STATE OF WISCONSIN PERSONNEL COMMISSION

JUANITA KOTTEN,

Complainant,

v.

Secretary, Department of INDUSTRY, LABOR AND HUMAN RELATIONS,

Respondent.

Case No. 81-PC-ER-23

DECISION
AND
ORDER

NATURE OF THE CASE

This is a complaint of discrimination with respect to which the Commission reached a determination of "no probable cause," and the complainant appealed, thus requesting a hearing on probable cause. This matter is before the Commission on the respondent's motion to dismiss on res judicata grounds which was filed on December 20, 1982. Both parties have filed briefs with the Commission. The facts as they relate to the motion do not appear to be in dispute. The findings which follow are based on documents contained in the file.

FINDINGS OF FACT

1. On February 17, 1981, complainant Kotten filed with the Commission a fair employment complaint alleging discrimination on the basis of race with regard to discharge. The specific allegations of the complaint are as follows:

> From August 1979 to June 2nd, 1980 (my last day of work), Linda Thelke, Job Service Director, put me through continuous harassment, mental strass [sic] and anxiety, all due to unnecessary cruel and inhumane treatment. No other employee was subjected

> to this treatment. Yes, this discrimination also affected my family as well. The relief that I am requesting is, to have my job back as soon as possible. Please see all attached memos. Also notice that she has not pay [sic] the last psychiatrist appt. She made for me, and I am been [sic] harassed, unnecessary for an appointment I did not make. Ms. Thelke and her atty. testify under oath that this bill was paid.

2. On July 20, 1981, the Commission accepted the EEOC's determination of no probable cause as to the identical charge filed there with regard to the allegations of her state complaint.

3. Ms. Kotten appealed the determination of no probable cause by letter dated August 18, 1981.

4. The Commission's prehearing conference report of February 24, 1982, noticed the issue for hearing as follows:

> Whether there is probable cause to believe that respondent discriminated against the complainant on the basis of race in terminating her employment.

5. Following Kotten's discharge effective June 24, 1980, she grieved her discharge under the applicable provisions of the collective bargaining agreement between the State of Wisconsin and the Wisconsin State Employees Union. As evidenced by the arbitrator's award which is attached hereto, the grievance challenging Kotten's discharge was heard before the arbitrator on December 9, 12 and 16, 1980. At the hearing, the burden of proof was on the employer to establish "just cause" for the discharge and for a previous ten day suspension. Based on the entire record, the arbitrator found in an award entered March 13, 1981, that the numerous factual charges contained in both the notice of suspension and the notice of discharge were largely supported by the evidence, and concluded that the employer had established just cause for Kotten's suspension and discharge. Award, pp. 8-9.

6. At the hearing, Kotten's primary defense, which she was allowed to, and did, fully litigate, was the claim that the work rules were not applied uniformly to all employes, specifically herself, and that she had been singled out by her supervisor, Linda Thelke, for special treatment which constituted harassment. Id. at 9-10.

7. The arbitrator addressed both the claim that Kotten was treated differently than other employes and that she was harassed, and expressly rejected them. The arbitrator's findings on these two factual issues are, in part, as follows:

> After a thorough review of the evidence, the Arbitrator concludes that the reprimands issued to the grievant were neither harassment nor did they constitute a singling out of the grievant for ununiform treatment....
>
> ...This record does establish that the grievant received a constant series of written reprimands to which no other employe was subjected. The record, however, also establishes that the grievant's conduct here was far different than the conduct of any other employee.... [O]ther employes of the Employer were responsive to supervisory direction nd to the requirements of the work rules. The record further establishes that the grievant was not. ...[T]he circumstances as they pertain to this grievant and the circumstances pertaining to all of the employes in the Kenosha office of the Employer are not alike, and consequently, the Employer has not applied work rules in an ununiform manner to all employes under "like circumstances." With respect to the Union argument that the grievant was harassed, the undersigned concludes otherwise. This arbitrator views the written reprimands issued to the grievant as an attempt ... to legitimately get the grievant to conform her conduct to the rules. ...[T]he Employer has gone the "last mile" with the grievant and has attempted through progressive discipline to remove the problem. The record establishes that the grievant has been unresponsive to the corrective disciplinary attempts made by the Employer....

Id., at 9-10.

8. The complainant could have, but failed to, submit any evidence in the arbitration proceeding tending to link the alleged disparate treatment and harassment with race.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.

2. The doctrine of res judicata is available with respect to administrative proceedings.

3. The arbitrator's decision dated March 13, 1981, is res judicata with respect to the issue of whether there is probable cause to believe that the respondent discriminated against the complainant on the basis of race in terminating her employment, and therefore this charge of discrimination must be dismissed.

OPINION

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, 293-294, 255 N.W. 2d 526 (1977)." Lee & Jackson v. UW-Milwaukee, 81-PC-ER-11, 12 (10/6/82). Under appropriate circumstances, this doctrine is applicable to administrative decisions, Lee & Jackson, supra; 2 Am Jur 2d Administrative Law §502; and in Lee & Jackson, supra, it was applied to arbitration awards to foreclose the relitigation of the same or very similar issues in charges of discrimination brought under the Fair Employment Act, Subchapter II of Chapter III, Stats., and §230.45(1)(b), Stats.

In the instant case, the complainant charged discrimination on the basis of race with respect to her discharge from employment with the respondent, and alleged that her supervisor subjected her to continuous harassment. Following her discharge she grieved her discharge under the collective bargaining agreement and pursued the matter to arbitration. The arbitrator determined that there was just cause for the discharge and that "all the reprimands issued to the grievant were neither harassment nor did they constitute a singling out of the grievant for ununiform treatment...." Arbitration Award, p. 9.

The award also stated that:

> Hearing was held at Kenosha, Wisconsin, on December 9, 1980, and December 16, 1980, at which time the parties were present and given full opportunity to present oral and written evidence and to make relevant arguments. In addition to testimony taken at the hearing on the foregoing dates, testimony ... was taken by telephone conference call on December 12, 1980. Award, p. 1.

In his brief in opposition to respondent's motion to dismiss, complainant's attorney does not contend that the complainant did not have a full opportunity to present her case before the arbitrator. Rather, he argues against the applicability of res judicata in an administrative proceedings generally, citing City of Fond du Lac v. Department of Natural Resources, 45 Wis. 2d 620, 173 N.W. 2d 605(1970), and Board of Regents v. Wisconsin Personnel Commission, 103 Wis. 2d 545, 309 N.W. 2d 366(1981).

While there is language to this effect in these cases, it must be considered in light of the facts of these cases. In neither case did the question of the application of res judicata relate to an administrative quasi-judicial adjudication with respect to historical facts. The City of Fond du Lac case involved a DNR decision regarding the establishment of a metropolitan sewage system where the department felt a second hearing was

necessary due to interim changes of circumstances as to population, water consumption, and sewage volume. The Board of Regents case involved "a question of law to which res judicata principles would be inapplicable." 103 Wis. 2d at 552.

Furthermore, these cases must be reconciled with cases such as Dehnart v. Waukesha Brewing Co., 21 Wis. 2d 583, 589 (1963), where the court held that "As a general rule the doctrine of res judicata is applicable to final awards made by arbitrators," and Sheehan v Industrial Commission, 272 Wis. 595, 604-605, 76 N.W. 2d 343 (01956), where res judicata was applied with respect to a hearing examiner's decision on workers compensation.

As the United States Supreme Court noted in 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.

The instant case involves an arbitration of a discharge. In such proceedings, the employer has the burden of proof. See Elkouri & Elkouri, How Arbitration Works, p. 621. The employer established that there was just cause for the discharge. With respect to the charge of harassment and lack of uniform treatment, the arbitrator found in part as follows:

> The Union's primary argument is grounded on the terms of the Collective Bargaining Agreement found at Article XI, Section 7, which requires that work rules be interpreted and applied uniformly to all employes

> under like circumstances. The Union argues that they have not been, and further contends that the grievant was singled out by Thelke for special treatment which constitutes harassment. The Union further contends that the unbroken continuity of memorandums of reprimand established that a vendetta existed between Thelke and the grievant, and that the constant hounding of the grievant by Thelke caused the grievant's illness, which caused her absences, which caused her termination. After a thorough review of the evidence, the Arbitrator concludes that the reprimands issued to the grievant were neither harassment nor did they constitute a singling out of the grievant for ununiform treatment in violation of Article XI, Section 7.
>
> Article XI, Section 7 provides that work rules are to be interpreted and applied uniformly to all employes under like circumstances. This record does establish that the grievant received a constant series of written reprimands to which no other employe was subjected. The record, however, also establishes that the grievant's conduct here was far different than the conduct of any other employe in the employ of this Employer. The testimony in the record establishes that other employes of the Employer were responsive to supervisory direction and to the requirements of the work rules. The record further establishes that the grievant was not. Thus, there is no other employe to which the grievant can be compared which would establish that other employes were in "like circumstances" as the grievant. To the contrary, the undersigned concludes that the grievant placed herself in a category of supervisor/employe relationship unlike the relationships of any other employe in the employ of the Employer. Therefore, the circumstances as they pertain to this grievant and the circumstances pertaining to all of the employes in the Kenosha office of the Employer are not alike, and consequently, the Employer has not applied work rules in an ununiform manner to all employes under "like circumstances". With respect to the Union argument that the grievant was harassed, the undersigned concludes otherwise. This Arbitrator views the written reprimands issued to the grievant as an attempt on the part of the Employer to legitimately get the grievant to conform her conduct to the rules. In short, it is the opinion of the undersigned that the Employer has gone the "last mile" with the grievant and has attempted through progressive discipline to remove the problem. The record establishes that the grievant has been unresponsive to the corrective disciplinary attempts made by the Employer, and consequently, the grievance will be dismissed and the discharge sustained. Award, pp. 9-10.

Clearly, evidence of racial discrimination would have been relevant to the charge of unequal treatment and harassment. The complainant has not

argued that she in any way was foreclosed or prevented from presenting any evidence at the arbitration hearing, including any evidence of racial discrimination. Furthermore, the arbitrator's findings are inconsistent with any possible finding that the complainant was the victim of racial discrimination by her supervisor, or that there is probable cause so to believe.

Therefore, the Commission concludes that the complainant had a full opportunity in the arbitration proceeding to have litigated essentially the same claim that is embodied in the instant charge of discrimination, that she had the opportunity in that proceeding to have presented any evidence of racial discrimination she may have had in addition to the evidence she actually presented, and that she either had no additional evidence or failed to present it, and that the arbitrator's findings should be given preclusive effect and this charge of discrimination should be dismissed.

ORDER

Pursuant to the doctrine of res judicata, and probable cause to believe that discrimination has been committed not having been found, this charge of discrimination is dismissed.

Dated: January 31, 1983 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

AJT:jmf

LAURIE R. McCALLUM, Commissioner

JAMES W. PHILLIPS, Commissioner, did not participate in the consideration or decision in this matter.

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