

JIMMY W. DUNN)
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 Claimant-Petitioner)
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 v.)
)
 LOCKHEED MARTIN CORPORATION) DATE ISSUED: Dec. 22, 1999
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 and)
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 CIGNA INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Order Granting Summary Decision of James W. Kerr, Jr.,
Administrative Law Judge, United States Department of Labor.

Ben A. Goff (Mitchell, Goff & Mitchell, L.L.P.), Dallas, Texas, for claimant.

Cynthia A. Galvan (Brown, Sims, Wise & White, P.C.), Houston, Texas, for
employer/carrier.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals
Judges.

PER CURIAM:

Claimant appeals the Order Granting Summary Decision (98-LHC-2475) of
Administrative Law Judge James W. Kerr, Jr., rendered on a claim filed pursuant to the
provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C.
§901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We
must affirm the findings of fact and conclusions of law of the administrative law judge if they
are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C.
§921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On March 26, 1996, claimant filed a claim for a work-related respiratory impairment

arising out of exposure to hazardous chemicals while in the course of his employment with employer as a sheet metal worker at the Rhein-Main Air Force Base in Germany.¹ Claimant was first required to wear a respirator in March 1995, when half-face respirators were issued to employees at the commencement of a painting operation. In March 1996, claimant advised employer of his medical treatment and intention to file a workers' compensation claim. Employer informed claimant that his beard prevented his respirator from sealing properly and that because he lacked a dermatologist's certification of a skin condition, he was in violation of its clean shaven policy. Employer offered to consider granting a special waiver, upon verification of claimant's jaw deformity, but advised that claimant would be required to provide his own hooded respirator. On March 25, 1996, claimant completed an Incident Report for respiratory and other medical conditions resulting from his chemical exposure. On March 26, 1996, claimant completed employer's First Report of Injury or Occupational Illness; on that same day, claimant was suspended without pay pending

¹When initially hired by employer in July 1992, claimant was informed of employer's written "clean-shaven" policy, which provides that the clean-shaven requirement may be waived upon production of a dermatologist's certification that the employee has a skin condition which precludes daily shaving. Claimant advised employer of his jaw deformity and related emotional disorders, which limited his interactions with other people unless he wore a beard to cover up the jaw deformity. Thereafter, claimant presented employer with medical certification of his deformity, and was granted a shaving waiver. Claimant, who wore a beard throughout his employment with employer, was the only employee at Rhein-Main with a beard.

confirmation of his jaw deformity.² On June 3, 1996, employer advised claimant that because he had not provided his own hooded respirator, he was being laid off effective June 6, 1996.

Thereafter, claimant filed suit in United States District Court, alleging that his jaw deformity, skin disorders, and emotional disorders constitute a disability and that employer discriminated against him on the basis of such disability in violation of the Americans with Disabilities Act (ADA). The court dismissed claimant's cause of action under the ADA, ruling that claimant is not disabled within the meaning of the ADA, and thereafter briefly addressed the reasons why claimant's allegations of unlawful inquiry and retaliation under the ADA were groundless.

Employer, on October 13, 1998, filed a motion for summary decision with the administrative law judge seeking to dismiss claimant's claim for discrimination under Section 49 of the Act on the basis that the doctrines of *res judicata* and collateral estoppel bar relitigation of the issues raised by claimant's Section 49 discrimination claim. Employer additionally asserted that even without the district court's judgment, there is sufficient evidence to dismiss the Section 49 claim. Claimant responded, objecting that employer's motion is beyond the scope of summary judgment set at the prehearing conference limiting the summary judgment inquiry to the issue of collateral estoppel, that he was not afforded the opportunity to complete discovery, that there are material facts in controversy, and that the doctrines of *res judicata* and collateral estoppel do not apply.

In his Order Granting Summary Decision, the administrative law judge found that the doctrine of collateral estoppel prevents relitigation of claimant's allegation of discrimination

²Following his suspension, claimant presented a dermatologist's certification of a skin condition which precluded shaving, and employer returned claimant to work on a conditional basis. Claimant asserts that he was offered a hooded respirator by an Air Force employee, but that employer prohibited its use by claimant, stating that he was required to provide his own. On May 29, 1996, employer granted claimant a shaving waiver after receiving a plastic surgeon's certification that claimant has a jaw deformity.

under Section 49 of the Act based on his determination that the United States District Court ruled, in claimant's ADA action, that claimant was discharged properly and not as a discriminatory or retaliatory act. The administrative law judge further found that even if collateral estoppel did not apply, employer's motion for summary judgment would be granted on the basis that the evidence warrants the conclusion that claimant was discharged for failure to comply with employer's lawful requests.

On appeal, claimant contends that neither *res judicata* nor collateral estoppel is applicable to the instant case. Claimant further assigns error to the administrative law judge's entry of a summary decision where claimant had not been afforded the opportunity to complete discovery and where there are contested issues of material fact which were not addressed by the administrative law judge. Employer responds, urging affirmance.

The sole issue raised by claimant on appeal is whether the administrative law judge erred in granting employer's motion for summary decision on the issue of whether employer violated the provisions of Section 49 of the Act, 33 U.S.C. §948a.³ Section 49 of the Act prohibits an employer from discharging or discriminating against an employee based on his involvement in a claim under the Act, and if the employee can show he is the victim of such discrimination, he is entitled to reinstatement and back wages. 33 U.S.C. §948a (1994). To establish a *prima facie* case of discrimination, a claimant must demonstrate that his employer committed a discriminatory act motivated by discriminatory animus or intent. See *Holliman v. Newport News Shipbuilding & Dry Dock Co.*, 852 F.2d 759, 21 BRBS 124 (CRT) (4th Cir. 1988), *aff'g* 20 BRBS 114 (1987); *Geddes v. Director, OWCP [Geddes II]*, 851 F.2d 440, 21 BRBS 103 (CRT)(D.C. Cir. 1988), *aff'g* *Geddes v. Washington Metropolitan Area Transit Authority*, 19 BRBS 261 (1987); *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996); *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993). The circumstances of an employee's discharge may be examined to determine whether employer's reason for discharge is the actual motive or a mere pretext, and the administrative law judge may infer animus from the circumstances. See, e.g., *Brooks*, 26 BRBS at 3. The essence of discrimination is in treating the claimant differently than other employees. *Jaros v. National Steel & Shipbuilding Co.*, 21 BRBS 26 (1988). Once claimant has met his burden of proof, a rebuttable presumption arises that the employer was motivated at least in part by claimant's involvement in a claim under the Act. The burden then shifts to employer to prove that it was not motivated, even in part, by claimant's exercise of his rights under the Act. See *Geddes II*, 851 F.2d at 440, 21

³The administrative law judge retained jurisdiction of the claim for compensation for a work-related respiratory impairment.

BRBS at 103 (CRT); *Geddes v. Benefits Review Board [Geddes I]*, 735 F.2d 1412, 16 BRBS 88 (CRT)(D.C. Cir. 1984), *rev'g Geddes v. Washington Metropolitan Area Transit Authority*, 15 BRBS 296 (1983); *Rayner v. Maritime Terminals, Inc.*, 22 BRBS 5 (1988); *Jaros*, 21 BRBS at 30.

The administrative law judge in the instant case found that claimant's assertion of discrimination under Section 49 of the Act was barred by the doctrine of collateral estoppel.⁴ We agree with claimant that the administrative law judge erred in finding that claimant is collaterally estopped from raising the issue of Section 49 discrimination under the Act by the district court's judgment in claimant's ADA lawsuit. The doctrine of collateral estoppel may apply to preclude relitigation of an issue actually litigated in the prior case where the determination of the issue was a critical and necessary part of the judgment in the prior action. *See, e.g., Figueroa v. Campbell Industries*, 45 F.3d 311, 315 (9th Cir. 1995); *Taylor v. Plant Shipyards Corp.*, 30 BRBS 90, 96 (1996); *Weber v. S.C. Loveland Co.*, 28 BRBS 321, 325 (1994). In order for collateral estoppel effect to be given to a court's finding by an administrative law judge deciding a claim under the Act, the same legal standards must be applicable in both forums. *See, e.g., Casey v. Georgetown University Medical Center*, 31 BRBS 147, 151 (1997). Collateral estoppel effect may be denied because of differences in the burden of proof. *Bath Iron Works Corp. v. Director, OWCP [Acord]*, 125 F.3d 18, 21, 31 BRBS 109, 111 (CRT) (1st Cir. 1997).

In the instant case, claimant contends, and we agree, that the basis of the district court's dismissal of his ADA claim was its determination that claimant's jaw deformity, skin condition and emotional condition do not constitute a disability protected by the ADA. This determination by the court did not involve an examination of any of the issues relevant to the inquiry under Section 49 of the Act, which is whether employer discriminated against claimant based on his involvement in a claim under the Act. Thus, the finding that is central to the court's dismissal of the ADA action bears no relationship to the issues presented by claimant's Section 49 claim. In finding collateral estoppel applicable, the administrative law judge apparently relied on the court's brief discussion of the reasons why claimant's claims

⁴In addition, the administrative law judge may have implicitly found the Section 49 discrimination claim precluded on the basis of *res judicata*. If, in fact, the administrative law judge did apply *res judicata*, his application of this doctrine was erroneous. As argued by claimant, the ADA claim and the present allegation of discrimination under Section 49 of the Act are two distinct causes of action involving different standards, and the issues presented by the Section 49 claim could not have been litigated in the ADA action. *See Wilson v. Norfolk & Western Ry. Co.*, 32 BRBS 57 (1998). *See generally Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 12 BRBS 828 (1980).

of unlawful inquiry and retaliation *under the ADA* are groundless. This discussion is, at most, peripheral to the court's judgment and, thus, fails to satisfy the requirement that, to be given collateral estoppel effect, the determination of the issue must have been a critical and necessary part of the court's judgment. *See Weber*, 28 BRBS at 324-325. Moreover, the court's discussion of unlawful inquiry and retaliation is confined to whether employer's actions were prohibited by the ADA, and the court applied standards specific to that statute. Thus, even if these findings could be considered essential to the court's judgment, they are not dispositive of the issues presented by claimant's Section 49 claim arising under the Act. *See generally Figueroa*, 45 F.3d at 315. We therefore reverse the administrative law judge's finding that consideration of claimant's Section 49 discrimination claim is precluded by the collateral estoppel doctrine.

We further agree with claimant's assignment of error to the administrative law judge's conclusion that, even without giving collateral estoppel effect to the district court's judgment, the pleadings and exhibits submitted in the instant case warrant the entry of a summary decision dismissing the Section 49 issue. Under the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges,⁵ 29 C.F.R. §18.40(a), Motion for Summary Decision, any party may move, with or without supporting affidavits, for summary decision at least twenty days before the hearing. Any party opposing the motion may serve opposing affidavits or countermove for a summary decision. *Id.* If the pleadings, affidavits, material obtained through discovery or otherwise, or matters officially noticed show that there is no genuine issue of material fact, the administrative law judge may enter summary judgment for either party. 29 C.F.R. §§18.40(d), 18.41(a).

The purpose of the summary judgment procedure is to promptly dispose of actions in which there is no genuine issue as to any material fact. *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1, 3-4 (1990). Not only must there be no genuine issue as to the evidentiary facts, but there must also be no controversy regarding inferences to be drawn from them. *Id.* In determining if summary judgment is appropriate, the court must draw all reasonable inferences in favor of the party opposing the motion and must look at the record in the light most favorable to the party opposing the motion. *See Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Hahn v. Sargent*, 523 F.2d 461, 464 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976). To defeat a

⁵The Rules apply unless inconsistent with a rule of special application as provided by statute or regulation. *See* 29 C.F.R. §18.1; *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

motion for summary judgment, the party opposing the motion must establish the existence of a genuine issue of material fact; a fact is material if it affects the outcome of the litigation. *See Hahn*, 523 F.2d at 464; *Hall*, 24 BRBS at 4.

In the instant case, the administrative law judge failed to address claimant's assertions that employer's motion exceeded the scope agreed upon at the pre-hearing conference and that entry of summary decision deprived claimant of the opportunity to complete discovery. *See* 29 C.F.R. §18.40(d) (the administrative law judge may deny the motion for summary decision where the moving party denies access to information by means of discovery). If, in fact, summary judgment was entered without allowing claimant to conduct the discovery necessary to present his Section 49 discrimination claim, claimant may have been deprived of due process. *See generally Cornell v. Lockheed Aircraft Int'l*, 23 BRBS 253, 259 (1990). Moreover, the applicable regulation requires that a summary decision contain findings of fact and conclusions of law and the reasons therefor. 29 C.F.R. §18.41. The administrative law judge's three-sentence discussion concluding that the pleadings and exhibits warrant the entry of summary judgment on the Section 49 issue does not satisfy this regulatory requirement. Moreover, in summarily deleting Section 49 as an issue in this case, the administrative law judge failed to go through the prescribed analysis and to apply the proper legal standards involved in consideration of the Section 49 issue. *See Jaros*, 21 BRBS at 30. Lastly, the administrative law judge did not address the contested issues of fact relevant to employer's motivation for claimant's termination that were set forth in claimant's objection to employer's motion. Indeed, in granting employer's motion for summary decision, the administrative law judge never explicitly made the requisite determination that there was no genuine issue as to any material fact. *See* 29 C.F.R. §§18.40(d), 18.41; *Hall*, 24 BRBS at 3-4. We therefore vacate the administrative law judge's summary decision and remand the case to the administrative law judge for an evidentiary hearing on the issue of discrimination under Section 49 of the Act. *See* 29 C.F.R. §18.41(b). In rendering a decision on remand, the administrative law judge must consider the evidence in accordance with the applicable legal standards under Section 49, and provide a fully reasoned analysis of the issue consistent with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c). *See Jaros*, 21 BRBS at 30.

Accordingly, the administrative law judge's Order Granting Summary Decision is vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

ROY P. SMITH

Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge