STATE OF WISCONSIN PERSONNEL COMMISSION

DONALD LEE,

Appellant,

v.

Chancellor, UNIVERSITY OF WISCONSIN-MILWAUKEE,

Respondent.

Case No. 81-PC-ER-11

GENE JACKSON,

Appellant,

v.

Chancellor, UNIVERSITY OF WISCONSIN-MILWAUKEE,

Respondent.

Case No. 81-PC-ER-12

AMENDED DECISION AND ORDER*

These matters are before the Commission on complaints of discrimination and the issuance of Initial Determinations finding probable cause to believe that complainants were retaliated against by the respondent. The respondent raised objections to any further proceedings on the grounds of lack of jurisdiction as well as res judicata due to the existence of prior arbitration proceedings involving

* This amended decision and order is being issued on the Commission's own motion in the place and stead of the original decision and order dated October 5, 1982, which inadvertantly contained certain errors, and which is hereby withdrawn.

the complainants. The findings that follow are based on documents in the case files and are made for the sole purpose of resolving these objections. All parties have filed briefs. Because none of the parties have requested an evidentiary hearing on the jurisdictional question or suggested that any jurisdictional facts are in dispute, they have waived any right to a jurisdictional hearing.

FINDINGS OF FACT

1. Complainant Donald Lee was terminated from his employment at the UW-Milwaukee power plant on May 29, 1980.

2. Mr. Lee grieved his discharge under the terms of the agreement between the State of Wisconsin and AFSCME Council 24, Wisconsin State Employes Union, alleging, inter alia, that he was the victim of racial discrimination, and that he had been subjected to constant harassment.

3. In a decision dated June 15, 1981, the arbitrator appointed under the terms of the agreement denied the grievance, finding no racial discrimination. The issue of retaliation could have been but was not raised by the complainant during the arbitration proceedings.

4. On February 3, 1981, Mr. Lee filed a charge of discrimination with the Commission, alleging that he had been racially discriminated against and retaliated against with respect to conditions of employment and his discharge.

5. On May 22, 1981, Equal Rights officers with the Commission issued an initial determination concluding that there was no probable cause to believe that respondent discriminated against complainant on the basis of race but finding probable cause to believe that complainant was retaliated against for having raised a complaint of discrimination.

6. Complainant Gene Jackson was terminated from his employment at the UW-Milwaukee power plant on January 2, 1981, effective December 22, 1980.

7. Mr. Jackson grieved his discharge under the terms of the agreement between the State of Wisconsin and AFSCME Council 24, Wisconsin State Employees Union. The issues of racial discrimination and retaliation were raised during the arbitration proceedings.

8. In a decision dated April 8, 1981, the arbitrator appointed under the terms of the agreement denied the grievance, finding no discrimination.

9. On February 3, 1981, Mr. Jackson filed a charge of discrimination with the Commission, alleging that he had been racially discriminated against with respect to actions in 1977 and retaliated against for having raised an issue of discrimination.

10. On December 7, 1981, an Equal Rights Officer with the Commission issued an initial determination concluding that the charges of racial discrimination were not timely filed but finding probable cause to believe that complainant was retaliated against for having raised a complaint of discrimination.

OPINION

The respondent's objection to jurisdiction is premised on §111.93(3), stats.:

> "If a labor agreement exists between the state and a union representing a certified or recognized bargaining unit, the provisions of such agreement shall supersede such provisions of civil service and other applicable statutes related to wages, hours, and conditions of employment whether or not the matters contained in such statutes are set forth in such labor agreement."

In Jones v. DNR, Wis. Pers. Commn., 78-PC-ER-12 (11/8/79), this Commission held that its jurisdiction under §230.45(1)(b), stats., was not superseded by the effect of §111.93(3), stats. See also Winnebago County v. LIRC, Dane County Circuit Court Reserve Circuit Judge Currie, No. 860-167 (9/18/78).

The respondent also argues that even if the Commission's jurisdiction is not superseded pursuant to §111.93(3), stats., principles of res judicata or collateral estoppel prevent the Commission from hearing these cases.[FN]

Res judicata is a legal doctrine which "... has the effect of making a final adjudication conclusive in a subsequent action between the same parties ... not only as to all matters which were litigated but also as to all matters which might have been litigated ..." Leimert v. McCann, 79 Wis. 2d 289,293-194, 255 N.W. 2d 526 (1977).

Under appropriate circumstances, this doctrine is applicable to administrative decisions. See 2 Am Jur 2d Administrative Law §502. While the Wisconsin Supreme Court has said that the doctrine of res judicata has no application to administrative proceedings, see, e.g.,

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FN The initial determinations in these cases found no probable cause as to racial discrimination and probable cause as to retaliation. It does not appear from the record that the initial determinations of no probable cause as to racial discrimination were ever appealed pursuant to §PC 4.03(3), Wis. Adm. Code. However, it appears that the parties have briefed these matters as if the issue of racial discrimination was still before the Commission, so the Commission has addressed the effect of res judicata or issue preclusion on both the issue of racial discrimination and of retaliation.

Fond du Lac v. DNR, 45 Wis. 2d 620, 625, 173 N.W. 2d 605 (1970), this has been with respect to legal issues or to legislative type determinations subject to continually changing facts and circumstances. Quasi-judicial administrative action presents different considerations. See United States v. Utah Construction and Mining Co., 384 U.S. 394, 421-422, 86 S.Ct. 1545, 1559-60, 16 L. Ed. 2d 642 (1962):

> Occasionally courts have used language to the effect that res judicata principles do not apply to administrative proceedings, but such language is certainly too broad when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.

See also, Davis, Administrative Law (3d Ed.), Chapter 18; Sheehan v. Industrial Commission, 272 Wis. 595,604-5, 76 N.W. 2d 343 (1956) (res judicata applied with respect to examiner's decision on workers compensation).

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).

In Leimert v. McCann, the Court set forth the elements of the doctrines as follows:

> 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.

There are many types of administrative proceedings, governed by varying rules of procedure and legal standards. Therefore, it is particularly important that these doctrines be applied flexibly in the administrative area, and that the facts and circumstances of each case be carefully evaluated. See International Wire v. Local 38, Int. Brs. of Elec. Workers, 357 F. Supp. 1018, 1023 (N.D. Ohio 1972):

> In Tipler, the rule which was adopted was a flexible one, proceeding from the premise that neither collateral estoppel nor res judicata is rigidly applied ... a party's right to relitigate issues previously determined in an administrative proceeding must be determined upon analysis of the factors relating to the nature and extent of the administrative proceeding.

There can be no question but that an arbitrator's award can have res judicata effect under appropriate circumstances. See, e.g., Dehnart v. Waukesha Brewing Co., 21 Wis. 2d 583, 589 (1963).

The cases before the Commission involve discharges from employment. Both complainants proceeded to arbitration where the issue was whether there was just cause for discharge. In such proceedings, the employe has the burden of proof. See Elkouri & Elkouri, How Arbitration Works, p. 621. Clearly, if either arbitrator had determined that the discharge had been motivated by racial discrimination or retaliation, there would have been an award in favor of the employe. However, the arbitrator in the Lee case specifically stated: "There is no evidence in support of Lee's statement in his grievance report that Janczak was prejudiced because Lee is black." In the Jackson case the arbitrator's comments were:

> "While it is relatively clear that Janczak's actions as a supervisor were resented by a number of the employes including the grievant, the undersigned must agree with the employer that there is no evidence in this record which would support a finding that his actions were racially motivated. On the contrary, the record establishes that he pursued a firm and aggressive supervisory role

in his dealings with all the employes in the department."

The basic elements of the complaints before the Commission and the matters before the arbitrator are very similar. The complainants were discharged from employment and they have alleged that those discharges were improperly motivated. There is no reason to believe that Mr. Lee could not have raised the question of retaliation in the arbitration proceedings under the ambit of just cause. In the briefs that the parties have submitted on the question of whether res judicata should be applied, there have been no arguments that Mr. Lee was prevented in some manner from raising the issue of retaliation in the proceedings under the collective bargaining agreement. Rather, they rely solely on the assertion that they have an absolute right to raise issues in proceedings under the Fair Employment Law regardless of whether they did or could have raised them in arbitral proceedings which clearly would have bound the employer had the employer been subject to an unfavorable award.

However, this agency and its predecessor body, the Personnel Board, have consistently been willing to apply principles of issue preclusion when appropriate, in order to prevent multiple litigation. As the Personnel Board observed in Martin v. DOT, No. 75-69 (4/11/78), "There is a public interest in finality which is not served if a party to a controversy is permitted to relitigate it following an unfavorable decision." See also, Jacobson v. DILHR, Wis. Pers. Commn., No. 79-PC-PER-11 (6/13/81).

While there are theoretical differences between an arbitration hearing of a contractual grievance and a hearing before the Commission of a discrimination complaint, these essentially come down to the fact

that the Commission is applying the Fair Employment Law and the arbitrator is applying the contract. However, in cases involving discharge where the employe raises questions of racial discrimination and retaliation, the factual issues are virtually identical. In a discrimination proceeding, it is difficult if not impossible for the adjudicator to fail to cover essentially the same ground as would be covered in a just cause inquiry before an arbitrator inasmuch as the complainant typically alleges that the reasons for discharge advanced by the employer are pretextual. Similarly, an arbitrator faced with an allegation that a discharge was motivated by racial discrimination or retaliation must consider the facts relating to such allegations because a discharge so motivated manifestly is not for just cause. If the complainants in the instant cases were to proceed to hearing before the Commission on the issue of retaliation, this would amount to a relitigation of these discharges, with the addition of a new theory of employer misconduct as to Mr. Lee. There has been no suggestion that Mr. Lee was prevented in any way from raising this issue before the arbitrator, where the employer had the burden of proving just cause, a concept that encompasses the absence of an improper motivation for employe discipline. Under these circumstances it is appropriate to apply the principle of res judicata and preclude any further litigation of these matters.

CONCLUSIONS OF LAW

1. This Commission has jurisdiction over the subject matter of these complaints pursuant to §230.45(1)(b), stats.

2. The elements of res judicata being present, the complainants are precluded from litigating the questions of retaliation and racial discrimination before this commission.

ORDER

Pursuant to the principle of res judicata, these complaints of discrimination are dismissed.

Dated: October 6, 1982 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

LAURIE R. McCALLUM, Commissioner

JAMES W. PHILLIPS, Commissioner

AJT:ers

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