STATE OF WISCONSIN PERSONNEL COMMISSION

DUANE FISCHER,

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN - MADISON,

Respondent.

Case No. 84-0097-PC-ER

INTERIM DECISION AND ORDER

This matter is before the Commission on respondent's motion to dismiss on the basis of res judicata and collateral estoppel, filed November 7, 1986. The respondent has filed copies of the record of the arbitration upon which the motion is based. This record includes a hearing transcript, exhibits, the parties' briefs before the arbitrator, and the arbitrator's award. Both parties have submitted briefs on the motion.

The complaint of discrimination in this case, filed August 16, 1984, alleges as follows:

> "I was discharged from my position as a Library Services Assistant 2 at the University of Wisconsin-Madison, Memorial Library, Circulation Department effective July 13, 1984, for allegedly not meeting minimal performance standards. I have been employed at the Memorial Library performing basically the same duties for approximately the past fifteen years. I believe my discharge is handicap discrimination."

Following an ex parte investigation an initial determination was issued which concluded there was "no probable cause" to believe respondent had discriminated against complainant. The complainant appealed that determination pursuant to §PC 4.03(3), Wis. Adm. Code, and the commission has noticed a probable cause hearing on the following issue:

"Whether there is probable cause to believe that the respondent discriminated against complainant with respect to handicap in connection with his termination from employment."

The documents filed with respect to the arbitration reflect that after the discharge referred to in the complaint, Mr. Fischer and the union (American Federation of State, County and Municipal Employes (AFSCME), Wisconsin State Employes Union (WSEU) Council 24) representing him pursued a contractual grievance contesting that discharge and related reprimands. The grievance proceeded to the fourth step (binding arbitration) where an arbitrator conducted a hearing and returned an award in favor of the employer.

The parties to the arbitration stipulated to the following issues:

"1. Did the Employer have just cause to issue the grievant letters of reprimand on November 21, 1983, December 14, 1983, and April 30, 1984? If not, what is the appropriate remedy?

2. Did the Employer have just cause to terminate the grievant? If not, what is the appropriate remedy?"

The arbitrator's specific award was as follows:

"The Employer had just cause to issue the grievant letters of reprimand on November 21, 1984. The Employer also had just cause to terminate the grievant. The grievances are dismissed."

In Lee & Jackson v. UW-M, Nos. 81-PC-ER-11,12 (10/6/82), this 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 Jr 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."

Accord, Massenberg v. UW-Madison, Wis. Pers. Comm. No. 81-PC-ER-44 (7/21/83).

The respondent argues that although the issues for arbitration did not include the issue of handicap discrimination per se, the complainant's representative did pursue such an issue, citing arguments appearing at pp. 13, 14 and 63 of the arbitration hearing transcript. However, some of this argument ran to the contention that the complainant was treated differently from other employes, which goes to the just cause issue. To the extent that complainant's representative tried to argue handicap discrimination, this was explicitly withdrawn following objection and off-the-record discussion:

> "ARBITRATOR KERKMAN: Mr. Highman, you have a statement which will clarify your position in response to Mrs. Sheeran's earlier question as it goes to the allegation of discrimination?
>
> MR. HIGHMAN: We expect the Arbitrator to rule on the just cause part of the contract as it pertains to the discipline of the grievant.
>
> ARBITRATOR KERKMAN: All right, and specifically you are not asking for an interpretation of whether Article XI, Section 1 [anti-discrimination clause] has been violated?
>
> MR. HIGHMAN: No." TS., pp. 84-85.

Respondent further argues that complainant introduced evidence to attempt to show the discharge action was taken because of complainant's handicap, that reasonable accommodation was not made, and that the arbitration decision necessarily resolved those issues. However, this evidence must be considered in light of the withdrawal by complainant's representative, as set forth above, of any claim of discrimination, and his arguments that the respondent applied a singular, unreasonable production standard to complainant, and that the respondent failed to follow a reasonable course of progressive discipline and corrective action in the context of complainant's mental condition. The arbitrator's award addressed these arguments, but did not necessarily resolve issues of handicap discrimination and accommodation. While there was discussion about complainant's limitations, this was in the

context of addressing the reasonableness of respondent's performance standards and its unwillingness to pursue further corrective action or progressive discipline:

> "The undersigned has further considered the fact that when grievant was hired the Employer took him into its employ, recognizing the limitations of the grievant. The foregoing is unpersuasive to the undersigned, in view of the record evidence establishing that grievant, prior to 1982, was able to and did perform at levels that were satisfactory to the Employer. The record evidence further establishes that it was not until after 1982 the grievant's work performance deteriorated to the point where it became unacceptable to the Employer. Consequently, the undersigned concludes that the Employer fulfilled its obligation to grievant, and properly took into account grievant's mental limitations in performing work. For all of the foregoing reasons, the undersigned concludes that the discharge of the grievant in this matter is for cause. Grievant here, over a lengthy period of time, two years, was given an opportunity to correct the deficiencies in his job performance. The record establishes that he was unable to do so. The record further establishes, to the satisfaction of the undersigned, that the grievant was treated in a manner in which he could understand the expectations of the Employer. The testimony of Dr. VanHorne establishes that in order to instruct the grievant the Employer simply had to tell him what it expected of him. In the opinion of the undersigned, that is precisely what the Employer had been doing for a period of two years, and has been unsuccessful in achieving the Employer's legitimate goal of bringing grievant's performance up to standard. Unfortunately, this is a case where the grievant has been unable to perform to reasonable standards established by the Employer. Since there is not another opportunity for the Employer to make a reasonable work assignment of less exacting nature to the grievant, the undesigned concludes the termination is proper." Award, pp. 20-21

While the Commission agrees there is a certain amount of similarity between the foregoing discussion and that which might be included in the decision of a handicap discrimination case, this is insufficient for a conclusion that Mr. Fischer's charge of discrimination should be dismissed on the basis of res judicata or collateral estoppel. This is particularly so given the nature of the administrative forums involved. As this Commission said in Massenberg v. UW-Madison, 81-PC-ER-44 (7/21/83), pp. 12, 14:

> "... the rule of res judicata in administrative proceedings is of necessity flexible and not to be rigidly applied. ...

* * *

> ... 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."

A final reason why the arbitrator's decision should not be afforded preclusive effect is that this matter is to be heard by the Commission on the issue of probable cause, which involves a different standard for evaluation of the evidence than does a hearing on the merits:

> "'Probable cause is not synonymous with 'preponderance', being somewhere between 'preponderance' and 'suspicion'.' Young Oil Co. of La., Inc. v. Durbin, 412 So. 2d 620,626 (La. App. 1982). The Commission agrees with this kind of characterization ... as it is supported both by the language of §PC 4.03(2), Wis. Adm. Code, and the policy underlying the probable cause requirement." Winters v. DOT Wis. Pers. Comm. Nos. 84-0003 & 0199-PC-ER (9/4/86).

ORDER

Respondent's Motion to Dismiss filed November 7, 1986, is denied.

Dated: December 18, 1986 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

AJT/baj
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