STATE OF WISCONSIN PERSONNEL COMMISSION

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ANN K. DOHVE,

Complainant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION,

Respondent.

Case No. 84-0200-PC-ER

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INTERIM DECISION AND ORDER

The underlying case is a complaint of discrimination based on sex and retaliation. On August 24, 1988, respondent DOT filed a Motion in Limine to the following effect:

> THE DEPARTMENT OF TRANSPORTATION BY ITS ATTORNEY JERRY L. HANCOCK respectfully moves the Commission to enter an order finding that the Complainant was terminated for just cause because of poor work performance and violation of work rules. The Department also requests that the Commission prohibit any testimony by the Complainant regarding the merits of her termination. The basis for this motion is that the Complainant is estopped as a matter of law from introducing evidence that her termination was not for just cause. These facts were determined as a result of arbitration between the parties.

A hearing on such motion was held before Laurie R. McCallum, Commissioner, on August 31, 1988.

The following facts appear to be undisputed:

1. Complainant was employed by respondent's Division of State Patrol from January 26, 1981, until she was discharged effective October 26, 1984.

2. Complainant grieved her discharge under the provisions of the applicable collective bargaining agreement.

3. On March 25 and 26, 1985, an arbitration hearing on such grievance was held. The parties in such arbitration hearing were complainant as

the Grievant; AFSCME Council 24, Wisconsin State Employees Union, and its affiliated Local 55 as the Union; and respondent DOT as the Employer.

4. On June 28, 1985, the arbitrator issued a decision finding that complainant had been discharged for just cause because of poor work performance and violation of work rules. The arbitration decision also stated: "it should be noted that neither the Union nor the Employer litigated in any manner whatsoever issue(s) relating to any charges or allegations of sex discrimination."

5. On November 5, 1984, complainant filed a Charge of Discrimination with the Personnel Commission.

6. In a prehearing conference held on April 21, 1988, complainant and respondent agreed that the hearing on complainant's charge of discrimination would be governed by the following issue:

> Whether or not respondent violated the Fair Empllyment Act when it terminated the complainant as set out in Section 8 of the charge of discrimination filed with the Personnel Commission on 11/5/84 (basis: sex and retaliation).

Although respondent characterized its subject request of the Commission as a Motion in Limine, i.e., as a request to prohibit the receipt of certain evidence into the record, it involves a request for the application of the doctrine of collateral estoppel or estoppel by record; i.e., as a request that the Commission adopt certain of the arbitrator's factual findings and conclusions of law.

While this motion raises a number of issues concerning such things as identity of parties, the procedural adequacy of the arbitral forum, etc., the Commission does not need to reach these specific questions. There have been a number of recent federal court decisions in Title VII proceedings that provide significant guidance on the more general question of the

appropriateness of using an arbitrator's decision for preclusive purposes in employment discrimination proceedings. As the Court of Appeals stated in Hilmes v. DILHR, No. 88-0575 (Oct. 5, 1988):

> There is no ipso facto incorporation of Title VII in the WFEA. Hiegel, 121 Wis. 2d at 216, 359 N.W. 2d at 411. Nevertheless, interpretations of Title VII by federal courts have provided guidance in applying the WFEA. Id.... slip opinion, p. 6.

In Johnson v. UW-Milwaukee, 39 FEP Cases 11822 (7th Cir. 1986), the Court declined to give preclusive effect to an arbitrator's decision in response to the employe's motion for partial summary judgment that sought to preclude defendant from raising the defense that she had been terminated for a legitimate business reason (this is the obverse of the situation presented by the motion in the instant case). In Duggan v. Bd. of Ed., East Chicago Heights, 43 FEP Cases 1025 (7th Cir. 1987), an ADEA case, the court declined to give preclusive effect to a hearing officer's determination on the charges against a terminated teacher.

Becton v. Detroit Terminal of Consol. Freightways, 687 F. 2d 140, 142 (6th Dir. 1982), contains a good description of the rationale for such holdings and the appropriate role of an arbitration award in the discrimination proceeding once it is determined that it should not be given preclusive effect:

> ...The District Court's distinction between the plaintiff's discharge on the one hand and his discrimination claim on the other attempts to draw a bright line in an area where there is actually considerable overlap. There is no realistic way to sever the discharge from the claim of discrimination because, according to the plaintiff, the discharge is the discrimination. An analysis of one must include consideration of the other because both involve the same operative facts. They cannot be considered in isolation from one another. Inasmuch as "just cause" or similar contract questions are an integral part of many discrimination claims, the better rule avoids judicial efforts to separate and classify evidence

> offered by the plaintiff under the hearing of "discrimination" or "just cause." In our view, Gardner-Denver should not be read as a restriction on the extent to which a Title VII or section 1983 claimant is entitled to develop his evidence of discrimination.
>
> We do not hold that the arbitration decision is without significance. Certainly the court may consider the arbitration decision as persuasive evidence that the grounds found by the arbitrator to be just cause for discharge under the collective bargaining agreement are sufficient to amount to just cause. The court should defer to the arbitrator's construction of the contract. Moreover, an arbitration decision in favor of the employer is sufficient to carry the employer's burden of articulating "some legitimate, nondiscriminatory reason for the employee's rejection." McDonnell Douglas Corp. v. Green, 411 U.S. at 802, 93 S.Ct. at 1824. See also Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093-94 (1981). However, to allow that decision to answer conclusively questions raised in the final step of the McDonnell Douglas analysis unnecessarily limits the plaintiff's opportunity to vindicate his statutory and constitutional rights.
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> In light of the foregoing discussion, we reverse the District Court's holding that it was conclusively bound by the arbitration panel's decision that Becton was discharged for just cause. We hold instead that a federal court may, in the course of trying a Title VII or section 1981 action, reconsider evidence rejected by an arbitrator in previous proceedings. (footnote omitted)

Therefore, while the Commission will deny the motion in limine, it will be guided in its treatment of the arbitration at hearing by the foregoing excerpt from Becton.

ORDER

Respondent's motion in limine filed August 24, 1988, is denied.

Dated: November 3, 1988 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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