compensation agency has decided fact questions central to the common-law claim. In the third situation a wrongful dismissal suit is brought premised on the employee's assertion of health or safety interests within the jurisdiction of an administrative agency. In all three situations, courts must decide whether res judicata should be applied to preclude the subsequent suit or the relitigation of certain issues. The space available does not permit exhaustive analysis of the issues raised; rather, the article limits itself to raising basic questions and suggesting the framework for analysis.

Basic Common-Law Concepts

Two separate wrongful dismissal doctrines have emerged in the case law: one based on intentional tort principles and the other based on traditional contract principles.[3] The most prominent tort theory is the "public policy tort." Under this doctrine a prima facie case is made out in tort when the employee can prove that he was terminated for conduct protected by the public policy of the state. Once such a prima facie case is established, the employer can resist liability only if she can show "justification" for the termination. A judge or jury may conclude justification existed because

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2 740 F.2d 1468 (9th Cir. 1984).

3 A third doctrine, the "implied covenant of good faith and fair dealing," has declined in importance as more traditional contract and tort theories have matured. See Treatise Section 4.9.

the termination occurred for other reasons or because the legitimate interest of the employer in terminating for the public-policy linked reason was great enough to override the public policy.

Recovery for breach of contract is permitted when the employee can show reasonable reliance on an employer promise of employment security. The promise may be contained in a personnel handbook, made informally by a supervisor, or reasonably inferred from practice with other employees. Recovery of damages is permitted for breach of this promise. Usually, "breach" means that the employer promised to terminate only for "cause" and terminated the employee without "cause." In some cases, the employer promised only that certain procedural steps would be exhausted before termination and terminated the employee without following these steps.

The first wrongful dismissal tort case was Nees v. Hocks,[4] in which the Oregon Supreme Court affirmed a jury verdict in favor of an employee who was discharged for jury service. The Nees opinion articulates the analytical framework used in most wrongful dismissal tort cases. Courts in other states have held that a dismissed employee can recover if he can prove that his termination was caused by filing a workers compensation claim, for opposing employer violations of consumer credit regulations or food labeling requirements, and for other conduct that furthers a "clear public policy." Most courts have held that the "clear public policy" must be expressed in a state statute or administrative regulation. The most expansive view of public policy tort liability is represented by a New Hampshire case, Cloutier v. Great Atlantic & Pacific Tea Co.,[5] and by a Third Circuit case applying Pennsylvania law, Novosel v. Nationwide Insurance Co.[6] In Cloutier, a judgment for the plaintiff was affirmed after he was dismissed because a food store of which he was manager was burglarized (by someone else). There was evidence of a series of attempts by Mr. Cloutier to persuade A & P to provide better security for the cash stolen from the store. The New Hampshire Supreme Court found that the dismissal violated a public policy contained in New Hampshire and federal employee safety statutes and regulations and in a state statute requiring that employees be given a day of rest. Mr. Cloutier was at home on a Sunday when his store was burglarized.

In Novosel, the Court of Appeals reversed a district court dismissal of the plaintiff's complaint. It held that the plaintiff stated a claim on which relief could be granted by alleging that he was discharged for refusing to participate in an employer-sponsored lobbying campaign. The court found that the public policy in favor of free political expression contained in the First Amendment to the United States Constitution could form a foundation for the wrongful dismissal tort.

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4 272 Or. 210, 536 P.2d 512 (1975).

5 121 N.H. 915, 436 A.2d 1140 (1981).

6 721 F.2d 874 (3d Cir. 1983).

Not all the tort case law recognizes employee rights to sue for wrongful dismissal. In Murphy v. American Home Products,[7] the New York Court of Appeals refused to recognize the tort of "abusive discharge," reasoning that the legislature is better equipped than the courts to make the policy choices involved.

The prevailing approach is to require the employee challenging a discharge on a tort theory: (1) to establish the existence of the public policy as a matter of law, (2) to establish as a matter of law that discouraging his conduct would jeopardize the public policy, and (3) to offer facts from which an inference can be drawn that his conduct was a determining factor in the discharge. The employer then can defend successfully by offering legitimate business reasons for the discharge. The ultimate burden of persuasion should rest with the employee.[8]

The wrongful dismissal breach-of-contract cases generally follow the pattern set by the Supreme Court of Michigan in Toussaint v. Blue Cross & Blue Shield of Michigan, Inc.[9] In Toussaint, the court held that representations that no employee would be dismissed without good cause, reinforced by oral promises of employment security made at a time of hire, would support an action for breach of contract by an employee dismissed without good cause. Subsequent cases in other states, of which Weiner v. McGraw Hill, Inc.,[10] and Pine River State Bank v. Mettille,[11] are notable, refined the Toussaint theory explaining that an informal employer promise of employment security is supported by consideration. The consideration is found in the employee's detrimental reliance on the employer's promise by taking the job in the first place, or remaining in the employer's service when the employee is free to go elsewhere. The doctrinal framework is that of unilateral contract ("If you climb the Washington Monument, I promise to pay you $100."). The unilateral contract/detrimental reliance basis for consideration is well recognized, reasoned these courts, and it is of no significance that the employee had no obligation to remain with the employer. In other words, the absence of "mutuality of obligation" is of no moment. It is reasonably clear that the plaintiff-employee has the burden of production and of

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7 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86 (1983).

8 See Treatise Sections 7.8-7.14 for a discussion of tort proof issues.

9 408 Mich. 579, 292 N.W.2d (1980).

10 57 N.Y.2d 458, 457 N.Y.S.2d 193, 443 N.E.2d 441 (1982).

11 333 N.W.2d 622 (1983).

persuasion on three elements, all of which involve fact questions: (1) the making of the promise, (2) reliance on the promise, and (3) breach of the promise by the employer.[12]

Basic Preclusion Concepts

The res judicata doctrines of bar, merger and collateral estoppel are designed to ensure that there will be a point at which litigation ends. Under the definitions of bar and merger, final merits determination of a cause of action precludes relitigation between the same parties of that cause of action and any allegation or defense which was or might have been presented in the first suit. A merits judgment for the defendant bars a subsequent attempt by the plaintiff to relitigate the same cause of action, while a judgment for the plaintiff merges with his cause of action and prevents its assertion in the later suit. When the second suit between the same parties involves a different cause of action the absolute barriers of bar and merger are inapplicable and the first judgment can be given only limited res judicata effect under the collateral estoppel doctrine, which precludes relitigation only as to questions which were actually litigated and determined in the first suit. Therefore the doctrines of bar and merger are used to preclude subsequent claims while collateral estoppel precludes the relitigation of issues already determined. Terminology relating to the preclusive effect of earlier litigation can be confusing. Modern usage distinguishes between "claim preclusion," usually associated with the term res judicata, and "issue preclusion," usually associated with the term collateral estoppel.[13]

Collateral estoppel can be asserted either by plaintiffs or defendants. Offensive use of collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant previously has litigated unsuccessfully in another action against the same or a different party. Defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from relitigating an issue the plaintiff has previously litigated unsuccessfully in another action against the same or a different party.[14] Collateral estoppel can prevent relitigation of either law or facts conclusively determined in prior litigation, though an exception for "unmixed questions of law" may permit relitigation of pure legal questions in subsequent cases involving unrelated claims.[15]

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12 See Treatise Sections 7.15-7.22 for a discussion of contract proof issues.

13 See United States v. Mendoza, ___U.S.___, ___ n.3, 104 S. Ct. 568, 571 n.3 (1984) (distinguishing res judicata from collateral estoppel, citing Restatement (Second) of Judgments Section 27 (1982).)

14 Mendoza, ___U.S. at ___ n.4, 104 S. Ct. at 572 n.4.

15 United States v. Stauffer Chemical Co., ___U.S.___, ___, 104 S. Ct. 575, 578-579 (1984).

The Full Faith and Credit Clause of the United States Constitution, Article IV, Section 1, requires states to give full faith and credit to the judicial proceedings of every other state. The law to be applied in determining the effect of a judgment under this clause generally is determined by the choice-of-law rules of the forum state of the first action.

A federal statute, 28 U.S.C. Section 1738 (1982), requires federal courts to give full faith and credit to state court judgments.[16] Generally Section 1738 requires that federal courts apply the law of the state in which the original judgment was issued to determine its preclusive effect. "Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the state from which the judgments emerged would do so."[17]

Sources of Overlap Between Administrative Decisions and Common-Law Wrongful Dismissal Cases

These basic concepts of preclusion can be at issue when a wrongful dismissal plaintiff or defendant asserts that an administrative agency decision bars relitigation of a fact or a legal conclusion in a judicial forum.

This kind of question arises frequently in public employee discharge cases, where the employee has administrative remedies under civil service laws and regulations. It arises occasionally in connection with statutory discrimination suits in which the claimant has pursued administrative remedies at the state level before bringing suit in federal court. The issue also may arise with increasing frequency, when unemployment compensation eligibility turns on the employee's conduct, or in connection with public policy torts based on statutes giving administrative agencies enforcement authority. For example, an employee may complain that she was fired for complaints about the safety of employer products or operations. In the employee's lawsuit, the court may be presented with a determination by the cognizant administrative agency respecting the safety question.

General Preclusion Rule for Administrative Decisions

Section 83 of the Restatement (Second) of Judgments (1982) presents the general rule with respect to the res judicata effect of decisions by administrative agencies:

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16 The predecessor to Section 1738 was originally enacted in 1790. See Kremer v. Chemical Construction Corp., 456 U.S. 461, 466 n.6 (1982); See also Annot. Supreme Court's Views as to res judicata or collateral estoppel effect of state court judgments on federal courts, 72 L.Ed.2d 911 (1983).

17 456 U.S. at 482.

> 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.

Subsection (2) of Section 83 limits the effect of the general rule to adjudicative determinations involving the "essential elements of adjudication," including the right to present evidence and argument and to rebut opposing evidence and argument.[18] The section also provides for exceptions to the general rule when the remedial scheme of a subsequent claim permits assertion of that claim notwithstanding a decision on the first claim;[19] or if giving preclusive effect to the administrative determination would be "incompatible with legislative policy."[20]

Generally, the Supreme Court has allowed administrative agency decisions that are adjudicatory in character to be given res judicata or collateral estoppel effect.[21] The diverse nature of administrative tribunals makes reliable application of general concepts difficult, however.[22]

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18 For application of this concept, though without reliance on the Restatement, see Bowen v. United States, 570 F.2d 1311, 1321-22 (7th Cir. 1978) (plaintiff estoppel from relitigating contributory negligence in Federal Tort Claims Act for failure of air traffic controllers to warn him of icing conditions, by an NTSB decision that he had violated federal aviation regulations); Moore v. Allied Chemical Corp., 480 F.Supp. 377 (E.D.Va. 1979) (chemical company collaterally estopped from relitigating its knowledge of the dangers of a chemical substance, by admission in an OSHA proceeding that it knew of hazards) (applying Virginia law).

19 Restatement (Second) of Judgments Section 83(3).

20 Restatement (Second) of Judgments Section 83(4).

21 See United States v. Utah Construction & Mining Co., 384 U.S. 394, 422 (1966) (giving collateral estoppel effect to contract review board decision in case subsequently heard by Court of Claims).

22 See, e.g. Thomas v. Washington Gas Light Co., 448 U.S. 261, 283 (1980) (denying res judicata effect to award of Virginia Workers Compensation Commission because of limited jurisdiction of Commission); McDonald Douglas Corp. v. Green, 411 U.S. 792, ___ (1973) (EEOC finding of no reasonable cause to believe discrimination occurred not binding on federal court; EEOC does not have adjudicatory function); Nasem v. Brown, 595 F.2d 801, 807 (D.C. Cir. 1979) (denying offensive collateral estoppel effect of administrative determination of discriminatory motive because agency did not permit live testimony or cross examination); Athan v. PATCO, 672 F.2d 706, 711 (8th Cir. 1982) (reversing trial court for permitting offensive collateral estoppel as to element of tort not actually decided by administrative agency which did decide all other elements of tort).

Statutory Discrimination and Constitutional Rights Cases

Frequently a dismissed employee will present statutory discrimination claims first to a state agency. Indeed Title VII requires that this be done as a prerequisite to suing in federal court.[23] Similarly, dismissed state and local government employees file federal court actions for violation of their constitutional rights after unsuccessful administrative appeals. The question of whether the administrative agency decision is entitled to preclusive effect in a subsequent federal court action is a difficult one, illustrated by a number of recent cases.

The difficulty in discrimination cases stems from the interaction of two Supreme Court decisions: Kremer v. Chemical Construction Co.,[23] and McDonnell Douglas Corp. v. Green.[24] In McDonnell Douglas, the Supreme Court held that a finding of no probable cause by the EEOC is not preclusive in a subsequent suit for race discrimination under Title VII because the EEOC does not have an adjudicatory function under Title VII. In Kremer, the Court held that a federal court hearing a Title VII suit must give preclusive effect to a state court decision refusing to overturn a state agency decision finding no discrimination. The two cases are hard to distinguish because the state court in Kremer did not reach the merits of the discrimination claim, but merely reviewed the agency decision under a typically deferential standard of review.

In Buckhalter v. Pepsi-Cola General Bottlers,[25] the plaintiff filed a charge of race discrimination with the Illinois Fair Employment Practices Commission (FEPC). An administrative law judge dismissed the claims, and the full state commission affirmed the ALJ's decision. Then the plaintiff, having received a right to sue letter from the EEOC, filed suit in federal court under Title VII and 42 U.S.C. Section 1981. The District Court granted the defendant's motion for summary judgment on the grounds of res judicata.[26]

The court premised its legal analysis on United States v. Utah Construction and Mining Co.,[27] which held that res judicata applied to the findings of an administrative tribunal if the tribunal is:

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23 456 U.S. 461 (1982).

24 411 U.S. 792, ___ (1973).

25 590 F. Supp. 1146 (N.D.Ill. 1984).

26 590 F. Supp. at 1148.

27 384 U.S. 394 (1966).

> . . . is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties . . . had adequate opportunity to litigate. . . (in that) both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings.[28]

The District Court was further influenced by Lee v. City of Peoria,[29] finding that the doctrine of collateral estoppel could bar relitigation of factual issues in a Section 1981 suit when the issues had been determined previously in an administrative proceeding.[30]

The plaintiff argued that footnote 7 in Kremer v. Chemical Construction Corp.[31] militates against giving res judicata effect to agency determinations, as contrasted with state court decisions reviewing agency decisions. The District Court rejected this argument, interpreting footnote 7 in Kremer to apply only to non-adjudicatory state agency determinations similar to those of the EEOC.[32] The EEOC is not authorized to act in an adjudicatory capacity. The court noted that agency decisions are entitled to preclusive effect under Illinois law, and reviewed the judicial-like powers of the state commission. It also found that the plaintiff was afforded sufficient procedural rights before the state agency to meet the second requirement of Utah Construction, without engaging in detailed analysis of the plaintiff's criticisms of the administrative procedure.[33]

Another District Court has refused to follow Buckhalter. In Jones v. Progress Lighting Corp.,[34] the District Court criticized Buckhalter as inconsistent with footnote 7 in Kremer. It believed Utah Construction to be inapplicable to the Title VII statutory scheme, pointing

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28 384 U.S. at 422.

29 685 F.2d 196, 198 (7th Cir. 1982).

30 590 F. Supp. at 1148.

31 456 U.S. 461, 470 n. 7 (1982).

32 590 F. Supp. at 1149.

33 590 F. Supp. at 1150.

34 ___ F. Supp. ___, Civ. No. 84-0074 (order denying summary judgment for defendant, Oct. 18, 1984.)

to Chandler v. Roudebush.[35] The language of the Jones opinion also suggests that the Buckhalter analysis also is suspect because it would have the effect of requiring Title VII claimants to appeal state agency determinations within the state court system, a result that the Kremer court expressly rejected.

In Snow v. Nevada Dept. of Prisons[36] the District Court concluded that footnote 7 in Kremer precludes giving res judicata or collateral effect to a state agency determination not reviewed by state courts,[37] but went on to find the plaintiff's relitigation of certain fact issues in her Section 1983 and 1985 claims barred by the agency decision.[38]

Unemployment Compensation Cases

A dismissed employee frequently will file for unemployment compensation before she considers litigating the propriety of her dismissal. Most state unemployment compensation statutes preclude receipt of benefits by an employee who is dismissed for misconduct.[39] Occasionally, therefore,

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35 425 U.S. 840 (1976) (Civil Service Commission determination not binding in subsequent Title VII suit).

36 543 F. Supp. 752 (D. Nev. 1982).

37 543 F Supp. at 755.

38 543 F. Supp. at 757. See also Moore v. Bonner, 695 F.2d 799, 801 (4th Cir. 1982) (unappealed state agency decision not entitled to preclusive effect in Section 1983 action applying Kremer); Griffen v. Big Spring Independent School District, 706 F.2d 645, 655 (5th Cir. 1983) (denying res judicata or collateral estoppel effect to state administrative appeals board determination because of gross irregularity of procedure, though procedure before hearing officer was adequate).

39 See Treatise Section 2.30.

an unemployment compensation agency will have decided the employer's reasons for dismissing the employee before the employee attempts to litigate the wrongfulness of her dismissal in court. Dismissal for misconduct, of course, would preclude recovery on either the common-law tort or the common-law breach-of-contract theories.

A few cases have addressed the preclusive effect of unemployment compensation decisions in subsequent wrongful dismissal actions. Two New York courts reached similar conclusions, in Ryan v. New York Telephone Co.,[40] and Bernstein v. Birch Wathen School.[41] In Ryan, the Court of Appeals held that a determination by an unemployment compensation tribunal barred a subsequent suit for wrongful discharge. Unemployment compensation was denied because Mr. Ryan was guilty of unauthorized removal and possession of company property, and was discharged for that reason. The Court concluded that this determination, entitled to collateral estoppel effect, "is dispositive of the fact that Ryan's termination from employment resulted from and was justified by his misconduct. Consequently, justification being a defense to the tort of wrongful discharge, the determination constitutes a basis for dismissal of these causes of action as well."[42]

In Bernstein, a teacher was barred from litigating her wrongful discharge suit involving a written contract of employment because an earlier unemployment compensation decision had found her employment termination to be voluntary. The court distinguished cases in which award of unemployment compensation was not given preclusive effect in subsequent wrongful dismissal actions because the issues were not identical as between the two adjudications.

In Chatelain v. Mount Sinai Hospital,[43] the District Court refused to give collateral estoppel effect to an unemployment compensation finding of dismissal for misconduct because the administrative decision was not judicially reviewed and because of procedural infirmities in administrative proceeding casting doubt on its fairness.[44]

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40 62 N.Y.2d 494, 478 N.Y.S.2d 823, 467 N.E.2d 487 (1984).

41 71 A.D.2d 129, 132 (N.Y. App. 1979), aff'd, 51 N.Y.2d 932, 434 N.Y.S.2d 994, 415 N.E.2d 982 (1980).

42 62 N.Y.2d at ___, 478 N.Y.S.2d at ___, 467 N.E.2d at 492.

43 580 F. Supp. 1414 (S.D.N.Y. 1984).

44 Id. at 1416-17. See also Roberts v. Wake Forest University, 286 S.E.2d 120, 124 (N.C. App. 1982) (administrative finding of entitlement to unemployment benefits not preclusive in wrongful dismissal suit because issues different); Donovan v. Peter Zimmer America, Inc., 557 F. Supp. 642, 652-53 (D.S.C. 1982) (no res judicata or collateral effect to state conciliation effort or to state unemployment compensation determination in OSHA retaliation case because former was not adjudicatory, and latter concerned different legal issues).

Giving preclusive effect to unemployment compensation decisions on the reasons for dismissal might induce employers to litigate unemployment compensation eligibility more vigorously. Such an inducement could be viewed as undermining the policy of the unemployment compensation laws, and thus form the basis for denying unemployment decisions preclusive effect under Section 83 of the Restatement (Second) of Judgments, which relaxes the preclusion rule when giving preclusive effect to an administrative determination would be "incompatible with legislative policy."[45] On the other hand, when the employer has vigorously contested eligibility, and the administrative decision is congruent with an outcome determinative issue in the wrongful dismissal litigation, it seems desirable to give the administrative decision preclusive effect.

Health and Safety Regulatory Cases

Public policy tort claims by dismissed employees must be founded on employee efforts to promote public policy. Many of these cases involve employee protests of alleged employer violations of federal or state health or safety statutes. Typically some enforcement responsibility under such statutes is vested in administrative agencies. Thus the allocation of decision-making responsibility between the wrongful-dismissal court and the health or safety enforcement agency frequently arises.

In Gaibis v. Werner Continental, Inc.,[46] the plaintiffs claimed they were dismissed under circumstances that violated regulations promulgated under the Federal Motor Carrier Safety Act relating to duty time. The collective bargaining agreement covering the plaintiffs employment made violation of federal safety regulations a breach of the agreement. The District Court stayed the action pending a decision of the Bureau of Motor Carrier Safety (BMCS), within the Department of Transportation, on whether the employer's practices violated the Federal Motor Carrier Safety Regulations. The BMCS decided that no violations occurred. The district judge concluded that he was not bound by the administrative determination. He considered the question of interpretation of the regulations to be a legal question fully within the competence of the court to decide. The Third Circuit reversed on the grounds that no private right of action existed under the federal statute, and did not reach the question of the weight to be given to the decisions of an administrative agency in such circumstances.

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45 See Restatement (Second) of Judgments Section 83 comment g (noting that interest in expeditious administrative decisions may militate against giving preclusive effect to those decisions).

46 565 F. Supp. 1538 (W.D. Pa. 1983), rev'd sub nom Vosch v. Werner Continental, 734 F.2d 149 (3rd Cir. 1984).

In Cavoli v. ARA Services, Inc.,[47] the plaintiff claimed he was dismissed from his job as a corporate pilot because he complained about poor maintenance of corporate aircraft. The District Court concluded, under the primary jurisdiction doctrine, that Mr. Cavoli's lawsuit should be stayed until the Federal Aviation Administration could apply its expertise to determine whether there had been violations of its "highly complex regulations governing airworthiness and airplane maintenance. . . . The agency may find that the plaintiff's concerns were frivolous, in which case we would be disposed to find that his discharge was justified. Or the agency may find that there were violations, in which case, taking the remainder of the complaint as true, the court or a jury might be disposed to find that the discharge was wrongful." The court did not say that the FAA's decisions would be conclusive, only that they would be helpful in putting the court in a more educated position.

In Wheeler v. Caterpillar Tractor Co.[48] the court found no tort cause of action based on employee complaints about the safety of radiation equipment. The plaintiff was a quality control employee and had refused to work with equipment he considered to be unsafe and in violation of Nuclear Regulatory Commission rules. The Nuclear Regulatory Commission had inspected his employer's facility and found only minor problems. Because "there was no hard evidence of unsafe conditions, but rather only plaintiff's unilateral and subjective decision that such conditions did exist," the court found that he failed to state a cause of action in tort.

The preclusive effect to be given agency decisions on health and safety issues on which public policy tort claims are based depends on the type of protection "public policy" affords to employees. If employees are protected against retaliatory dismissal only when they correctly believe their employers are violating the law, then agency decisions on the underlying violation should be given collateral estoppel effect on the violation question. But in public policy tort cases, the issue probably should not be whether the employee was correct on her complaints; rather the issue should be whether the employee's right to complain without fear of retaliation promotes public policy. On the other hand, if the employee's protest is frivolous, then it is less clear that public policy is served by protecting her from retaliation by the employer.[49] Accordingly, even when an administrative agency has been given responsibility for applying public policy, the agency's decision on the legality of the employer's conduct should not be outcome determinative in a related public policy tort case.

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47 Civil No. 83-3764 (D.N.J. letter opinion filed Jan. 24, 1984).

48 462 N.E.2d 1262 (Ill. App. 1984).

49 See Alford v. Harold's Club, 669 P.2d 721, 724 (Nev. 1983) (employees dismissed for refusal to comply with employer's tip pooling policy cannot recover for wrongful dismissal because employer's policy legal under state statute).

Most federal statutes expressly protecting against retaliatory dismissal have been construed to protect good faith, though meritless, protest. For example, in cases arising under Section 8(b)(4) of the National Labor Relations Act, an employee protesting violations of the Act need not be correct on her assertions of a violation; she need only make the protest in good faith.[50] A similar rule is followed under the Fair Labor Standards Act,[51] under the Occupational Safety and Health Act,[52] and under Title VII.[53]

If the same concepts are applied in common-law wrongful dismissal cases, an administrative finding of a serious violation would be persuasive evidence that the employee's concern was reasonable. An administrative finding of no violation may support an argument that the employee's complaint was frivolous. A decision on the merits of the employer's conduct by the responsible administrative agency may assist the court in deciding whether the employee's complaint was frivolous or made in good faith.

Conclusion

Deciding the preclusive effect to be given to administrative agency decisions in wrongful dismissal suits is the responsibility of judges hearing the wrongful dismissal suits, not the responsibility of ALJ's hearing the administrative claims. Nevertheless, agencies making decisions that subsequently may be given preclusive effect should be aware of this possibility. Such agencies may wish to express their views as to the policy implications for them of subsequent res judicata effect of their decisions. Such an expression may be entitled to some degree of deference in a subsequent judicial decision. Also, agencies may wish to adjust the procedures used, and the evidence admitted on certain fact issues to make the preclusive effect of decisions on those fact issues either more or less likely.

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50 Interior Alternations, Inc. v. NLRB, 738 F.2d 373, 376 (10th Cir. 1984) (enforcing NLRB order arising from discharge of employees for protesting work assignments).

51 See Love v. RE/MAX of America, Inc., 738 F.2d 383, 387 (10th Cir. 1984) (violation of 29 U.S.C. Section 215(a)(3) for discharge of employee making good faith, though mistaken, internal protest of disparate treatment of women).

52 See Whirlpool Corp. v. Marshall, 445 U.S. 1, 21 (1980) (employee making bad faith refusal to work because of OSHA violation subject to discharge); Donovan v. Hahner, Foreman & Harness, Inc., 736 F.2d 1421; 1429 (10th Cir. 1984) (affirming judgment for employee; evidence showed reasonable belief in imminent risk).

53 See Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130 (5th Cir. 1981), cert. denied, 455 U.S. 1000 (1982); Treatise Section 2.14 at 51.