STATE OF WISCONSIN PERSONNEL COMMISSION

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*
JERRY D. SCHAEFFER, *
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Complainant, *
*
v. *
* DECISION
Adjutant General, DEPARTMENT * AND
MILITARY AFFAIRS, * ORDER
*
Respondent. *
*
Case No. 82-PC-ER-30 *
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This matter is before the Commission on respondent's motion to dismiss on the grounds "that the claims before the Personnel Commission are barred because they have been finally adjudicated adversely to the complainant in a prior federal court judgment." In the alternative the respondent requests that the Commission stay the instant proceding "until the United States Court of Appeals for the Seventh Circuit decides the appeal in Schaeffer v. Matera, et al., No. 85-C-857-C, on appeal, Nos. 87-1139 and 87-1187." The parties have been afforded the opportunity to file briefs, and completed their briefing schedule on May 14, 1987.

The underlying facts of this matter appear to be undisputed and are relatively straightforward.

FINDINGS OF FACT

1. On March 24, 1982, complainant filed a charge of discrimination with the Personnel Commission alleging respondent dismissed complainant from his position in the Wisconsin Army National Guard because of his handicap, in violation of the Fair Employment Act, Subch. II, Ch. 111, Wis. Stats.

2. On February 20, 1985, the Commission issued an Initial Determination of Probable Cause to believe that complainant was discriminated against on the basis of his handicap in regard to his not being retained in the National Guard in 1982.[1]

3. At a prehearing conference held on April 15, 1985, before Anthony J. Theodore, General Counsel, the parties agreed to the following issue: "Whether respondent discriminated against complainant with respect to his non-selection for retention, effective on or about May 5, 1982."

4. On September 18, 1985, the Commission granted complainant's request for a stay in the above-referenced matter while complainant went to federal court with his First Amendment claim.

5. The amended complaint in Jerry D. Schaeffer v. Adjutant General Raymond A. Matera, Colonel Barry Young and Colonel Richard Fuszard, No. 85-C-857-C (W.D. Wis) alleges that complainant was unlawfully terminated from the National Guard because he is a recovering alcoholic and because he expressed concern about alcoholism and drug abuse among guard members. The amended complaint alleges that Schaeffer's treatment was discrimination based on handicap and that the defendants retaliated against him for exercise of his rights to free speech and association.

6. On June 4, 1985, the defendants in the federal case moved for summary judgment. On November 12, 1986, United States Magistrate James Groh issued a 20-page report and recommendation recommending that the

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[1] Initially, the Commission dismissed this complaint for lack of subject matter jurisdiction on March 14, 1984. Following a petition for rehearing by the complainant, the Commission issued another decision and order on April 25, 1984 dismissing "So much of this complaint as relates to Mr. Schaeffer's status as a technician" and retaining jurisdiction over "so much of this complaint as relates to Mr. Schaeffer's status as a military member of the National Guard." On November 7, 1984, the Commission denied respondent's motion to dismiss filed September 20, 1984.

defendant's motion for summary judgment be granted. The magistrate's recommendation was based on a widely-accepted analysis proposed by the Fifth Circuit in Mindes v. Seaman, 453 F.2d 197 (1971). The Mindes court held that the reviewability of an allegation of deprivation of a constitutional right by the military depends on four factors. The magistrate applied the Mindes test and concluded that "In light of the agreed facts, there is virtually nothing from which to infer a redressable constitutional violation. ...I find that, on balance, the Mindes factors weight in favor of declining review."

7. The Magistrate's discussion of the first Mindes factor is of particular importance to the instant matter. The Magistrate stated at pp. 17-18 of his report as follows:

> With respect to this, the first Mindes factor, plaintiff has alleged, based on the First and Fourteenth Amendments, that the defendants discriminated and retaliated against him because of his alcoholism and his offer to assist other similarly situated. It is undisputed that of the three defendants only defendant Young sat on the Selective Retention Board that considered plaintiff's record.[9] It is also undisputed that the Board consisted of nine members, that Young was the only Board member who had personal knowledge of plaintiff's recent performance, and that he did not communicate to the other members of the Board plaintiff's status as a recovering alcoholic or plaintiff's offer to set up an alcohol and drug abuse program.

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[9] The parties made no specific finding on this point, but it is clearly inferable. The parties agreed that Young was the only member of the Board with personal knowledge of plaintiff's recent performance, which would exclude defendant Fuszard, plaintiff's first line supervisor. Indeed, in his affidavit in support of defendant's motion, Colonel Fuszard made the uncontradicted assertion that he did not serve on the Board at issue. (Dkt. #29 p. 3) Neither does it appear that Adjutant General Matera sat on the Board, as his function is to appoint Board members and review Board recommendations.

> In light of the agreed facts, there is virtually nothing from which to infer a redressable constitutional violation. Even assuming that Young's vote was tainted by impermissible influences, the facts indicate that the votes of the other eight members were not similarly affected. It appears that the ultimate decision to deny retention (by unanimous and 5-4 votes) could not have been the product of the claimed constitutional deprivations. Neither does defendant Matera's refusal to overturn the Board's recommendation suggest a constitutional violation or the need for judicial review. To the extent that such a claim has been asserted, it is simply too tenuous to overcome the strong policies discouraging review.[10]

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[10] Plaintiff also alleges that an adverse Officer Efficiency Report (OER), covering the period July 1, 1981, to May 7, 1982, was prepared in response to his comments regarding his alcoholism and offer of counseling. However, it is acknowledged that the OER was not presented to the Selective Retention Board. Given this fact, plaintiff's constitutional claims based on the allegedly adverse OER appear to be groundless. In any event, the OER claim would not alter the conclusion I have reached, even if it could be said to have a constitutional dimension. (See also Army Regulation 623-105 (attached as Ex. 3 to Aff. of Richard Fuszard, Dkt. #29) which provides an intraservice appellant procedure for correction of disputed OERs.)

8. On December 15, 1986, United States District Judge Barbara B. Crabb issued an order adopting the findings of fact and conclusion of law of the magistrate and granting the defendants' motion for summary judgment. The court concluded, inter alia, that the complainant had failed to produce any evidence that would support his claim that he was not retained in the National Guard because of his status as a recovering alcoholic or because of his efforts to promote alcohol and drug abuse programs. In discussing Schaeffer's argument that the Magistrate was wrong in concluding that his constitutional claim had no merit, the court made these observations:

> Without attacking any of the underlying facts found by the magistrate, plaintiff contends that the magistrate erred in ignoring the possibility that defendant Young's statements to the Selective Retention Board about plaintiff were tainted with bias stemming from defendant Young's knowledge

of plaintiff's alcoholism, and that plaintiff should have an opportunity to bring this out through testimony at trial.

In making this argument, plaintiff misapprehends his burden in opposing a motion for summary judgment. It is not enough simply to suggest that a witness might say something at trial that would tend to prove plaintiff's claim. Plaintiff must come forward with specific facts showing that there is a genuine issue for trial. Plaintiff has had ample opportunity to conduct discovery to determine whether any evidence exists to support his claim of bias. He does not suggest there is any. Therefore, I can assume that at trial, the jury could find the same facts as the magistrate did.

Assessing the undisputed facts and drawing all inferences from them in the light most favorable to plaintiff, I conclude that no reasonable jury could find that the nine-member Selective Retention Board was influenced by considerations of plaintiff's status as a recovering alcoholic or his efforts to promote alcohol and drug abuse programs. Any finding to that effect would be sheer speculation.

Plaintiff argues that defendant Matera's refusal to overturn the board's adverse decision was a biased one. However, the only evidence of bias he can point to is Matera's refusal to overturn the decision. Clearly, this is insufficient.

Finally, plaintiff argues that the adverse Officer Evaluation Report was evidence of bias. As the magistrate noted, this report was prepared long after the Selective Retention Board decision that is at issue here, and by a person who was not a member of the board. It cannot be used to show animus against plaintiff by board members at an earlier time.

The fact that plaintiff's claims go to the defendants' motives and intent does not defeat summary judgment.

9. On December 16, 1986, the District Court entered judgment in favor of defendants.

10. On January 2, 1987, complainant asked the Personnel Commission to lift the stay of this proceeding granted September 18, 1985.

11. On January 15 and 16, 1987, complainant filed notices of appeal with the Clerk of the Court for the Western District of Wisconsin.

12. Schaeffer's appeal in the seventh circuit is pending. Complainant wishes to proceed to hearing before the Personnel Commission on the instant complaint.

CONCLUSIONS OF LAW

1. This Commission has jurisdiction over the subject matter of this complaint pursuant to §230.45(10(b), Stats.

2. The elements of res judicata being present, the complainant is precluded from litigating the questions of retaliation and handicap discrimination before this commission.

DECISION

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. Also, 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.

The respondent argues at some length in its opening brief that the parties in this proceeding and in the federal court are identical. The federal action named three individual employes of the Department of Military Affairs as defendants. The caption names them individually and in their official capacities. The three defendants in the federal case were represented by the same government counsel as represents the Department of Military Affairs in this proceeding. The three individual defendants, however, are not named parties in this administrative proceeding. The

Department of Military Affairs is a party to this proceeding but was not a party in the federal proceeding.

The respondent cites several court decisions and statutory provisions for the proposition that there is an identity of parties in the federal and state proceedings. The complainant does not contest this contention or say anything about the identity of the parties in his responsive brief. The Commission therefore concludes that the parties are identical for res judicata purposes.

The next question is whether there is an identity of causes of action in the federal and state proceedings.

A cause of action is defined in Wisconsin in terms of a transaction, or factual situation. DePratt v. West Bend Mut. Ins. Co., 113 Wis. 2d 306, 311, 334 N.W. 2d 883 (1983)., Marshall-Wisconsin v. Juneau Square, 130 Wis. 2d 247, 265, 387 N.W.2d 106. (Ct. App. 1986) Where the state and federal complaints allege the same set of operative facts, there is but one cause of action, regardless whether there may be multiple theories of relief. Juneau Square Corp. v. First Wisconsin National Bank, 122 Wis. 2d 673, 683-84, 364 N.W.2d 164. (Ct. App. 1985)

A comparison of the federal court complaint and the allegations contained in the charge of discrimination filed with the Personnel Commission on March 24, 1982 demonstrate that the claims involve the same factual circumstances. Both allege that complainant is a recovering alcoholic. Both allege that he disclosed his handicap to Adjutant General Matera in August 1981, and offered to help set up an alcohol and drug abuse program. Both allege that following this disclosure and offer complainant suffered adverse employment consequences, such as isolation from meetings, exclusion from seminars, and the denial of promotion. Both allege that he was not selected for retention in the National Guard because of his alcoholism and

because he spoke out about the problems of alcohol and drug abuse in the Guard. Both allege that prior to his disclosure complainant always received at least "average" performance evaluations. It is undisputed that complainant received a bad officer efficiency evaluation after he was not selected for retention. In summary, the record supports a finding that both actions flow from the same underlying transactions.

The complainant does not dispute the respondent's argument on pages 5 and 6 of its opening brief that the federal and state claims are based on the same factual situation; i.e., the same cause of action. Instead, he argues that the federal theory of relief was couched in terms of deprivation of constitutional rights, and that the federal claim did not rest on an alleged violation of the federal Rehabilitation Act. Complainant further argues that the facts which the magistrate found and on which he based his recommendation do not determine the truth or falsity of complainant's allegations in the state proceeding concerning discrimination on the basis of handicap. Complainant states in his brief as follows:

> The Magistrate's findings of fact may or may not support a conclusion based on the Mindes analysis, that complainant has no constitutional claim; whether complainant prevails on appeal remains to be seen. However, a review of the specifics of the Magistrate's finding clearly shows that they do not support a conclusion that complainant cannot meet a Burdine burden of proof in regards to his Wisconsin Fair Employment Act claim.

In conclusion, the complainant argues that because the theory and analysis of a discrimination case before the Personnel Commission where the Title VII burden of proof sequence is applicable is different than the Mindes test used by the Magistrate, he is entitled to a hearing before the Commission on the merits of his claim.

The Commission rejects complainant's contentions. In the first place, complainant ignores the point made above that it is the facts to which the

doctrine of res judicata applies, not the theories of relief. Secondly, although the complainant may have different theories of relief in the federal and state proceedings, the record is clear that the facts offered to prove both claims are basically the same. The complainant at page 4 of his brief discusses the possibility he could at a full hearing on the merits of his complaint establish some additional facts to prove his case. However, complainant offers no new evidence to support his claim. The allegedly new points covered in his brief at page 4 were previously included in his amended complaint in the federal proceeding and in the discrimination charge filed with the Personnel Commission. They also were included in the decisions rendered in said forums to date. Complainant argues that he was not put on notice of the need to litigate the facts and did not have a full and fair opportunity to litigate his case before the federal court. However, the record indicates otherwise. In fact, as noted above, the court noted: "It is not enough to simply suggest that a witness might say something at trial that would tend to prove complainant's claim. Complainant must come forward with genuine facts showing there is a genuine issue for trial. Complainant has had ample opportunity to conduct discovery to determine whether any evidence exists to support his claim of bias. He does not suggest any. Therefore, I can assume that at trial, the jury could find the same facts as the Magistrate did." The complainant was put on notice by the Magistrate that he did not have enough facts to prove bias and retaliation in his termination. He simply has not pointed out any new evidence to support his claim to the court or to the Commission.

Respondent argues that the pendency of Schaeffer's appeal to the Seventh Circuit does not deprive the federal court judgment of its preclusive effect. Respondent cites Omernick v. La Rocque, 406 F. Supp.

1156, 1160 (W.D. Wis. 1976) wherein the Western District Court stated that the pendency of an appeal does not deprive a final judgment of a lower court of its preclusive effect unless and until the judgment is reversed. Respondent also cites Knuth v. Lepp, 180 Wis 529, 536, 193 N.W. 519(1923), wherein the Supreme Court stated:

> The stay pending appeal plainly in no wise lessens or affects the adjudication upon the issues presented to the court and disposed of in the judgment. The recital of the entry of judgment ... carries with it a presumption that such judgment is still in force and effect.

Complainant does not disagree with this contention. In view of the above, the Commission finds that Schaeffer's appeal to the Seventh Circuit does not deprive the federal court judgment of its preclusive effect herein.

As noted above, 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...." Leinert v. McCann, supra. 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. In the instant case, the Commission concludes that complainant had a full opportunity in the federal court proceeding to have litigated essentially the same claim that is embodied in the instant charge of discrimination, that he had the opportunity in that proceeding to have presented any evidence of handicap discrimination and/or retaliation he may have had in addition to the evidence he actually presented, and that he either had no additional evidence or failed to present it, that there is an identity between the parties and the issues as discussed above, and that the federal

court's findings should be given preclusive effect and this charge of discrimination should be dismissed.

Notwithstanding this conclusion, the Commission will retain jurisdiction over this matter during the pendency of appellate proceedings, since under the Wisconsin Administrative Procedure Act, after 30 days after the final order, the Commission in effect would lose the authority to reopen this matter in the event of a reversal of the District Court decision.

ORDER

Unless the decision of the federal matter through the appellate process results in a change in circumstances that removes one or more of the bases for res judicata, this matter is to be dismissed on that ground following the completion of federal appellate proceedings. The parties are to keep the Commission advised of the status of said proceedings.

Dated: June 24, 1987 STATE PERSONNEL COMMISSION

Dennis P. McGilligan
DENNIS P. McGILLIGAN, Chairperson

DPM:jmf
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