

STATE OF WISCONSIN

PERSONNEL COMMISSION

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JUNE R. LAXTON,

Appellant,

v.

SECRETARY, DEPARTMENT OF
TRANSPORTATION

Respondent,

Case No. 79-PC-ER-65

* * * * *

INTERIM
DECISION
AND
ORDER

NATURE OF THE CASE

This case involves a complaint of discrimination which is being processed by the Commission pursuant to s.230.45(1)(b), Stats. The respondent has filed a motion to dismiss on the grounds that a decision rendered by the Commission in a companion personnel appeal is res judicata.

OPINION

The respondent's argument may be summarized as follows: the complainant, following the termination of her probationary employment with the department, filed an appeal of that transaction with the Commission pursuant to s.230.45(1)(f), Stats., and Art. IV, s.10 of the WSEU collective bargaining agreement. Following a hearing, the Commission reached a determination on the merits, applying the standard set forth at s.111.91(3), Stats., that the termination had not been arbitrary and capricious and dismissed the appeal. The complainant filed the instant complaint of discrimination charging that the termination was discriminatory on the basis of sex.

It is argued that the two proceedings involve the same controversy,

arise out of the same transaction and include the same parties. The respondent also argues that although the complainant did not raise an issue of sex discrimination in her appeal she had an opportunity to do so and therefore that res judicata applies to prevent her from pursuing this complaint, citing 46 Am Jur 2d Judgments s.417:

. . . the conclusiveness of the judgment in such case extends not only to matters actually determined, but also to other matters which could properly have been raised and determined thereby. This rule applies to every question relevant to and falling within the purview of the original action, in respect to matters of both claim or grounds of recovery, and defense, which could have been presented with due diligence.

While the appellant could have raised an issue of sex discrimination in the context of her appeal of probationary termination on the theory that sex discrimination would have constituted arbitrary and capricious action under s.111.91(3), Stats., there are very real differences between appeals under ss.230.45(1)(f) and 111.91(3), on the one hand, and ss.230.45(1)(b) and 111.33(2), on the other hand. The procedures used in handling these matters are different, see s.129(4), (4m), chapter 196, Laws of 1977, and chapters PB and IND 88, Wis. Adm. Code. One of the more significant differences is the availability of an independent ex parte investigation in a discrimination complaint proceeding.

Also, an appellant in a probationary termination appeal can raise certain issues related to the termination that are unrelated to the sex discrimination question but which could lead to a conclusion of arbitrary and capricious action.

For these reasons the Commission can not conclude that there is an identity of "cause of action" between probationary termination appeals and discrimination complaint proceedings, nor that an appellant must raise

possible discrimination issues in a probationary termination appeal to avoid a bar of res judicata against a discrimination complaint.

The Commission does wish to note that in many situations a good deal of economy could be effected by consolidating for hearing purposes both the appeal and the discrimination complaint, and early filing of both matters and consolidation where possible is encouraged.

ORDER

The respondent's motion to dismiss is denied.

Dated Dec. 4, 1979

STATE PERSONNEL COMMISSION

Charlotte M. Higbee
Charlotte M. Higbee, Commissioner