**OFFICE OF COMPLIANCE**
**LA 200, John Adams Building, 110 Second Street, S.E.**
**Washington, DC 20540-1999**

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| **THOMAS J. DEVLIN,** | | |
| **Appellant,** | ) | |
| | ) | **Case No. 03-AC-19 (RP)** |
| | | **Date: September 29, 2004** |
| **OFFICE OF THE ARCHITECT OF THE CAPITOL,** | ) | |
| | ) | |
| **Appellee.** | ) | |

**Before the Board of Directors: Susan S. Robfogel, Chair; Barbara L. Camens, Alan V. Friedman; Roberta L. Holzwarth; Barbara Childs Wallace, Members.**

## DECISION OF THE BOARD OF DIRECTORS

On March 10, 2004, Hearing Officer Michael Doheny issued the attached Order Granting Respondent's Motion for Dismissal of Complainant's retaliation claim under Section 207(a) of the CAA, 2 U.S.C. 1317(a). The Hearing Officer held that the Complainant's retaliation claim was precluded by the proceedings in *Thomas J. Devlin v. Office of the Architect of the Capitol*, Case No. 01-AC-373 (RP) ("Devlin I"). We affirm the dismissal of this case upon the determination that it is barred by the doctrine of issue preclusion, also referred to as collateral estoppel.

In Devlin I, the Complainant alleged that the Respondent had engaged in age discrimination by failing to classify him properly or provide him with a non-competitive promotion on the basis of the duties he was performing. After hearing, Hearing Officer Sylvia Bacon dismissed the complaint on the merits. The Hearing Officer's decision was based, in large part, on findings regarding the issue of whether Respondent had denied Complainant a position classification desk audit. In a desk audit, a Human Resources Specialist interviews the employee and his/her supervisor and determines: (1) whether the employee's position description accurately depicts the work performed by the employee, and (2) whether the job is classified at the proper pay level. *Mary Dollis v. Robert E. Rubin, Secretary of the Department of Treasury*, 77 F.3d 777, 779, n. 1 (5th Cir. 1995).

Hearing Officer Bacon found that the Complainant had not been refused a desk audit by the Respondent, Respondent was willing to do a desk audit whenever Complainant would agree, and Complainant had "frustrated for whatever reason, the efforts of Respondent to do a desk audit". (Hearing Officer's November 18, 2003 Decision, pp. 6-8.) These factual findings were supported by Complainant's own statements in the Devlin I proceedings: he admitted at his deposition that he was unwilling to have a desk audit performed, and his post-hearing brief acknowledged that he was never denied a desk audit. The Hearing Officer then determined that the Complainant had not proven that Respondent's failure to promote him was based on his age, and that the Respondent's alleged failure to conduct a desk audit did not constitute an actionable adverse action. The Board affirmed the Hearing Officer's conclusion that Complainant had failed to prove that the Respondent's failure to promote him was motivated by his age. The Board rested its affirmance solely on the Hearing Officer's causation findings and explicitly did not find it necessary to consider the Hearing Officer's non-adverse action conclusion. *Thomas J. Devlin v. Office of the Architect of the Capitol*, Case No. 01-AC-373 (RP) (June 17, 2004).

Complainant's instant retaliation claim relates back to the discovery phase in Devlin I, where the Complainant learned that, after he filed his complaint in Devlin I, a management official of Respondent allegedly "aborted" a desk audit that had been requested, which thereby "foreclosed the Complainant from the statutory entitlement" of equal pay for equal work. Complainant did not present this evidence in Devlin I, even though it related to his claim that his position should be classified at a higher pay level.

In order to establish a prima facie case of retaliation, an employee must demonstrate that a causal link exists between his protected activity and the employing office's allegedly retaliatory action. See, e.g., *Baker v. Library of Congress*, 260 F.Supp.2d 59, 67 (D.D.C. 2003) (discussing retaliation claims under Title VII). In this case, issue preclusion prevents Complainant from establishing this causal link.

Under the doctrine of issue preclusion, a judgment on the merits in a first suit precludes relitigation in a second suit of issues actually litigated and determined in the first suit. *Shell Petroleum, Inc. v. U.S.*, 319 F.3d 1334, 1338 (Fed. Cir. 2003). The underlying rationale is that a party who has litigated an issue and lost should be bound by that decision and cannot demand that the issue be decided over again. *Mother's Restaurant, Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1569 (Fed. Cir. 1983).

Issue preclusion is generally appropriate if: (1) an issue is identical to one decided in the first action; (2) the issue was actually litigated in the first action; (3) the resolution of the issue was essential to a final judgment in the first action; and (4) the party defending against issue

through the proceedings conducted in Devlin I. *Compare Jack Faucett Associates v. AT & T Co.*, 744 F.2d 118, 128-29 (D.C.Cir.1984) (refusing to apply collateral estoppel where evidence tending to require a different result was excluded in the first action by erroneous evidentiary rulings by the court), *cert. denied,* 469 U.S. 1196, 105 S.Ct. 980, 83 L.Ed.2d 982 (1985); *and Butler v. Stover Bros. Trucking Co.,* 546 F.2d 544 (7th Cir.1977) (newly discovered evidence may preclude application of the collateral estoppel doctrine if the party against whom it is asserted was deprived of crucial evidence in the prior litigation without fault of his own).

Complainant's argument that issue preclusion should not apply because this case involves a different claim, which "could not have been brought" in Devlin I, also misses the mark.[3] Collateral estoppel may preclude the relitigation of an issue that was actually litigated in a previous action, even if the claim in which the issue arises in the subsequent action could not have been brought in the previous action whose judgment gives rise to the estoppel. *See, e.g., Marrese v. American Academy of Orthopaedic Surgeons,* 470 U.S. 373, 380-81, 105 S.Ct. 1327, 1332, 84 L.Ed.2d 274 (1985) (state court judgment may preclude later action that is within federal court's exclusive jurisdiction); *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, (2nd Cir. 2003); citing Restatement (Second) of Judgments § 27 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a

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[3] Under Section 225 (e) of the Congressional Accountability Act, only a covered employee who has undertaken and completed the counseling and mediation procedures described in Sections 402 and 403 may be granted a remedy under part A of the Act. 2 U.S.C. § 1361 (e). While we need not decide the matter in the context of this decision, we note that several Circuit Courts have applied *res judicata* to bar Title VII claims where the plaintiffs failed to amend their initial complaint or take other measures to avoid preclusion while they perfected their claims. *See Davis v. Dallas Area Rapid Transit*, 2004 WL 1909136, p. 5 (5th Cir. Aug. 27 2004) (barring claims arising before initial suit filed); *Havercombe v. Department of Education,* 250 F.3d 1, 8-9 (1st Cir.2001) (barring claims of ongoing harassment of which plaintiff was aware during the proceedings in his initial suit); *Woods v. Dunlop Tire Corp.*, 972 F.2d 36 (2nd Cir.1992); *Churchill v. Star Enterprises,* 183 F.3d 184, 193-94 (3rd Cir.1999); *Rivers v. Barberton Board of Education,* 143 F.3d 1029, 1032-33 (6th Cir.1998); *Herrmann v. Cencom Cable Assocs., Inc.,* 999 F.2d 223, 225-26 (7th Cir.1993); *Owens v. Kaiser Foundation Health Plan, Inc.,* 244 F.3d 708, 714-15 (9th Cir.2001); Wilkes v. Wyoming Dept. of Employment Div. of Labor Standards, 314 F.3d 501, 505 (10th Cir. 2002); *Jang v. United Techs. Corp.*, 206 F.3d 1147, 1149 (11th Cir.2000); *cf. Dubuc v. Green Oak Township*, 312 F.3d 736, 751 (6th Cir. 2002) (*res judicata* precluded Section 1983 claim where allegedly retaliatory act occurred after initial complaint filed but was found to be the "same course of conduct which was litigated and found to be proper" in the prior action).

subsequent action between the parties, *whether on the same or a different claim.*" (Emphasis added.)).

As a result, Complainant is precluded from relitigating Respondent's willingness to perform a desk audit and his own unwillingness to participate in an audit. In turn, the determination in Devlin I erodes any causal connection between Complainant's protected activity and the alleged adverse action, because Complainant's own conduct was the intervening cause which resulted in the desk audit not being performed. *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir.1999) (dismissing retaliation claim as a matter of law where employee was terminated for engaging in unacceptable conduct while protesting perceived discrimination). In sum, Complainant cannot claim that Respondent's failure to conduct a desk audit was the product of unlawful retaliation where he refused the Respondent's repeated offers to perform the desk audit.

## ORDER

Pursuant to Section 406(e) of the Congressional Accountability Act and Section 8.01(d) of the Office's Procedural Rules, the Board affirms the Hearing Officer's Order dismissing the complaint.

*It is so ordered.*

Issued, Washington, D.C.: September 29, 2004

## CERTIFICATE OF SERVICE

I hereby certify that on this 30 th day of September, 2004, I delivered a copy of this Decision of the Board of Directors to the following parties by the below identified means:

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