

STATE OF WISCONSIN

PERSONNEL COMMISSION

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TRISH KREBS,
 BARBARA CRAWLEY

 Complainants,

v.

Secretary, DEPARTMENT OF
 INDUSTRY, LABOR AND
 HUMAN RELATIONS

 Respondent.

Case Nos. 85-0131-PC-ER
 85-0162-PC-ER
 86-0031-PC-ER
 86-0032-PC-ER
 86-0099-PC-ER

* * * * *

DECISION
AND
ORDER

On September 28, 1993, respondent filed a Motion to Dismiss based on application of the doctrine of res judicata. The parties were permitted to file briefs and the final brief was filed on November 9, 1993. The following findings of fact are based on information provided by the parties and appear to be undisputed:

1. Case No. 85-0131-PC-ER was filed by complainant Krebs on September 12, 1985; alleged sex discrimination and whistleblower retaliation in regard to her reassignment in September of 1985 to clerical duties while her former professional position was being filled by a male with less seniority, and to attempts to place her on layoff status some time between April and October of 1983; and alleged that she was being retaliated against based on her involvement in the investigation of Walter Marty in February of 1984 and her status as a possible witness in the Bill Hebert and Ken VanderZanden cases.

2. Case No. 85-0162-PC-ER was filed by complainant Crawley on November 20, 1985; alleged whistleblower retaliation in regard to a review by respondent of her time and attendance in a meeting with her supervisor on November 7, 1985; and alleged that this incident was part of a continuing campaign of retaliatory harassment directed at her by respondent as the result

of her participation in an internal investigation of Walter Marty, the Oshkosh District Job Service Director, that took place in February and March of 1984.

3. Case No. 86-0031-PC-ER was filed by complainant Crawley on February 7, 1986; alleged that she was discriminated against based on sex and marital status and retaliated against based on fair employment and whistleblower activities in regard to a February 25, 1985, reprimand, a two-day suspension effective March 21 and 22, 1985, a January 21, 1986 letter of reprimand, and in regard to a pattern of harassment whereby other employees made disparaging remarks about her and were instructed by supervisors to keep track of her time and attendance; and alleged that these actions were part of a pattern of sex and marital status discrimination directed to single women in the unit, and were in retaliation for her participation in the 1984 investigation and her involvement in union activities.

4. Case No. 86-0032-PC-ER was filed by complainant Krebs on February 18, 1986; alleged discrimination based on sex and marital status and retaliation based on whistleblower activities in regard to an October 23, 1985 meeting where she was assigned three weeks of computer input work, in regard to an incident which occurred on February 6, 1986, during which her supervisor allegedly swore at her, and in regard to a pattern of harassment whereby other employees made disparaging remarks about her and were instructed to keep track of her time and attendance; and alleged that these actions were part of a pattern of sex and marital status discrimination directed to single women in the unit, and were in retaliation for her participation in the 1984 investigation.

5. Case No. 86-0099-PC-ER was filed by complainant Krebs on July 24, 1986; and alleged discrimination based on race and sex and retaliation in regard to her layoff effective June 27, 1986.

6. In February of 1988, complainants filed a summons and complaint in Winnebago County Circuit Court entitled Barbara Crawley and Trish Krebs v. Walter Marty, Patrick Quirt, Howard Bellman and State of Wisconsin Department of Industry, Labor and Human Relations, Case No. 88-CV-274. In this action, complainant Crawley alleged that she was the victim of an atmosphere of harassment and intimidation from at least April of 1983 until May of 1986; and that she was retaliated against for participating in the 1984 investigation of Walter Marty by being isolated from other employees, by

being harassed by other employees, by being the subject of false, inaccurate and misleading statements by other employees, when she was denied pay for a Saturday of work in February of 1984, when she received an oral reprimand in April of 1984, when she was the subject of letters of instruction, letters of reprimand, complaints, and verbal and physical harassment from 1984 to 1986, when her duties were eroded throughout this time period, when she was denied recognition or opportunities for advancement, and when she accepted a constructive layoff in May of 1986. Complainant Krebs' allegations parallel those of complainant Crawley except that she was laid off in June of 1986. In this action, complainants claimed that these actions by defendants Marty, Quirt, and Bellman, which continued "from late 1983 up to and including 1986" were taken against them for exercising their rights to free speech and association as protected by the Wisconsin State Constitution; and that these actions by defendants Marty, Quirt, and Bellman were attributable to defendants DILHR and the State of Wisconsin and constituted retaliation for engaging in protected whistleblower activities within the meaning of §895.65, Stats. Complainants also presented claims for defamation and the intentional infliction of emotional distress.

7. On April 25, 1989, the Winnebago County Circuit Court entered an order dismissing certain claims of the action, as follows:

1. The plaintiffs' action as to the defendant, Howard Bellman, is dismissed, in its entirety, with prejudice.
2. The plaintiffs' claims for intentional infliction of emotional distress and defamation are dismissed with prejudice.
3. The plaintiffs' claims for violation of rights under Article I, Section 3, Wis. Const. are dismissed with prejudice.
4. The plaintiffs' claims under sec. 895.65, Stats., against defendants Walter Marty and Patrick Quirt are dismissed with prejudice.
5. The plaintiffs' claims under sec. 895.65, Stats., against the State of Wisconsin, Department of Industry, Labor and Human Relations that accrued prior to February 22, 1986, are dismissed with prejudice.

8. Upon appeal of this circuit court decision, the court of appeals issued a decision affirming the circuit court on March 5, 1990, and characterized the circuit court's decision as follows:

. . . The trial court held that no state whistleblower action could be commenced absent compliance with the notice of claim provisions of sec. 893.82, Stats. The court held that the action against Bellman was barred because the notice of claim that had been filed made no mention of him. The trial court further held that claims against Marty and Quirt for acts that occurred before November 5, 1984, were barred by the two-year statute of limitations in the whistleblower statute and that claims for actions that occurred after November 5, 1984, were barred for lack of notice of claim under sec. 893.82, Stats. The court then dismissed all claims against Bellman, Marty, and Quirt. The trial court dismissed those claims against DILHR that accrued before February 22, 1986.

9. On February 6 and 7, 1991, the parties to the action in Winnebago County Circuit Court (Case No. 88-CV-274) stipulated to its dismissal with prejudice. On February 8, 1991, the Winnebago County Circuit Court entered the order of dismissal with prejudice on the basis of this stipulation.

10. In November of 1991, complainants commenced an action in Dane County Circuit Court entitled Barbara Crawley and Trish Krebs v. Walter Marty, Patrick Quirt, Howard Bellman and the State of Wisconsin Department of Industry, Labor and Human Relations, Case No. 91-CV-4186. In this action, complainants alleged that they were subjected to a continuing pattern of harassment and unequal treatment from at least 1981 through 1986 based on handicap, sex, and marital status, and of retaliation for their role in the 1984 investigation; that this treatment included having attendance monitored by other employees, being subjected to unwelcome sexual attention, receiving unfair criticism of the quality of work, losing assignments to other employees, receiving letters of correction or discipline, being isolated by other employees, being reprimanded by Quirt in April of 1984, being denied recognition for work accomplishments and the opportunity to advance, being demoted to a part-time clerical position, being denied promotions, and being laid off in May and June of 1986; and that this discrimination and retaliation violated the Equal Protection Clause of the Fourteenth Amendment and rights secured by the First Amendment to the U. S. Constitution.

11. The defendants in this Dane County Circuit Court action moved for summary judgment on the basis of res judicata. On June 26, 1992, the court rendered an oral decision granting the motion; and, on July 21, 1992, entered an order of dismissal of the action "on its merits and with prejudice." The plaintiffs filed an appeal of this decision but later entered a notice of

voluntary dismissal of the appeal, and the appeal was dismissed on January 15, 1993.

12. Complainants have now requested that their complaints with the Commission, which have been held in abeyance since the filing of the Winnebago County Circuit Court action, be heard and decided by the Commission.

In Schaeffer v. DMA, 82-PC-ER-30 (6/24/87), aff'd Schaeffer v. State Personnel Comm., 150 Wis. 2d 132, 441 N.W. 2d 292 (Ct. App. 1989), the doctrine of res judicata or estoppel by record was applied under similar procedural circumstances as present here, i.e., a discrimination complaint had been filed with the Commission and a subsequent parallel action in federal court had been filed and later dismissed by the court. The decision of the Commission, which was upheld by the circuit court and the court of appeals, was that the Commission action, which had been held in abeyance pending the results of the federal action, should be dismissed based on res judicata due to sufficient identity of parties, sufficient identity of causes of action, and the availability to complainant of a full and fair opportunity to have litigated his case before the federal court. The following discussion addresses these elements in the context of the arguments presented by the parties.

Complainants' first argument in opposition to the Motion to Dismiss before the Commission here is as follows:

**THE ORDERS OF THE CIRCUIT COURT FOR WINNEBAGO COUNTY
DISMISSING THE COMPLAINANTS' CLAIMS IN CASE NO. 88-CV-274
CANNOT BE RES JUDICATA AS TO EVENTS CONCERNING WHICH
LITIGATION WAS ALREADY BARRED BY THE APPLICABLE STATUTES
OF LIMITATIONS AT THE TIME THAT CASE WAS FILED.**

Ms. Crawley and Ms. Krebs filed Case No. 88-CV-274 on February 24, 1988. This action raised intentional tort claims and whistleblower claims under §895.65, Stats. The longest statute of limitations applicable to any of the plaintiffs' claims was two years. Accordingly, this action did not purport to reach events occurring before February 24, 1986. Certain events occurring prior to that date were pleaded to provide background.

However, both the pleadings in the Winnebago County Circuit Court action and the decision of the circuit court and the court of appeals reveal that actions from at least April of 1983 until May and June of 1986 were included

within the ambit of the action and were the subject of the courts' decisions. Particularly noteworthy here is the decision of the court of appeals (See finding 8, above) which states that, "The trial court further held that claims against Marty and Quirt for acts that occurred before November 5, 1984, were barred by the two-year statute of limitations in the whistleblower statute and that claims for actions that occurred after November 5, 1984, were barred for lack of notice of claim under sec. 893.82, Stats. The court then dismissed all claims against Bellman, Marty, and Quirt. The trial court dismissed those claims against DILHR that accrued before February 22, 1986." It should also be noted here that, ultimately, based on the stipulation of the parties, the entire action was dismissed with prejudice.

Complainants next argue as follows:

THE ORDER DISMISSING CASE NO. 91-CV-4186 IN THE CIRCUIT COURT FOR DANE COUNTY CANNOT BAR THE PERSONNEL COMMISSION CASES BECAUSE OF A LACK OF IDENTITY OF PARTIES.

The only party respondent in the several Personnel Commission cases here is the State of Wisconsin Department of Industry, Labor and Human Relations. . . . the only claim against the defendant, State of Wisconsin Department of Industry, Labor and Human Relations in the Circuit Court for Dane County was not a substantive claim but an indemnification claim under §895.46, Stats. The doctrine of res judicata (or estoppel by record) bars claims which could have been litigated in an earlier action or proceeding. . . . The Dane County Circuit Court action was a federal action under 42 U.S.C. §1983, and the plaintiffs could not have litigated substantive claims against the defendant Department in that action, because states and their agencies are not persons within the meaning of §1983.

Complainants have represented here that the party respondent in the complainant's cases before the Commission is the Department of Industry, Labor and Human Relations (DILHR). However, the party respondent in these cases is the Secretary of DILHR. At all times relevant to these matters, the Secretary of DILHR was Howard Bellman, who was named as a defendant in both the Winnebago County Circuit Court action and the Dane County Circuit Court action. Moreover, it is clear that substantive claims were brought against both Howard Bellman and DILHR in the Winnebago County Circuit Court action. In addition, as the Commission noted in Weatherall v. DHSS, 84-

0047-PC-ER (10/7/87), aff'd, Weatherall v. Personnel Commission, Ozaukee Co. Cir. Ct., 87-CV-481-B1 (9/15/88), a sufficient identity of parties exists for purposes of the application of the doctrine of res judicata to actions before the Commission when a state agency is identified as the party respondent/defendant in one action and an official of that state agency in the other action.

Complainants' third argument is as follows:

THE ORDER DISMISSING CASE NO. 91-CV-4186 IN THE CIRCUIT COURT FOR DANE COUNTY CANNOT BAR THE PERSONNEL COMMISSION CASES BECAUSE IT WAS BASED ENTIRELY ON THE WINNEBAGO COUNTY DISMISSALS WHICH RELATED ONLY TO THE PERIOD AFTER FEBRUARY 24, 1986.

As already discussed above, the pleadings and the decisions of both the Winnebago County circuit court and the court of appeals made it clear that incidents from at least April of 1983 through June of 1986 were the subject of the orders of the courts.

The Commission has reviewed the decision of the Dane County Circuit Court (see findings 10 and 11, above) which states as follows, in pertinent part, in distinguishing the case before the court with that decided in Patzer v. Board of Regents, 763 F. 2d 851, 37 FEP Cases 1847 (7th Cir. 1985):

Patzer, however, does not control in this case for several reasons. First and most importantly, and as a sufficient basis in and of itself, is the fact that in Patzer the dismissal order in the earlier case recited that it was "for want of personal jurisdiction." Here the dismissal order of the Winnebago County circuit court explicitly recited that the dismissal was "with prejudice."

The plaintiffs have submitted no affidavit which indicates that they objected to the form of this order before it was issued or raised any concern about it on appeal, and the decision of Judge Williams, I believe, in Winnebago County specifically provided them with an opportunity to review the order that was presented to Judge Williams for his signature and to object to its form. On the contrary, the decision of the Wisconsin Court of Appeals affirming the Winnebago County court dismissal order makes no mention of any objection ever having been raised to the form of the dismissal order.

The plaintiffs could have sought review of this issue but they failed to do so. They cannot ask me to in effect provide them with that review in the guise of filing a new state court action and ask me to go behind what was the clear, unambiguous

language of the dismissal order that was affirmed by the Court of Appeals in the Winnebago County case. They are bound by both the substance and the form of the order entered and subsequently affirmed in that case.

Now in Bishop v. Blue Cross & Blue Shield at 145 Wis. 2d 315, the distinction between a dismissal with prejudice and a dismissal without prejudice was made very clear. Here the dismissal order was clearly one that was with prejudice while in Patzer it was just as clearly one that was not made explicit in this regard.

* * * * *

Thirdly, Patzer is further distinguishable in that here there are two dismissal orders in the earlier Winnebago County case. The first, of course, was the one I have been referring to and was the one entered and then appealed from; the second was the one entered pursuant to stipulation of the parties which also recited that it dismissed the action "with prejudice." It's clear, and I don't think that the plaintiffs' counsel has disputed this, that that kind of an order entered pursuant to agreement essentially for voluntary dismissal is recognized as the kind of a final judgment that can have res judicata effect.

Now the stipulation and the form of the order that were prepared were drafted by plaintiffs' counsel and recited that the stipulation was made by each of the defendants, including the defendants involved in this action, in addition to the Department itself, and that stipulation was ultimately signed by their counsel as their counsel and indicated quite explicitly that he was signing as counsel for each of the defendants, not just dismissing whatever of that action may have remained as it left the Department as a party to the case. Thus, that order of dismissal again was one where the identity of the parties was the same as the parties present in this case and was a final judgment with prejudice, or said in another equivalent way, on the merits.

The Winnebago County court orders, and I use the plural here, thus are of a type that may have res judicata effect. They are . . . valid and final judgments on the merits in favor of the defendants which bar another action on the same claim or cause of action.

In Bishop, cited by the Dane County Circuit Court, the court of appeals stated, in pertinent part, that:

Dismissals granted without prejudice differ from those granted with prejudice. In the former case, the defendant continues to be exposed to the risk of further litigation. . . . [I]n cases where the dismissal is with prejudice, . . . the defendant is protected from the risk of further litigation.

None of these cited decisions, nor any of the authority cited by the parties, stands for the proposition apparently being advanced by complainants that dismissal of a case with prejudice based on failure to file the case within the applicable statute of limitations does not have preclusive effect on a parallel action brought in another forum because the plaintiffs, as the result of the bar imposed by the statute of limitations, have not had a full and fair opportunity to have their claim adjudicated. However, the Commission finds that the weight of authority is to the contrary. For example, in Kale v. Combined Ins. Co. of America, 736 F. Supp. 1183 (D. Mass. 1990), the court stated as follows, in pertinent part:

. . . There is overwhelming support for giving preclusive effect to dismissals based on the statute of limitations. See *Thompson Trucking, Inc. v. Dorsey Trailers*, 880 F. 2d 818 (5th Cir. 1989); *Shoup v. Bell & Howell Co.*, 872 F. 2d 1178 (4th Cir. 1989); *PRC Harris v. Boeing Co.*, 700 F. 2d 894 (2d Cir. 1983); *Myers v. Bull*, 599 F. 2d 863 (8th Cir. 1979); *Cemer v. Marathon Oil Co.*, 583 F. 2d 830 (6th Cir. 1978); *Chang v. Northwestern Memorial Hosp.*, 549 F. Supp. 90 (N. D. Ill. 1982); 18 C. Wright, A. Miller & E. Cooper, 18 *Federal Practice and Procedure*, §4441 (1981) [Wright & Miller]. Cf. *Rose*, 778 F. 2d at 80 ("For one thing, our survey of recent cases suggests a clear trend toward giving preclusive effect to dismissals based on the statute of limitations.")

The Commission also concludes that the orders of the circuit courts under consideration here clearly evidence an intent on the part of the courts that the subject actions be dismissed with prejudice, i.e., on the merits, as to all matters within the pleadings. It should also be noted that complainants agreed to the voluntary dismissal of their entire case before the Winnebago County Circuit Court with prejudice.

Finally, complainant's argument that incidents prior to November of 1986 were described in the pleadings just for background purposes is simply not consistent with the language of the pleadings. It is apparent, as concluded above, that complainants, consistent with the language of their complaints before the Commission, were contending in these circuit court actions that they had been the subject of a pattern and practice of discrimination and retaliation over a period of years extending back to at least 1983 and that the order of dismissal based on the stipulation of the parties covered all allegations, including those pre-dating 1986.

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The Commission concludes that application of the doctrine of res
judicata is appropriate here.

Order

Respondent's Motion to Dismiss is granted.

Dated: March 11, 1994 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM:lrn


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served

and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)
2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)