STATE OF WISCONSIN PERSONNEL COMMISSION

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*
MARION NAMENWIRTH, *
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Complainant, *
*
v. *
*
Chancellor, UNIVERSITY OF *
WISCONSIN - MADISON *
*
Respondent. *
*
Case No. 79-PC-ER-93 *
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DECISION
AND
ORDER

This matter is before the Commission on respondent's motion to dismiss on the grounds of "general doctrines of preclusion" filed November 15, 1985. The parties have been afforded the opportunity to file briefs. No brief was filed by the complainant.

The underlying facts of this matter appear to be undisputed and are relatively straightforward. This file was opened on June 19, 1979, when a copy of an U.S. Equal Employment Opportunities Commission (EEOC) charge of discrimination alleging that the complainant was denied tenure in the Zoology Department because of her sex was cross-filed with this Commission by the EEOC. The EEOC form used to transmit the charge was checked by EEOC as follows: "Pursuant to the work-sharing agreement, this charge is to be initially processed by EEOC."

Subsequently, the matter has been held in abeyance by this Commission pending completion of federal proceedings under Title VII. The latter proceeded through a trial in the U.S. District Court for the Western District of Wisconsin and an appeal to the U.S. Court of Appeals for the Seventh Circuit. Copies of the decisions of these courts have been filed with this Commission.

The district court decision, Namenwirth v. Board of Regents of the University of Wisconsin System, No. 80-C-340-G, included the following:

> "... I conclude that Namenwirth failed to prove the Board's reason for denying her tenure was pretextual, and that she thus failed to discharge her ultimate burden of persuasion. I am simply not persuaded that Namenwirth's preferred evidence -- much of which was too insubstantial to support the intended finding -- showed that the tenure decision-makers in her case acted against her on the basis of sex.
>
> Instead, I am persuaded that defendant Board's articulated reason for denying tenure was the time and genuine basis for the challenged denial of tenure ... I am persuaded that the denial of tenure in this case was genuinely based upon a commitment to scientific excellence, and not upon adherence to illegal sex-based animus."

The decision of the Court of Appeals, No. 83-3155, included the following:

> "We conclude that the magistrate's finding of no discrimination was supported by the evidence, and that in this case there was no convincing evidence of other sorts to counter that evidence.
>
> The judgment of the district court is therefore affirmed."

In Massenberg v. UW-Madison, No. 81-PC-ER-44 (7/21/83), the Commission discussed at length the doctrines of res judicata and collateral estoppel. See Jackson v. UW-Madison, Wis. Pers. Commn., No. 81-PC-ER-11 (10/6/82) as follows:

> The doctrine of collateral estoppel or estoppel by record is closely related to the doctrine of res judicata, and has been described as another aspect of the doctrine of res judicata. See 46 Am Jur 2d Judgments §397. It has been said that the doctrine of estoppel by record "prevents a party from litigating again what was litigated or might have been litigated in a former action." Leimert v. McCann, 79 Wis. 2d 289, 293, 255 N.W. 2d 526 (1977).
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> In Leimert v. McCann, the court set forth the elements of the doctrines as follows:
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> > In order for either doctrine to apply as a bar to a present action, there must be both an identity between the parties ... and an identity between the causes of action or the issues sued on ... 79 Wis. 2d at 294.

In the instant case, the parties are the same as in the Title VII proceeding brought by the complainant in federal court. Furthermore, not only is the instant complaint a copy of the charge of discrimination filed with the EEOC and the basis for the Title VII action, but also the legal framework for decision of this case under the Wisconsin Fair Employment Act, Subchapter II of Chapter 111, stats., is essentially the same as is utilized in Title VII actions. Ray-O-Vac v. ILHR Department, 79 Wis. 2d 919, 236 N.W. 2d 209 (1975); Bucycus-Erie Co. v. ILHR Department, 90 Wis. 2d 408, 280 N.W. 2d 142 (1979). See also, Johnson v. American Airlines, 38 FEP Cases 1017, 1019 (Cal. Ct. of Appeal, 3/27/84):

> "Appellant also urges that the instant state court litigation is not barred by the previous federal class action because the 'causes of action' in this suit are 'distinct and different' from those in the federal lawsuit. Citing the fact that the earlier federal action was brought under provisions of federal civil rights laws while this case alleges violations of the California state Constitution and statutes, she argues that her rights under state law may may well be 'broader than those found by the federal court.
>
> This argument is not novel; it has been considered before the courts of this state, and rejected. While it is true that res judicata will only bar relitigation of the same cause of action by the same parties, the question of whether a cause of action is identical for purposes of res judicata depends not on the legal theory or label used, but on the 'primary right' sought to be protected in the two actions. The invasion of one primary right gives rise to a single cause of action ... Moreover, the 'cause of action' is based on the harm suffered, as opposed to the particular theory asserted by the litigant ..."

See also, Juneau Square Corporation v. First Wisconsin National Bank, 122 Wis. 2d 673, 364 N.W. 2d 164 (1985).

Even if the doctrine of res judicata were not applicable, collateral estoppel would prevent relitigation of the key issues of this case, including the question of the respondent's motivation for respondent's denial of tenure.

ORDER

Respondent's motion to dismiss filed November 15, 1985, is granted, and this complaint is dismissed.

Dated: February 13, 1986 STATE PERSONNEL COMMISSION

Dennis P. McGilligan
DENNIS P. McGILLIGAN, Chairperson

Laurie R. McCallum
LAURIE R. McCALLUM, Commissioner

AJT:jgf
JGF002/2

Commissioner Donald R. Murphy did not participate in the consideration of this case.

Parties

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