STATE OF WISCONSIN PERSONNEL COMMISSION

DONALD M. WEATHERALL,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 84-0047-PC-ER

DECISION
AND
ORDER

This matter is before the Commission on complainant's motion for summary judgment and respondent's motion to dismiss. The parties were afforded the opportunity to file briefs and completed their briefing schedule on August 19, 1987.

The following facts appear to be undisputed:

1. On April 26, 1984, complainant filed a charge of discrimination with the Commission alleging that he was sexually harassed while employed as an Administrative Assistant 3 (AA 3) by respondent and that respondent discriminated against him on the bases of sex, race, and retaliation by terminating his employment in such AA 3 position on January 4, 1984.

2. An Initial Determination was issued by the Commission on August 9, 1985, finding no probable cause to believe some of complainant's allegations and probable cause to believe complainant's remaining allegations. On September 9, 1985, complainant filed an appeal of such no probable cause findings with the Commission.

3. On December 26, 1985, complainant requested that the Commission hold any proceedings relating to his charge of discrimination in abeyance in view of complainant's intent to file an action in federal court. The Commission granted such request on January 15, 1986.

4. The case brought by complainant in the U.S. District Court for the Western District of Wisconsin (Case No. 86-C-274-S) was brought pursuant to 42 U.S.C. §1981, 42 U.S.C. §1983, and Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. 2000(e), et seq. The named defendant for purposes of the Title VII aspect of the case was respondent Department of Health and Social Services (DHSS). Complainant stated in connection with his request for a stay that his federal "claims arose out of the same disputed behavior alleged in Weatherall's Personnel Commission complaint," that "Weatherall's Wisconsin Fair Employment case arises out of the same incidents from which his federal claim is derived," and that "a hearing at the Personnel Commission will involve the same witnesses, describing the same incidents" as the trial in federal court. Complainant also stated that the federal court case and the charge of discrimination before the Personnel Commission involve the same parties.

5. On March 13, 1987, the federal court entered judgment in favor of the defendants and dismissed complainant's case.

6. Subsequently, complainant moved the federal court for a new trial and to alter or amend the judgment entered for the defendants. On May 21, 1987, the federal court denied such motions for relief from the judgment.

7. In relation to the §1981 and §1983 aspects of complainant's federal court case, the jury returned a special verdict which provided in pertinent part:

> 1. Did defendant Belshaw fail to properly supervise plaintiff because of his race?

Answer: Yes

3. Was defendant Belshaw's failure to properly supervise plaintiff a cause of the termination of his employment?

Answer: Yes

5. Was plaintiff's race a substantial or motivating factor in the decision of either of the following defendants to terminate plaintiff's employment?

Ruth Belshaw: Yes

Kathryn Morrison: No

7. Would the decision of either of the following defendants to terminate plaintiff's employment have been the same regardless of considerations of race or sex?

Ruth Belshaw: Yes

Kathryn Morrison: Yes

8. On March 19, 1987, complainant requested of the Commission that proceedings relating to his charge of discrimination before the Commission be reactivated.

9. On April 20, 1987, complainant filed a motion for summary judgment with the Commission "as to the merits of Weatherall's complaint that his race was a substantial or motivating factor in the respondent's failure to supervise him and in its termination of his employment", citing the federal court jury's special verdict as the basis upon which the Commission should grant such motion.

10. On July 8, 1987, respondent filed a motion to dismiss complainant's charge of discrimination before the Commission alleging that the judgment of the federal court in favor of the defendants in that action barred complainant from proceeding with his case before the Commission by operation of the doctrine of res judicata.

CONCLUSIONS OF LAW

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

2. The elements necessary to meet the requirements of res judicata being present, the complainant is precluded from litigating this charge of discrimination before the Commission.

DECISION

In Massenberg v. UW-Madison, No. 81-PC-ER-44 (7/21/83) and Schaeffer v. DMA, No. 82-PC-ER-30 (6/24/87), 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).
>
> 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.

In the instant case, it is undisputed that there is an identity of parties. As stated in Finding of Fact 4 above, complainant has stated that his cases before the federal court and the Commission involve the same parties. It is clear that the DHSS is the respondent in the case before the Commission and one of the defendants in the federal court case. Although there were also three individual defendants in the federal court case who are not parties to the case before the Commission, complainant has

not argued that this should be the basis for a conclusion that there is not an identity of parties and the Commission sees no reason for so concluding.

The next question is whether there is an identity of causes of action in the federal and Personnel Commission cases.

> 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 264. (Ct. App. 1985)

As stated in Finding of Fact 4 above, complainant has stated that the federal court case brought by the complainant and the charge of discrimination complainant filed with the Commission involve the same incidents. This is also apparent from the pleadings filed in the two cases; i.e., the pleadings reveal that both cases flow from the same underlying transactions and that complainant cites the same factual bases for the alleged discrimination against him by respondent in both cases.

Complainant argues, that "the judgment of the federal court dismissing Weatherall's claims should not bar Weatherall's state claims before the Commission since these claims are based on different laws."

The Commission rejects complainant's argument in this regard. Complainant ignores the point made above that it is the facts to which the doctrine of res judicata applies, not the legal theories of relief. Substantive differences in the laws in question do not remove the case from this rule. The Juneau Square Corp. case contained the following:

> Juneau Square contends that res judicata does not bar the instant lawsuit because none of the asserted causes of action requires proof of the essential element (restraint upon competition) of the federal claim. Juneau Square apparently believes that, for purposes of res judicata, causes of action are not the same if one cause requires proof of an element that another cause

> does not. Harper Plastics plainly refutes that theory. The Harper court held that a state law breach of contract claim and a federal claim for violation of an antitrust statute were the same cause of action for purposes of the rule against claim-splitting. Id. at 942. For purposes of res judicata, a basic factual situation generally gives rise to only one cause of action, no matter how many different theories of relief may apply.... 122 Wis. 2d at 683-684.

Also, see In re Univ. of Texas, 38 FEP Cases 886, 888 (U.S. Dept. of Labor, 1985), where an administrative complaint of sex discrimination was dismissed on res judicata grounds on the basis of a final court judgment in a Title VII case, notwithstanding that "...the legal bases for relief in the court case and the ALJ hearing were different...." The Commission concludes, therefore, that there is an identity of causes of action.

Respondent also argues that "complainant is precluded from litigating his State Fair Employment action before the Personnel Commission because he failed to raise this claim in the federal district court." Complainant argues that "Weatherall could not raise his Wisconsin Fair Employment cause of action in federal court because the Western District of Wisconsin Federal Court does not permit a private cause of action under the Wisconsin Fair Employment Act." In view of the Commission's conclusions as to the res judicata effect of the federal court's judgment on these proceedings before the Personnel Commission, it is unnecessary for the Commission to reach this issue. Once it has been determined that both proceedings involve the same cause of action, the operation of res judicata serves to foreclose relitigation of the same matter in a different forum under a different legal theory. It is not material whether that legal theory could have been litigated in the first forum. See Patzer v. Bd. of Regents, 37 FEP Cases 1847, 1850 (7th Cir. 1985):

> Patzer argues that his Title VII claim is not a matter that might have been litigated in the state court proceeding, because he could not have introduced

> it in the administrative proceeding or in the state court review; consequently, it is not barred. The fallacy in this argument is that the claim he makes in his Title VII suit is identical for purposes of res judicata to the claim he made in the administrative proceedings; that claim has therefore already been litigated. The "might have been litigated" provision comes into play only for claims or causes of action distinct from the one actually litigated.

Complainant also argues that "the respondent failed to object at the time of Weatherall's request for a stay of these proceedings pending the result of the federal court action and therefore the respondent has waived the defense of res judicata." The complainant cites no authority for his position in this regard and the Commission is not aware of any. Staying the proceedings before the Commission served to avoid the possibility of simultaneously trying two cases involving the same transaction, and presumably it left the door open to complainant to come back to the Commission for a hearing if federal proceedings were terminated short of the merits, but respondent's acquiescence in that course of action does not now foreclose it from pleading res judicata after a final judgment in the federal proceeding.

The Commission concludes that further proceedings before the Commission relating to the subject charge of discrimination are barred by the res judicata effect of the federal court's decision in favor of the defendants in the subject federal court action. In view of this conclusion, complainant's motion for summary judgment based on the special verdict as to Belshaw's discrimination must be denied. See Patzer v. Bd. of Regents, supra:

> ...It is true that if an issue is determined unfavorably to a party in an action that reaches final judgment on the merits, that party is bound by the prior determination in subsequent litigation between the same parties to which that issue is material... But subsequent litigation can arise only if it is not barred by res judicata....

Finally, in Patzer the Court concluded that the application of res judicata could be avoided for policy reasons. In the instant case, policy factors of the kind discussed in Patzer, involving the perceived frustration of the role of Title VII[1], are not present. While the Court in complainant's federal action utilized a different substantive approach to causation than this Commission has used, this kind of result is always a possibility when a party elects to proceed under federal rather than state law. To interpret this difference in the law as a policy reason for refusing to apply res judicata would be directly at odds with the basic principles of res judicata as set forth in Juneau Square Corp. where the Court rejected the argument that "...for purposes of res judicata, causes of action are not the same if one cause requires proof of an element that another cause does not....," 122 Wis. 2d at 683.

---

[1] The Court felt that the application of res judicata to state proceedings would frustrate the legislative intent that Title VII be supplemental to state remedies, citing New York Gas Light Club, Inc. v. Carey, 447 U.S. 54, 67, 22 FEP Cases 1642 (1980): "Title VII merely provides a supplemental right to sue in federal court if satisfactory relief is not obtained in state forums," and would lead to the anomalous result that a successful complaint in a state administrative proceeding where there was no judicial review would be entitled to pursue a federal Title VII remedy while one, like Patzer, who was affirmed in state court, would not.

ORDER

Complainant's motion for summary judgment filed April 20, 1987, is denied, and respondent's motion to dismiss filed July 8, 1987, is granted, and this charge of discrimination is dismissed.

Dated: October 7, 1987 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

LRM/AJT:jmf
JMF05/2

Parties:

Donald M. Weatherall
13136 W. Shoreland Drive
Mequon, WI 53092

Tim Cullen
Secretary, DHSS
P. O. Box 7850
Madison, WI 53707