STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AUDREY METHU, Complainant,

vs.

STATE OF WISCONSIN (DEPARTMENT OF EMPLOYMENT RELATIONS) and DISTRICT 1199W, UPQHC, SEIU, Respondents.

Case 377
No. 51508
PP(S)-226

Decision No. 30808-B

Appearances:

Linda Harfst, Cullen, Weston, Pines & Bach, Attorneys at Law, 122 West Washington Avenue, Suite 900, Madison, Wisconsin 53703, appearing on behalf of District 1199W, UPQHC, SEIU.

David Vergeront, Chief Legal Counsel, Department of Administration, Office of State Employment Relations, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the State of Wisconsin.

Raymond M. Dall'Osto, Gimbel, Reilly, Guerin & Brown, Attorneys at Law, 330 East Kilbourn Avenue, Suite 330, Milwaukee, Wisconsin 53202, appearing on behalf of Audrey Methu.

ORDER ON REVIEW OF EXAMINER'S DECISION

On September 13, 2005, Examiner Daniel J. Nielsen issued an Order Dismissing Complaint in the above-captioned matter, concluding that the allegations set forth in Complainant Audrey Methu's initial Complaint filed September 9, 1994, as well as those set forth in her amended Complaint filed June 1, 2004, should be dismissed in part on the basis of claim preclusion and in part for failure to comply with the Commission's one-year statute of limitations set forth in Sec. 111.07(14), Stats.

On October 3, 2005, Ms. Methu filed a timely petition seeking review of the Examiner's decision, after which all parties submitted briefs in support of their respective positions. On November 18, 2005, the Respondent District 1199W, UPQHC, SEIU (SEIU) filed a Motion to Strike Attachments that had accompanied Ms. Methu's reply brief and on November 28, 2005, Ms. Methu filed a written opposition to SEIU's Motion to Strike, at which point the record was closed.

As explained more fully in the accompanying Memorandum, the Commission affirms the Examiner's decision in all respects.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

1. To the extent Ms. Methu's initial Complaint alleges that either Respondent committed misconduct by actions occurring before September 9, 1993, the Examiner's Order dismissing those allegations as outside the Commission's one year statute of limitations set forth in Sec. 111.07(14), Stats., is affirmed.

2. To the extent Ms. Methu's amended Complaint alleges that either Respondent committed misconduct by actions occurring after September 9, 1994, and before June 1, 2003, including allegations relating to Ms. Methu's termination from employment and/or the manner in which the Respondent SEIU handled Ms. Methu's grievance regarding said termination, the Examiner's Order dismissing said allegations as outside the Commission's one-year statute of limitations set forth in Sec. 111.07(14), Stats., is affirmed.

3. To the extent any allegations in Ms. Methu's initial Complaint and/or amended Complaint are timely, the Examiner's Order dismissing said allegations as precluded by the judgment entered on December 18, 1998 by the U.S. District Court for the Eastern District of Wisconsin in Case: 2:98-cv-00599-CNC is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 10th day of January, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

State of Wisconsin (Department of Employment Relations)

MEMORANDUM ACCOMPANYING ORDER ON REVIEW OF EXAMINER'S DECISION

The parties have not challenged the Examiner's recitation of the protracted procedural history of this matter and we summarize it as follows.[1]

From 1991 through September 1994, Ms. Methu was employed by the State at the Southern Wisconsin Center in Union Grove, where she was a member of the bargaining unit represented by the Respondent SEIU. Ms. Methu initiated these proceedings on September 9, 1994, by filing a 28-paragraph Complaint referring to various conflicts between herself and a union representative at her work location, "removal of her from her union duties, retaliation against her for reporting another employee for patient abuse, attempts to isolate her from the members of the nursing staff, efforts by her boss to humiliate her, removal of clerical support, inadequate union representation on grievances, an effort by the union and management to have her fired, and denial of promotions." Examiner's Decision at 21. The Complaint also refers to Ms. Methu's severe depression and sickle cell anemia. As the Examiner noted, the initial Complaint includes little information reflecting the dates on which the alleged conduct occurred. The Complaint was assigned to a Commission examiner who made various efforts at conciliation.

In October 1994, shortly after filing her initial Complaint, Ms. Methu was terminated from her employment. Correspondence in the file suggests that the initial Complaint may have been held in abeyance while the SEIU pursued a grievance challenging Ms. Methu's termination (and perhaps encompassing other matters, as well). However, in or about August 2001, SEIU, asserting that Ms. Methu had not cooperated with it, notified the State and Methu that SEIU was withdrawing her termination grievance from arbitration. In the meantime, Ms. Methu had filed an action at the Equal Employment Opportunity Commission (EEOC) claiming that the State and SEIU had discriminated against her on the basis of disability, race, and gender. The EEOC issued a "right to sue" letter to Ms. Methu on March 26, 1998. On June 26, 1998, Ms. Methu filed a discrimination lawsuit in federal district court. The claims

[1] In her November 14, 2005 reply to the Respondents' briefs in opposition to her petition for review, Ms. Methu referred to and appended copies of six letters dated between August 26, 1996 and March 5, 2001. SEIU filed a Motion to Strike the appended documents as outside the record that is before the Commission in connection with the petition for review. Because the Commission is reviewing the Examiner's decision granting a motion for pre-hearing dismissal, the record before the Commission consists of the pleadings and correspondence in the file. The Examiner relied upon the correspondence in the Commission's file that reflected the course of developments in the case over time, after ensuring that all parties were in possession of the relevant materials. We note that all six letters to which SEIU objects are within the Commission's file, as they were either drafted by or sent to the Commission's then-Examiner in connection with the instant case, and at least some of them clearly formed the basis of portions of Examiner Nielsen's recitation of the prior proceedings in the case to which neither party has taken exception. Accordingly, the Commission has undertaken this review based upon the recitation of proceedings set forth by the Examiner and to that extent overrules SEIU's Motion to Strike.

Ms. Methu asserted at the EEOC and in federal court were substantively similar to the allegations in her initial Complaint before the Commission, except that in the EEOC/federal court complaints, she included allegations regarding her termination. The federal court dismissed her claims for lack of prosecution, issuing a judgment on December 18, 1998 that stated, "The judgment came before the court. The issues have been decided and a decision has been rendered. IT IS ORDERED AND ADJUDGED that this case is dismissed."

After receiving the SEIU's notice in August 2001 indicating that it was withdrawing Methu's termination grievance from arbitration, the Commission's examiner contacted the parties in September and November about how they wished to proceed. SEIU responded that it believed it had met its obligations. Ms. Methu apparently did not respond in writing, although she may have responded verbally or by telephone. In late December 2001, the case was reassigned to Examiner Nielsen who proceeded to establish a date for hearing. The original hearing date he established, April 17, 2002, was postponed because Ms. Methu requested time to obtain legal representation. Although the Examiner instructed Ms. Methu to advise him as soon as she obtained counsel, Ms. Methu did not contact the Examiner. Some 20 months later, by letter dated December 10, 2003, the Examiner wrote to the parties setting forth a deadline of December 30, 2003, for Ms. Methu to contact him if she wished to continue the case. Ms. Methu contacted him on December 27 indicating she wished to proceed and the hearing was rescheduled for March 2004.

In January 2004, prior to the established hearing date, the State sought clarification as to its status as a Respondent and, if so, as to the nature of Ms. Methu's claims against the State. The Examiner established a deadline of February 27, 2004 for Ms. Methu to provide the requested clarification. On February 23, Ms. Methu, still pro se, submitted a document entitled "Violations by the State," after which the State submitted an Answer and a Motion to Dismiss. In early March 2004, the SEIU also filed an Answer and a Motion to Dismiss. The State essentially argued that Ms. Methu had failed to exhaust her administrative and contractual remedies and had not identified any violations of the State Employment Labor Relations Act (SELRA). SEIU argued for dismissal based on the statute of limitations, Ms. Methu's alleged failure to mitigate damages, her failure to exhaust her administrative and contractual remedies, her failure to provide a clear and concise statement of her claims, and her failure to state any claims under SELRA.

Shortly before the March 26 hearing date, Ms. Methu secured legal counsel, who requested and received a postponement of the hearing in order to prepare. The Examiner conducted a telephone conference, in which the Respondents agreed to provide Methu's counsel with certain documents and Ms. Methu agreed to file an amended Complaint specifying the dates of events and the individuals and conduct complained of. An amended Complaint was filed on June 1, 2004, followed by Motions to Dismiss by both Respondents.

As the Examiner noted in his decision granting Respondents' motions, the amended Complaint added little detail to the initial Complaint in terms of clarifying the dates on which various events occurred. The amended Complaint does suggest that the central material events occurring during the year prior to September 9, 1994, the date Ms. Methu filed her initial Complaint, related to the State's imposition of attendance-related discipline upon Ms. Methu and her belief that the State, with SEIU's collusion or encouragement, thereby discriminated against her based upon her disabilities, race, and/or gender. As the Examiner also noted, the amended Complaint also specifically added, for the first time, allegations regarding Ms. Methu's termination from employment and SEIU's alleged failure to represent Ms. Methu regarding that termination and its related grievance.

In ascertaining Ms. Methu's potential timely SELRA claims, the Examiner appropriately followed the Commission's longstanding reluctance to dismiss complaints prior to an evidentiary hearing on the merits. "To this end, "'the complaint must be liberally construed in favor of the complainant and the motion [to dismiss] should be granted only if under no interpretation of the facts alleged would the complainant be entitled to relief,'" CITY OF MEDFORD, DEC. NO. 30537-B (WERC, 2/04) at 9, quoting UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, DEC. NO. 26926-N (HOORNSTRA WITH FINAL AUTHORITY FOR WERC, 12/77) at 3. The Examiner carefully reviewed the specific allegations of the initial Complaint and amended Complaint and, despite their lack of specificity as to time, liberally construed them to determine whether any of the allegations were raised within the requisite one year of their occurrence. His construction of the pleadings has not been challenged by the parties and we find it to be accurate.

Of primary importance, no doubt, is the Examiner's conclusion that the State's termination of Ms. Methu's employment and SEIU's alleged failure to represent Methu in challenging that termination must be dismissed for lack of timely filing. We agree with the Examiner that the latest date that these allegations conceivably could have ripened was August 2001, when SEIU informed Ms. Methu that it was withdrawing her termination grievance from arbitration. Ms. Methu did not submit anything to the Commission challenging her termination or SEIU's handling of the related grievance until June 1, 2004, when she filed her amended Complaint.

As the Examiner explained, the Commission as an administrative agency has only the authority specifically provided to it by statute. The relevant statute specifically limits the Commission's jurisdiction to acts occurring during the one year prior to filing the complaint. Sec. 111.07(14), Stats. Methu argues, however, that "due process" requires the Commission to permit her to proceed on these allegations because of the Commission's complicity in the delay surrounding prosecution of her claims, citing LOGAN V. ZIMMERMAN BRUSH CO, 455 U.S. 422 (1982). We agree with the Examiner that LOGAN has no bearing on this case, for the

reasons he has articulated at pages 26 to 29 of his decision, which do not need repetition. We also agree with the Examiner's pointedly accurate statement that "the inability of the Complainant to challenge her termination is not due to the inaction of anyone other than the Complainant herself." Examiner's Decision at 28.

Absolutely nothing in this record supports Ms. Methu's suggestion that the Respondents or the Commission confused or misled Ms. Methu into passivity regarding her rights. The 10-year documentary history of this case reflects not a single instance in which Ms. Methu sought information, assistance, or other action from the Commission regarding her claims without receiving a prompt response from the agency. Nor is SEIU, a Respondent in this matter, required to advise Ms. Methu about how and when to pursue claims against itself (or the related claims against the State). Thus, if Ms. Methu relied upon SEIU to prosecute her claims before this agency, that reliance was misplaced, as is her current suggestion that, because of that reliance, she should not be held to the one-year limitation period for challenging her termination.

Nor can we accept Ms. Methu's claim that her termination was part and parcel of the earlier misconduct allegedly perpetrated by the Respondents and thus a "continuing violation" or one which should "relate back" to the conduct alleged in her initial complaint so as to toll the statute of limitations. The "continuing violation" doctrine is not designed to reach <u>forward</u> to discrete conduct occurring after a complaint has been filed, but instead provides an equitable means to reach <u>back</u> to remedy unlawful activity that began prior to the one-year period but continued during the limitations period. See, e.g., CITY OF MEDFORD, DEC. NO. 30537-B (WERC, 2/04) at 10. Complaints may also be amended after expiration of the one-year filing period, if the additional allegations "arise out of the same transaction, occurrence or event set forth in the original pleading." KORKOW V. GENERAL CASUALTY CO., 117 WIS.2D 187, 196 (1984), cited in MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 16635-F (WERC, 2/88) at 14. While Ms. Methu's termination from employment (and SEIU's handling of the related grievance) allegedly derive from similar unlawful motives, they are discrete events separate and distinct from the suspensions or other conduct alleged in the initial Complaint and occurring at a different point in time. Without statutory authority, the Commission cannot simply assume jurisdiction over conduct that a complainant has not challenged within a year of its occurrence – indeed, in this case, not challenged until three years later.

However, the Examiner's careful construction of the pleadings, which we adopt, led him to discern certain potentially timely allegations that are at least facially within the Commission's jurisdiction under SELRA. As we see it, these potentially timely allegations concern the manner in which the State applied its attendance and sick leave policies to Ms. Methu between September 9, 1993 and September 9, 1994, and the extent to which SEIU encouraged or colluded with the State in these actions and/or failed to represent Ms. Methu in

challenging them. Ms. Methu appears to allege, for example, that the State suspended her on one or more occasions during that time frame and that she sought assistance from SEIU, which failed to fairly represent her. These allegations could support claims that the State violated the discipline, sick leave, or other provisions of the collective bargaining agreement, arguably in violation of Sec. 111.84(1)(e), Stats., that Methu attempted to exhaust the grievance procedure to redress those contractual violations, and that she was thwarted in doing so by SEIU's unlawful failure to represent her in violation of Sec. 111.84(2)(a), Stats., which would give the Commission jurisdiction to consider the underlying contract violation claims. UNIVERSITY OF WISCONSIN-MILWAUKEE, DEC. NO. 11457-H (WERC, 5/84).

While acknowledging these potentially timely allegations, the Examiner dismissed them on the ground that they "all relate to the discrimination theory, and are therefore subject to preclusion . . ." Examiner's Decision at 26 n.4. Ms. Methu does not challenge that general conclusion in connection with the instant petition for review, but instead argues that her SELRA claims are distinct from the discrimination claims determined by the federal court judgment. We agree that, with further clarification, Ms. Methu might be able to extract from her SELRA complaints some allegations that do not depend upon evidence regarding gender, race, or disability discrimination. However, under the circumstances present here, the doctrines of merger and bar (incorporated into claim preclusion principles) that attend the federal court judgment preclude all of Ms. Methu's SELRA claims arising out of the suspensions, termination, and related grievances that were the subject of her federal lawsuit and not just those that are rooted in discrimination.

In summary form, under both state and federal law, the three necessary elements for claim preclusion are those cited by both SEIU and the Examiner, i.e., (1) identity of the parties; (2) identity between the causes of action; and (3) a final judgment on the merits by a court of competent jurisdiction. Examiner's Decision at 22, citing NORTHERN STATES POWER CO. V. BUGHER, 189 WIS.2D 541, 551 (1995). When, as here, the preclusive effect of a federal court judgment is at issue, federal preclusion precedents apply. SHAVER V. F. W. WOOLWORTH CO., 840 F. 2D 1361, 1364 (7TH CIR. 1988), CERT. DENIED, 488 U. S. 856 (1988); RESTATEMENT OF JUDGMENTS (SECOND), SEC. 87. In SHAVER the court articulates the elements of federal claim preclusion essentially the same as the Wisconsin Supreme Court did in BUGHER: "'(1) a final judgment on the merits in an earlier action; (2) an identity of the cause of action in both the earlier and later suit; and (3) an identity of parties or privies in the two suits.'" ID. (citations omitted).

The third element in the federal paradigm (identity of parties) is clearly satisfied here. The first and second elements pose more difficulties, but ultimately must be resolved in favor of preclusion.

Regarding the first element, it is well settled that a final judgment in federal court even for what the court has labeled a "plain vanilla" failure to prosecute under F.R.C.P. 41(b) operates as a final judgment on the merits for purposes of claim preclusion. HORWITZ V. ALLOY AUTOMOTIVE CO., 992 F. 2D 100, 104 (7TH CIR. 1993). SEE GENERALLY, WRIGHT, MILLER, & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 2373. It is also clear that claim preclusion applies whether or not a particular claim was actually set forth in the pleadings; it is sufficient that the claim could have been brought. SHAVER, 840 F.2D at 1364 and authorities cited therein. However, as to the first element, one might instinctively question whether the federal court is a forum of competent jurisdiction for Ms. Methu's SELRA claims and, if so, whether federal preclusion principles presume that, absent clear contrary indications, the court's supplemental jurisdiction and hence its judgment cover those claims. The answer to both questions is yes.

Claim preclusion principles are rooted, in part, on the underlying "merger" doctrine requiring, for the sake of judicial economy, that all claims related to each other must be joined in the same suit, assuming there is a forum that has jurisdiction over all those claims. STAATS V. COUNTY OF SAWYER, 220 F.3D 511, 515-16 (7TH CIR. 2000), quoting RESTATEMENT (SECOND) OF JUDGMENTS, § 25 COMMENT (E). As a result of 1990 amendment to the federal court jurisdictional statutes, it is clear that the federal district court's original jurisdiction over Ms. Methu's Title 7 claims also conferred "supplemental jurisdiction" over her claims, whether state or federal, that are "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article II of the United States Constitution." 28 U. S. C. § 1367. There are some statutory claims over which a designated administrative agency has exclusive jurisdiction, a pertinent example being discrimination claims under the Wisconsin Fair Employment Act (WFEA), Sec. 111.31 et seq., Stats. Such claims are not within the federal court's supplemental jurisdiction. Therefore, a judgment against a plaintiff in a WFEA suit in state court will not preclude a subsequent federal court lawsuit based, for example, upon Title 7. STAATS, SUPRA. SEE ALSO, PACE INDUSTRIES, INC. V. NLRB, 118 F.3D 585 (8TH CIR. 1997) (holding that a previous judgment in a case brought under Sec. 301 of the federal Labor Managements Relations Act did not preclude a subsequent action brought to enforce an order of the National Labor Relations Board (NLRB), even though both claims involved related facts, because the NLRB has exclusive jurisdiction over unfair labor practices under 29 U.S. C. Sec. 185. Unlike the Wisconsin Equal Rights Division or the NLRB, however, the WERC does not have exclusive jurisdiction over SELRA claims. Though seldom invoked, courts share with the WERC original jurisdiction over such claims. Sec. 111.07(1), Stats., incorporated into SELRA at Sec. 111.84(4), Stats. It follows that the federal district court where Ms. Methu brought the claims that resulted in the adverse judgment had supplemental jurisdiction over her SELRA claims.

Had Ms. Methu so requested, one can speculate that the federal district court might very well have exercised its discretion to withhold jurisdiction over her SELRA claims and thus severed them from the effects of the court's final judgment. See 28 U. S. C. § 1367 (c) (3) (permitting a court to decline supplemental jurisdiction where "the district court has dismissed all claims over which it has original jurisdiction.") However, unless the court has clearly indicated its intention to thus limit the effects of its judgment, the judgment will preclude all claims that were or could have been within the court's jurisdiction. In other words, where the court has been silent, the presumption favors preclusion. SEE, E.G., HORWITZ V. ALLOY AUTOMOTIVE CO., 992 F.2D 100 (7TH CIR. 1993); LEE V. VILLAGE OF RIVER FOREST, 936 F.2D 976 (7TH CIR. 1991). SEE GENERALLY, WRIGHT, MILLER, AND COOPER, FEDERAL PRACTICE AND PROCEDURE, JURISDICTION 2D, §§ 4412, 4415. Accordingly, the first jurisdictional element of the federal claim preclusion paradigm is also satisfied.

Ms. Methu's central argument against preclusion seems to lie in her belief that her SELRA claims are sufficiently distinct from the claims she brought in federal court so that the second element of the paradigm, requiring an identity of "cause of action" in the two suits, is not met. However, the federal courts, and in particular the Seventh Circuit Court of Appeals, have been quite clear that "various ways of contesting the same [adverse employment action] – breach of contract, violation of Title VII, violation of the equal protection clause via 42 U.S.C. § 1983, violation of state law – must be consolidated in a single suit." PERKINS V. BOARD OF TRUSTEES OF THE UNIV. OF ILLINOIS, 116 F.3D 235, 137 (7TH CIR. 1997), citing DAVIS V. CHICAGO, 53 F.3D 801 (7TH CIR. 1995). In HERRMANN V. CENCOM CABLE ASSOCIATES, INC., 999 F.2D 223 (7TH CIR. 1993), the court set forth its seminal interpretation of the term "cause of action" in employment cases:

> Building on earlier statements by this and other courts, which helpfully if a little vaguely define "transaction" in terms of "core of operative facts," "same operative facts," or "same nucleus of operative facts," *Prochotsky v. Baker & McKenzie, supra,* 966 F.2d at 335; *Lane v. Peterson, 899 F.2d 737, 744 (8th Cir. 1990); Diversified Foods, Inc. v. First National Bank, 985 F.2d 27, 30* (1st Cir. 1993), we suggest that two claims are one for purposes of res judicata if they are based on the same, or nearly the same, factual allegations. *Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518*, 521, 106 S.Ct. 768, 770, 88 L.Ed.2d 877 (1986); *McCarney v. Ford Motor Co., 657 F.2d 230,* 232 (8th Cir. 1981). If the plaintiff here had had an employment contract which protected her from being fired without cause, and she claimed that she was fired in violation both of the contract and of Title VII, these two claims would be the same claim for purposes of res judicata because, although they would not have the identical elements, the central factual issue would be the same in the trial of each of them. It would be whether she had been fired for cause, in which event the employer would be guilty neither of a breach of the employment contract nor of

> discrimination, or because of her race and her sex, in which event the employer would be guilty of both a breach of contract and discrimination. Another possibility, it is true, is that she was fired neither for cause nor because of her race or her sex; but it is enough that the question why she was fired would as a practical matter be at the center of litigation of both claims.

999 F.2d at 226-227. In the Hermann case itself, the court concluded that the prior judgment did not bar the plaintiff's Title 7 action challenging her termination from employment, because the prior judgment in her COBRA claim did not concern essentially the same facts. Rather, the COBRA claim arose out of events occurring after her termination (the processing of her request for continued benefits after she was discharged) whereas the Title 7 claims challenged the bona fides of the termination. Thus, as the court pointed out, "only one fact on which the two claims are based is the same – that the plaintiff was terminated." 999 f.2d at 227.

The Seventh Circuit has applied the Hermann formulation frequently to preclude subsequent suits that challenge essentially the same negative employment action, even if the elements of evidentiary proof between the two suits diverge in accordance with divergent statutory rights. See, e.g., Davis, supra (earlier judgment affirming a city personnel board's denial of back pay precludes subsequent suit based upon alleged deprivation of constitutional rights arising out of the same employment event); Shaver, supra (federal court judgment on ADEA claim challenging an employee's layoff precluded a subsequent suit arising out of the same layoff but based on breach of contract and negligent termination of employment); Brzostowski v. Laidlaw Waste Systems, Inc., 49 F.2d 337 (7th Cir. 1995) (judgment in first suit challenging his termination under the ADEA precluded subsequent lawsuit challenging termination as a breach of contract). In Brzowstowski, the court stated, "While the legal elements of each claim may be different, the central factual issues are identical: Laidlaw's employment actions and Brzostowski's termination." Id. at 339. In the instant case, not only are Ms. Methu's factual allegations in her SELRA complaints very similar to those in her federal court complaint, but they arise out of the same adverse employment actions allegedly inflicted upon her by SEIU and/or the State, i.e., allegedly unfair application of the sick leave and attendance policies, suspensions, and termination from employment. Accordingly, there is little doubt that, under the applicable federal standards, Ms. Methu's SELRA claims arise out of the same "cause of action" as the federal court lawsuit that ended in a judgment on the merits, and that her SELRA claims – whether or not rooted in discrimination – are now barred.

As the Examiner pointed out, the application of these preclusion principles to Ms. Methu seems harsh in light of her status as a pro se litigant before the federal court. While the equities of her situation may have provided a basis for the federal court to grant relief in whole or in part from its judgment, those equities have become largely irrelevant to

whether that judgment in its present form should preclude subsequent suits. As the court noted in HORWITZ, SUPRA, in holding that a dismissal for failure to prosecute in a bankrupty proceeding foreclosed a subsequent RICO suit arising out of the same situation: "None of the established exceptions to claim preclusion applies, and MOITIE[2] closes the door on ad hoc, equitable exceptions. Plaintiffs' inattention to the case they filed in the bankruptcy proceeding is their undoing."

For the foregoing reasons, Ms. Methu's SELRA complaints are dismissed in their entirety.[3]

Dated at Madison, Wisconsin this 10th day of January, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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[2] FEDERATED DEPARTMENT STORES V. MOITIE, 452 U. S 394 (1981)

[3] As they did before the Examiner, the Respondents also advance the doctrine of laches as a basis for dismissing Ms. Methu's claims. The three traditional elements to establish laches are (1) unreasonable delay; (2) lack of knowledge on the part of the party asserting the defense that the other party would assert the claim; and (3) prejudice to the party asserting the defense in the event the suit is maintained. SMART V. DANE COUNTY BD. OF ADJUSTMENTS, 177 WIS.2D 445 (1993). Since Ms. Methu's claims have been dismissed on statute of limitations and/or preclusion grounds, we need not address the Respondents' laches argument in any detail. However, we note that Respondents have been aware since at least September 1994 that Ms. Methu believed their conduct violated her rights under SELRA. They sought neither clarification nor dismissal until at least 2003. Ms. Methu never withdrew her claims and never failed to respond to a directive that carried the threat of consequences, such as claim dismissal. In similar circumstances, we have recently declined to dismiss a complaint and thereby hold a complainant entirely responsible for the excessive delays in his case. See, WINGRA REDI-MIX, INC., DEC. NO. 31056-B (WERC, 5/05) at 7.

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