STATE OF WISCONSIN PERSONNEL COMMISSION

* * * * * * * * * * * * * * * * * DWIGHT MASSENBERG Complainant, v. President, UNIVERSITY OF WISCONSIN-MADISON, Respondent. Case No. 81-PC-ER-44 * * * * * * * * * * * * * * * * *	INTERIM DECISION AND ORDER

NATURE OF THE CASE

This complaint of discrimination resulted in an initial determination, dated January 22, 1982, that there was no probable cause to believe that the complainant had been illegally discriminated against by the respondent. The complainant appealed this determination and requested a hearing on the question of probable cause. The respondent then filed on February 15, 1983, a motion to dismiss the complaint on the ground of res judicata, and the parties have been afforded the opportunity to file briefs thereon. The motion is based in substantial part on the results of a grievance proceeding conducted under the auspices of a collective bargaining agreement, and an unemployment compensation proceeding which was pursued through the Labor and Industry Review Commission and the Dane County Circuit Court. The respondent submitted with its brief in support of its motion copies of the following:

1. Excerpts from the collective bargaining agreement covering the complainant (agreement between State of Wisconsin and AFSCME Council 24, Wisconsin State Employes Union, AFL-CIO, and its appropriate affiliated

locals, Blue Collar and Non-Building Trades, Technical and Security and Public Safety Bargaining Units, November 9, 1979 to June 30, 1981);

2. Transcript of arbitration hearing held June 15, 1952;

3. Arbitrator's Award and Opinion dated September 30, 1982;

4. Transcript of Unemployment Compensation Hearing No. 81-01609 AM;

5. Unemployment Compensation decision issued by LIRC, dated December 23, 1981;

6. Memorandum Decision and Order of Circuit Court dated March 8, 1983, upholding the LIRC, dated December 23, 1981;

The following findings of fact are based on the foregoing documents and other documents contained in the Commission's file which reflect the procedural background of this matter before the Commission.

FINDINGS OF FACT

1. On April 13, 1981, the complainant filed with the Commission a fair employment complaint on which the following boxes were checked: national origin or ancestry, race, creed, color, arrest/conviction and retaliation with regard to discharge. The specific allegations of the complaint are as follows:

> I started work as a BMH 2 for the University Physical Plant June 1, 1980. The supervisors were Ralph Boss, Larry Wall and Gayland Malisch. I filed a discrimination grievance against the 3 men above on Feb. 1, 1981 because I felt I was treated unfairly and was told to do duties that were not asked of other employes. Management wrote the grievance [sic] off as a misunderstanding of holiday work schedule. They did not look into the harassment of discrimination part of the grievance. On Feb. 21, 1981 I was terminated for violation of the following rules:
>
> I. Work Performance
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> B. Loafing, loitering, sleeping or engaging in unauthorized personal business.

E. Failure to provide accurate and complete information whenever such information is required by an authorized person.

II. Use of property

A. Unauthorized or improper use of University property or equipment including vehicles, telephone or mail service.

I feel this was cruel and unusual punishment considering that on Feb. 6, 1981, Matea Cadena, head of the State Migrant Bureau had only been suspended for 3 days without pay for bringing a gun to his office in the General Executive Facility I. Also Victor Zepeda, a Job Service Employee, was only suspended for 1 day without pay for buying that gun.

2. On January 22, 1982, the Commission issued an initial determination finding no probable cause to believe that complainant has been illegally discriminated against by respondent in violation of Wisconsin Statutes, sections 111.31 et seq.

3. On February 24, 1982, the complainant requested a hearing on the issue of probable cause.

4. The Commission's prehearing conference report of January 11, 1983 lists the issue for hearing as "whether there is probable cause to believe that respondent discriminated against the complainant on the basis of race, color and/or arrest/conviction record in terminating his employment" and "whether there is probable cause to believe that respondent discriminated against the complainant on the basis of retaliation (for having filed grievances on February 1, 1981 and on or about November 1, 1980) with respect to terminating his employment."

5. Following his discharge effective February 20, 1981, Massenberg grieved the discharge under the applicable provisions of the collective bargaining agreement between the State of Wisconsin and the Wisconsin State Employes Union. The grievance was heard by an arbitrator on June 15, 1982.

The issue for the hearing was "Was the grievant's discharge for just cause? If not, what is the appropriate remedy." At the hearing the burden of proof was on the respondent to establish just cause for the discharge. When the respondent attempted to introduce evidence relative to race discrimination, the complainant's attorney stated that he did not intend to pursue that matter in that forum, and the question was withdrawn by the respondent. Arbitration transcript, pp; 38-40. The arbitrator read and considered all arguments and contentions advanced by both parties in their briefs and considered all the evidence of record. The arbitrator concluded that "the termination of the grievant was shown by the substantial credible evidence to be for just and sufficient cause." Award, p. 13.

6. At the arbitration, Massenberg introduced evidence on the employer's knowledge of the two prior grievances referred to in his fair employment complaint (see Arbitration transcript pp. 17-19, 44, 72-74 and Massenberg's testimony at pp. 76-80, 84, 85-86); on whether the employer considered his arrest in deciding to discharge him; (see Arbitration transcript pp. 24, 71-72, 74-75, and Massenberg's testimony pp. 80-83); and on whether other employes had been guilty of similar offenses but had not been disciplined; (see Arbitration transcript pp. 41, 44-48, 61, 65, 69). In his brief, Massenberg's attorney argued that the failure to have discharged other employes was evidence that the decision to discharge the complainant was arbitrary and capricious:

> It is noteworthy that Director Rice has never dismissed anyone for unauthorized use of a University building in the sense that he believes Grievant violated the rule....(Award, p. 6)
>
> Mr. Rice testified that any employe who charged telephone calls to the state was not terminated. This was a direct violation of Work Rule IIIA and precisely the kind of conduct

> the rule was designed to prevent. It caused expense to the University and involved one of the listed types of equipment. If this flagrant violation, a form of theft, did not merit discharge, Mr. Massenberg's termination was clearly arbitrary and capricious. (Award, pp. 6-7)

7. Under the terms of the collective bargaining agreement covering the parties the issue of uniform applicability of the work rules may be challenged through the grievance and arbitration procedure. Art. IV; Art. XI, Sec. 7. Complainant had the opportunity to raise and address this claim as thoroughly as desired.

8. In the arbitration proceeding disputed issues of fact where resolved, each party had a full and fair opportunity to argue their version of the facts, to present witnesses, to cross-examine witnesses, to be, and they were, represented by counsel. Both parties were on notice that the arbitrator's decision would be final and binding on both parties. Art. IV, Sec. 2, Clauses 56 and 60.

9. The arbitrator considered all of complainant's contentions and found that just cause existed for discharge.

10. On April 20, 1981, the complainant appealed the initial denial of unemployment benefits by the Job Service Division, Department of Industry, Labor and Human Relations (DILHR). A hearing was held on June 1, 1981, before the DILHR Appeal Tribunal. At that hearing, the complainant introduced basically the same or similar evidence as was introduced in the aforesaid arbitration proceeding, except the respondent's witnesses were not questioned regarding whether the fact of complainant's arrest was in any way causal with respect to the decision to discharge him from employment. In this proceeding, each party had a full and fair opportunity to argue its

version of the facts, to present and cross-examine witnesses, and to be, and they were, represented by counsel.

11. The Appeal Tribunal, in a June 16, 1981, decision, held that the complainant's discharge was not for misconduct connected with his employment, and allowed benefits.

12. The employer appealed this decision to the Labor and Industry Review Commission (LIRC). In that proceeding, the complainant advanced the following contentions, as summarized in LIRC's decision:

> The employe contended that his action on the night of February 17, 1981, did not violate any employer work rule related to illegal drugs and that his discharge was therefore not for misconduct connected with his employment.
>
> * * *
>
> It is argued in the employe's belief that his conduct on February 17, 1981, was a single, isolated instance of such conduct and that such an instance cannot constitute statutory 'misconduct' in the absence of 'aggravating additional circumstances.' It is argued that such aggravating additional circumstances are not present in this case and that the employe's conduct did not impair his ability to perform his duties.

In a decision dated December 23, 1981, LIRC reversed the Appeal Tribunal's decision and denied benefits, having determined, in part, that:

> ... the employe's conduct in receiving a controlled substance in one of the employer's buildings while he was at work was sufficiently serious in itself to demonstrate an intentional and substantial disregard of the employer's interests, and of the standards of behavior the employer could reasonably expect of him as an employe, regardless of whether his conduct interfered significantly with his performance of his work responsibilities.

In its decision, LIRC noted the following:

> In reversing the decision of the appeal tribunal, the Commission has acted as a matter of law rather than because of any conclusion concerning the credibility of the witnesses differing from that of the appeal tribunal. The Commission has in effect adopted the same conclusions concerning the material facts as the appeal tribunal adopted but has reached a different legal conclusion from those facts.

13. Pursuant to §227.16, Stats., the complainant petitioned the Dane County Circuit Court for review of the LIRC decision. The Court affirmed the decision in a memorandum decision and order dated March 8, 1983, in Case No. 82 CV 0426.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of this complaint of discrimination pursuant to §230.45(1)(b), Stats.

2. The elements of res judicata are not present, and therefore the complainant is not precluded from relitigating the matter of the illegality of his discharge under Ch. 111, Subch. II, before this Commission.

OPINION

In Kotten v. DILHR, 81-PC-ER-23 (1/31/83), pp. 4-6, this Commission discussed the doctrine of res judicata as follows:

> 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.
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> * * *
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> 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 (1956), 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.

In Lee and Jackson v. UW-M, supra, pp. 5-6, the Commission discussed the basic elements of the doctrine of res judicata, and the closely related doctrine of collateral estoppel or estoppel by record, 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:

> 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.

A statement of the basic doctrine of res judicata as applied in judicial proceedings is set forth in 46 Am Jur 2d Judgments §394 as follows:

> ... the doctrine of res judicata is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.

In the instant case, there is an initial question whether the final decisions of the arbitrator and LIRC either explicitly or necessarily addressed and decided the issues raised in this proceeding before the Commission. The general rule is that even though a judgment or decision did not explicitly address an issue, it may preclude litigation of that issue in a subsequent proceeding involving the same parties, if it can be

said that the issue was necessarily resolved in the first judgment. See 46 Am Jur 2d Judgments §422:

> The general rule precluding the relitigation of material facts or questions which were in issue and adjudicated in a former action is commonly held to be applicable to all matters essentially connected with the subject matter of the litigation. This application of the general rule extends to questions necessarily involved in an issue, and necessarily adjudicated, or necessarily implied in the final judgment, although no specific finding may have been made in reference thereto, and although such matters were not directly referred to in the pleadings and were not actually or formally presented. Under this rule, if the record of the former trial shows that the judgment could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties, and if a judgment necessarily presupposes certain premises, they are as conclusive as the judgment itself.

In the proceeding before the Commission, the issues for decision are set forth in the prehearing conference reports as follows:

> Whether there is probable cause to believe that respondent discriminated against the complainant on the basis of race, color and/or arrest/conviction record in terminating his employment... whether there is probable cause to believe that respondent discriminated against the complainant on the basis of retaliation (for having filed grievances on February 1, 1981, and on or about November 1, 1980), with respect to terminating his employment.

In the arbitration proceeding, the only issues for hearing were: "Was the grievant's discharge for just cause? If not, what is the appropriate remedy?" Award and Opinion, p. 2. In the award, the arbitrator summarized the dispute between the parties as follows:

> The substance of the grievant's contention is that the possession of a small amount of marijuana is not considered under the law or the customs of the area to be a serious offense. They contend that the receipt of a small amount of marijuana during working hours on the Employer's premises, simply does not constitute sufficient cause to warrant the extreme penalty of discharge. pp. 8-9.

The remainder of the arbitrator's opinion was essentially a discussion of this contention, plus some discussion of the employe's denial of

complicity in the pre-termination interview. The arbitrator concluded as follows:

> On the basis of the total record evidence, the arbitrator finds that the termination of the grievant is shown by the substantial evidence to be for just and sufficient cause. The arbitrator further finds that there exists no mitigating circumstances favorable to the grievant's cause sufficient to justify modification of the discipline. p. 13.

With respect to any matters he did not discuss, the arbitrator stated as follows:

> The arbitrator has read and considered in detail all of the other contentions and arguments advanced by both parties in their respective briefs. Further discussion on other aspects is omitted for the reason that they do not involve matters that are controlling to the disposition of this matter. p. 13.

In the arbitration, the fact of the employe's receipt of a small quantity of a controlled substance while at work was not really in dispute. The real issue, as addressed by the arbitrator, was whether the offense was serious enough to warrant discharge. The arbitrator did not address any of the issues which are before the Commission in this discrimination proceeding. Nor can it be said that these issues were "necessarily implied" in the award or that the award "could not have been rendered without deciding the particular matter," as set forth in 46 Am Jur 2d Judgments §422, above. Such a conclusion is inconsistent with the arbitrator's statement that matters not discussed were not "controlling to the disposition of this matter." Furthermore, although there was testimony adduced that related to the role, if any, that the complainant's arrest and grievances might have played in the respondent's discharge decision, there is no evidence in the record before the Commission that the complainant presented these arguments in his brief to the arbitrator. As to the complainant's contention that other employes were not discharged for similar kinds of derelictions, it seems clear that this was not advanced to

attempt to demonstrate that there had been a violation of Art XI, Sec. 7B: "Work rules are to be interpreted and applied uniformly to all employes under like circumstances..." Rather, these incidents were presented to show the lack of seriousness of the employe's offense and that the discharge was arbitrary and capricious. The Commission cannot conclude that the arbitrator's decision necessarily decided these issues concerning discrimination, which were not only not addressed, but also not argued and not the subject of any substantial amount of evidence.

The fact that the arbitrator's decision neither addressed nor necessarily resolved the issues of discrimination does not completely preclude the possibility of applying res judicata, see, e.g., 46 Am Jur 2d Judgments §420:

> Under the rule that where two actions are on the same cause of action, the earlier judgment is conclusive not only as to matters actually determined in the prior action, but also as to matters which could properly have been raised and determined therein, it is not essential that the matter should have been formally put in issue in the former litigation, but it is sufficient that the status of the action was such that the parties might have had the matter disposed of on its merits.

Even if the arbitration proceeding were considered the same "cause of action" as the instant charge of discrimination, it does not necessarily follow that the complainant should be prevented from raising any issue before this Commission that he conceivably _might_ have raised before the arbitrator. As noted, above, see _International Wire v. Local 38, IBEW_, 357 F. Supp. 1018, 1023 (N.D. Ohio 1972), the rule of res judicata in administrative proceedings is of necessity flexible and not to be rigidly applied.

In keeping with his rule of flexible administration, the Commission must consider the fact that administrative agencies are bodies of strictly limited jurisdiction set forth by statutes. This is in contrast with

judicial forums, which frequently are of relatively general jurisdiction within certain broad parameters. It is one thing to say that a party who sues with respect to a transaction in circuit court should be subject to res judicata as to all related issues, even though not raised in the initial lawsuit, when there is no reason that a particular issue could not have been raised in the first lawsuit as readily as in the second lawsuit. In an administrative forum, where particular issues may perhaps only be raised in a collateral fashion to the primary issue the agency is empowered to consider, more caution must be exercised in applying res judicata. In certain cases, a party may at least theoretically have the right to argue an issue as collateral to the central issue before the agency, but would have to do so with no assurance of how completely and with what degree of particularized expertise the collateral issue will be considered.

This principle strikes the Commission as particularly acute in the area of the state Fair Employment Law. Here, a specialized body of law has been developed, as the state courts and agencies have applied precedents established by the United States Supreme Court under Title VII and 42 U.S.C. §1983. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849 (1971); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973). It certainly is true that issues of discrimination can bear on other issues such as the issue of whether there was just cause for disciplinary action, which typically is decided by an arbitrator. However, an employe involved in an arbitration who has a possible argument that the discharge was motivated by discrimination has no assurance that the issue of discrimination, if raised, would be resolved by the arbitrator by the application of this specialized body of legal analysis. The arbitrator's decision typically is not substantively reviewable judicially. The

arbitration grievant typically lacks the kind of broad discovery rights which frequently play a large role in Title VII and state Fair Employment Law proceedings. Under such circumstances, a complainant well may question whether he or she will get a comprehensive and adequate review of a claim of discrimination, and it is only with great caution that the Commission should apply res judicata to bar a charge of discrimination before the Commission where the complainant did not raise the discrimination issue in an arbitration.

This is not to suggest that in no cases would an employe be subject to the application of res judicata with respect to issues he or she did not raise before an arbitrator. For example Lee & Jackson v. UW-M, Wis. Pers. Commn. No. 81-PC-ER-11,12 (1/6/82), involved charges of discrimination under the Fair Employment Law. The discharged employes both charged that the discharges were discriminatory on the basis of race and retaliation. Both employes had taken their discharges to arbitration under the collective bargaining agreement, where the discharges were upheld. In the arbitrations, Mr. Jackson raised the allegations of race and retaliation discrimination. Mr. Lee raised the issue of race discrimination but, for no apparent reason, did not raise the issue of retaliation. The Commission applied res judicata and dismissed both complaints.

In the Lee case, the employe voluntarily raised one basis of discrimination before the arbitrator, but for undisclosed reasons did not raise the other. These are circumstances under which res judicata normally would be applied to bar relitigation as to both issues.

In Kotten v. DILHR, Wis. Pers. Commn. No. 81-PC-ER-23 (1/31/83), the complainant charged discrimination on the basis of race with respect to her

discharge. The specific allegations of her complaint were that her supervisor:

> ... put me through continuous harassment, mental stress and anxiety, all due to unnecessary cruel and inhumane treatment. No other employe was subjected to this treatment....

The complainant had taken this matter to arbitration, where, although she had not explicitly alleged racial discrimination, her primary defense 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.

The arbitrator found, 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.

In this case, the Commission applied res judicata and dismissed the complaint. However, the Commission's holding was not so much that the complainant could have raised but failed to have raised a charge of racial discrimination in the arbitration. Rather, it was more to the effect that the specific allegations in her charge of discrimination were essentially the same as those argued before the arbitrator, with the addition before the Commission of an allegation that the harassment and lack of uniform treatment had been motivated by racial discrimination:

> 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.

The instant case presents neither a situation wherein the complainant essentially litigated his charge of discrimination before the arbitrator, nor a situation where he presented some, but not all of this alleged bases of discrimination.[FN] Rather, the essence of his case in arbitration was that his misconduct was too insignificant to have warranted discharge. Under these circumstances, the Commission cannot conclude that it would be appropriate to bar him from pursuing his charge of discrimination before this agency.

Many of the same observations apply to the unemployment compensation proceeding. The complainant did not try to demonstrate discrimination in that forum. Rather, in a manner similar to the arbitration, he tried to show that his actions were not so serious as to constitute the type of statutory "misconduct" as to result in a denial of benefits. The Labor and Industry Review Commission concluded as follows:

> The Commission has concluded that the employer is a statutory "Person" under section 161.42 and is exposed to a significant criminal liability if it knowingly permits the use of its buildings for certain purposes involving controlled substances.
>
> In the view of the Commission, this potential exposure to criminal liability entitles the employer to be concerned about the introduction of controlled substances into its buildings and, more importantly, imposes on employes who use those buildings a responsibility not to disregard the employer's interest in avoiding such criminal liability. The Commission has concluded further that the employe's conduct in receiving a controlled substance in one of the employer's buildings while he was at work was sufficiently serious in itself to demonstrate an intentional and substantial disregard of the employer's interests and of the standards of behavior the employer could reasonably expect of him as an employe, regardless of whether his conduct interfered significantly with his performance of his work responsibilities.

[FN] On the contrary, he specifically declined to pursue his allegations of race discrimination in the arbitration proceeding, and indicated that he wanted to reserve these for litigation before this Commission.

Under these circumstances, it cannot be said either that the LIRC decision explicitly or by necessary implication decided the issues of discrimination raised before the Commission, or that the complainant should be barred from pursuing those issues because of his failure to have raised them in the unemployment compensation proceeding.

ORDER

The respondent's motion to dismiss this charge of discrimination on the basis of res judicata is denied.

Dated: July 21, 1983

STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

LAURIE R. McCALLUM, Commissioner

AJT:jmf

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CONCURRING OPINION

In joining in the decision that the elements of res judicata and collateral estoppel are not present herein, the undersigned does not wish to convey the message that he agrees with the broad application of said principles in the Jackson and Lee and Kotten cases noted above.

The Commission derives its jurisdiction over equal rights proceedings via §§230.45(1)(b) and 111.375(2), Stats. (1981). The latter of these two subsections provides:

> This subchapter applies to each agency of the state except that complaints of discrimination ... against the agency as an employer shall be filed with and processed by the Personnel Commission under §230.45(1)(b).

It seems clear that non-discrimination in employment is a goal of state agencies as employers. Section 230.01(2), Stats., provides in part:

> It is the policy of this state to provide for equal employment opportunity by ensuring that all personnel actions including hire, tenure or term, and condition or privilege of employment be based on the ability to perform the duties and responsibilities assigned to the particular position without regard to age, race, creed or religion, color, handicap, sex, national origin, ancestry, sexual orientation or political affiliation.
>
> ... It is the policy of the state to ensure its employes opportunities for satisfying careers and fair treatment based on the value of each employe's services.

In Section 111.31, the legislature declared in part as follows:

> (1) The legislature finds that the practice of unfair discrimination in employment against properly qualified individuals by reason of their age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record or conviction record substantially and adversely affects the general welfare of the state. Employers, labor organizations, employment agencies and licensing agencies which deny employment opportunities and discriminate in employment against properly qualified individuals ... deprive those individuals of the earnings which are necessary to maintain a just and decent standard of living.

> (2) It is the intent of the legislature to protect by law the rights of all individuals to obtain gainful employment and to enjoy privileges free from employment discrimination ... to encourage the full, nondiscriminatory utilization of the productive resources of the state to the benefit of the state, the family and all the people of the state. It is the intent of the legislature in promulgating this subchapter to encourage employers to evaluate an employe or applicant for employment based upon the employe's or applicant's individual qualifications rather than upon a particular class to which the individual may belong.
>
> (3) In the interpretation and application of this subchapter, and otherwise, it is declared to be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified individuals regardless of ... This subchapter shall be liberally construed for the accomplishment of this purpose.

The Supreme Court stated in Kurtz v. City of Waukesha, 91 Wis. 2d 103, 115, 280, N.W. 2d 757 (1979): "The [Fair Employment] Act addresses two evils of employment discrimination: its harmful effect on the aggrieved and its detrimental effect on the state as a whole."

In light of these pronouncements of the significant public policy considerations underlying the Fair Employment Act noted above, the Commission must be very careful in applying the principles of res judicata and collateral estoppel to dismiss a charge of discrimination. Under the law the Commission has a very special responsibility and some specific procedures to handle complaints of discrimination. Unlike an arbitration proceeding or unemployment compensation hearing, the Personnel Commission in its rules, Chapter PC 4 "Equal Rights Proceedings," Wis. Adm. Code, provides certain investigatory procedures followed by an initial determination whether or not there is probable cause to believe that discrimination has been or is being committed. If there is a probable cause determination, the Commission will immediately "endeavor to eliminate the discriminatory practice or recompense

the discriminatory act by conciliation or persuasion." The differences between an arbitration proceeding or an unemployment compensation hearing and the Commission's equal rights proceedings go beyond the pre-hearing practices noted above. For example, it is noteworthy that the Commission rules permit "... all the means of discovery that are available to parties to judicial proceedings as set forth in Ch. 804, Stats. ..." Section PC 2.02, Wis. Adm. Code. Discovery frequently is an important aspect of the litigation of discrimination complaints, which often involve circumstantial evidence and attempts to draw inferences therefrom. Arbitrators as a rule don't permit extensive discovery procedures and otherwise have very different fact-finding procedures.

Nor is there any evidence that the arbitrators in the aforesaid cases applied the State's Fair Employment Act to the grievances before them, which of course is what this Commission by law must do. Finally, there is limited judicial review of arbitral decisions. See Section 788.10(1), Stats. Even if it were assumed that the parties to the collective bargaining agreement had adopted by reference the substantive parts of the Fair Employment Act, and that the arbitrator would attempt to apply it, there is no judicial review to ensure that the precepts of the law are interpreted and applied correctly, although in a particular case where the Commission is determining whether to apply res judicata, it can scrutinize the arbitrator's decision to ascertain whether the arbitrator utilized the same method of analysis of allegations of discrimination that the Commission must use.

Based on the above, the undersigned believes that it is only with extreme caution that res judicata and collateral estoppel should be applied to a complaint of discrimination where the issue was, or could have been, litigated within the just cause standard of a disciplinary grievance before the arbitrator. A similar line of reasoning would lead to the same conclusion with respect to the res judicata effects of the unemployment compensation forum.

For the foregoing reasons, I hereby concur in the decision by the Commission denying the respondent's motion to dismiss the Complaint on the ground of res judicata and offer the above comments by way of further explanation of my position.

Dated: July 21, 1983

Dennis P. McGilligan
DENNIS P. McGILLIGAN, Commissioner

DPM:jmf