



On September 24, 2010, the Court *sua sponte* converted Defendant's Motion to Dismiss to a motion for summary judgment pursuant to Rule 12(d) of the Federal Rules of Civil Procedure, as matters outside the pleadings were presented [D.E. 15]. At that time, the Court instructed the parties to submit any supplemental material pertinent to the motion, including a copy of the arbitration agreement on which Defendant relies. Defendant has now submitted the CBA and personnel documents regarding Plaintiff's termination [D.E.s 16 and 17] and Plaintiff has filed a Supplemental Memorandum of Law in Opposition to Defendant's Motion to Dismiss [D.E. 18]. For the following reasons, Defendant's Motion is DENIED.

Summary judgment for Defendant is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Defendant bears the burden of proving that there are no genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The ultimate inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

As stated above, the basis for Defendant's Motion is collateral estoppel. Collateral estoppel prevents the relitigation of a previously decided issue. *See, e.g., Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982). To invoke collateral estoppel, a party must show (1) the precise issue raised in the present case was raised and actually litigated in the prior proceeding, (2) determination of the issue was necessary to the outcome of the prior proceeding, (3) the prior proceeding resulted in a final judgment on the merits, and (4) the party against whom estoppel is sought had a full and fair opportunity to litigate the issue in the prior

proceeding. *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 583 (6th Cir. 2003) (citing *Aircraft Braking Sys. Corp. v. Local 856, Int'l Union*, 97 F.3d 155, 161 (6th Cir. 1996)); *Thompson v. Davidson Transit Org.*, 563 F. Supp. 2d 820, 831-832 (M.D. Tenn. 2008).

Here, Defendant argues that the issues raised by the Plaintiff in his Complaint, and in the current action, are the same. Defendant points to the following in support of its argument:

In the instant case, it is undisputed that Plaintiff filed a grievance pursuant to the collective bargaining agreement between Windsor Republic Doors, Inc., and United Steel Workers of America Local 8915 in regards to his termination. (Exhibit 1). Further, it is undisputed that a hearing was conducted on March 4, 2010 regarding whether or not Plaintiff's discharge was for cause. (Exhibit 1). It is undisputed that Plaintiff received a "final suspension level discipline" on November 13, 2008. (Complaint ¶ 7). It is further undisputed that after receiving the final level suspension discipline, Plaintiff could be terminated for any other violations of company policy within twelve months. (Complaint ¶ 7). There is no dispute that Plaintiff violated company work rules by falsifying a company insurance form, which resulted in his termination. (Complaint ¶ 7).

Defendant attaches the Arbitration Award as Exhibit 1 to its Motion, which lists as the Issue, "[w]as the discharge for Cause? If not, what shall be the appropriate remedy?" After some discussion, the arbitrator concludes that "[t]he Greivant's conduct warranted discipline. The discharge was for cause, given the prior suspension of record." Nowhere in the Award does the arbitrator discuss the issue of whether Plaintiff's discharge was retaliatory.

Defendant bears the burden of demonstrating that the issues on which it seeks preclusion were actually decided by the arbitrator. *See Clarke v. Frank*, 960 F.2d 1146, 1150 (2d Cir. 1992). Collateral estoppel, or "issue preclusion," prevents a party from relitigating only those "issues *actually adjudicated*, and essential to the judgment, in a prior litigation." *Id.* quoting *Kaspar Wire Works*, 575 F.2d 530, 535-36; *Schreiber v. Philips Display Components Co.*, 580

F.3d 355, 367-368 (6th Cir. Mich. 2009). The party asserting the preclusion of an issue bears the burden of showing with clarity and certainty what was determined by the prior judgment; in the absence of this showing the preclusion of an issue is inappropriate. *See, e.g., Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318 (9th Cir. 1992); *Hybert v. Shearson Lehman/American Exp. Inc.*, 688 F. Supp. 320 (N.D. Ill. 1988).

Here, Defendant did not meet its burden, because it failed to show that the issue of retaliatory discharge was actually adjudicated and essential to the judgment in the parties' arbitration. As stated previously, the Arbitration Award does not discuss or make any findings as to whether Plaintiff's discharge was retaliatory, nor does Defendant argue that the issue was addressed. Defendant has only offered evidence that the arbitrator found that Plaintiff was terminated for violating company work rules. There is no showing by Defendant that the arbitrator considered whether the stated reason for the termination was pretextual. *See Wallace v. DTG Operations, Inc.*, 442 F.3d 1112, 1120-21 (8th Cir. Mo. 2006) ("In effect, a plaintiff may concede that the proffered reason, if truly the motivating cause for the termination *would have been* a sufficient basis for the adverse action while arguing that the employer's proffered reason was not the true reason for the action." (emphasis in original)); *See also Tewolde v. Owens & Minor Distrib., Inc.*, 2009 U.S. Dist. LEXIS 49098, 24-28 (D. Minn. June 10, 2009) ("Even if [the defendant] argued that [it] issued the corrective action because [the plaintiff's] 'error rate was not subsiding at an acceptable pace,' the same facts establishing a prima facie case would also establish a fact issue as to pretext.").

Nor does the Court find that the CBA at issue requires Plaintiff to arbitrate these claims. Plaintiff argues that unlike an arbitration agreement between the employer and the employee, the arbitration agreement that Defendant relies on was a collective bargaining agreement entered into

between the employer and the United Steelworkers of America. Unlike a private agreement to litigate all claims before the AAA, and waive right to a jury trial in court, nowhere in the arbitration agreement in question does Plaintiff waive his rights to seek remedies of Tennessee retaliatory discharge law in court. Accordingly, Plaintiff argues, the collateral estoppel basis for Defendant's motion is misplaced. In support of his arguments, Plaintiff relies on *McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 291 (1984) (discussing how the interests of a union and its employees are divergent); and *Nance v. Goodyear Tire & Rubber Co.*, 527 F.3d 539, 549 (6th Cir. 2008) ("if a plaintiff does not expressly waive [his] right to bring claims in federal court, a prior arbitration does not preclude [a court] from reconsidering all factual issues underlying a statutory claim").

The CBA states that "[t]he parties agree that grievances should be settled as close to the source as possible. The term 'grievance' as used herein means any alleged violation of this Agreement . . . [t]he decision of the arbitrator shall be final and binding upon both parties." (Article 4, Adjustment of Grievances). The CBA does not expressly state that Plaintiff is waiving his right to bring state or federal claims in a court; rather, its language is limited to compelling the parties to arbitrate violations of the CBA. In this case, Plaintiff is not bringing allegations that Defendant violated the CBA, rather, he is alleging that Defendant violated common law and the Tennessee Public Protection Act (TPPA), Tenn. Code Ann. §50-1-304. Because there is no agreement to arbitrate these claims between Plaintiff and Defendant, they are properly before this Court. See *Nance* 527 F.3d at 549 ("if a plaintiff does not expressly waive [his] right to bring claims in federal court, a prior arbitration does not preclude [a court] from reconsidering all factual issues underlying a statutory claim"); *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1468, (2009) (noting with approval the line of cases finding that where employees

had not contractually agreed to arbitrate their statutory claims, the prior arbitrations did not preclude subsequent statutory actions).

In sum, Defendant's Motion is DENIED because it has failed to establish that the elements of collateral estoppel have been met. Defendant failed to show that the retaliation claims at issue were actually adjudicated and essential to the parties' prior arbitration. Moreover, the Collective Bargaining Agreement between the parties does not mandate that these state law claims be arbitrated.

IT IS SO ORDERED.

**s/Edward G. Bryant**  
EDWARD G. BRYANT  
UNITED STATES MAGISTRATE JUDGE

Date: **October 21, 2010**