STATE OF WISCONSIN	CIRCUIT COURT Branch 12	DANE COUNTY

JERRY D. SCHAEFFER,

Complainant,

v.

STATE PERSONNEL COMMISSION and DEPT MILITARY AFFAIRS and STATE OF WISCONSIN,

Respondents.

Case No. 87 CV 7413

Filed: 6-22-88

MEMORANDUM DECISION AND ORDER

Complainant has filed a Ch. 227 petition to review the final decision and order of the State Personnel Commission dismissing his complaint of handicap discrimination on the grounds of res judicata. On June 24, 1987, the Personnel Commission entered a decision and order concluding that the prior summary judgment of the U.S. District Court for the Western District of Wisconsin in Schaeffer v. Matera on November 12, 1986, barred Schaeffer's handicap discrimination claim. While the district court decision was pending on appeal, the Personnel Commission (hereinafter "Commission") ordered the following relief:

> 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 federal district court granted summary judgment

dismissing Schaeffer's claims. The district court found that there were no facts from which a reasonable jury could infer that the selective retention board was influenced by the complainant's status as a recovering alcoholic or his efforts to promote alcohol and drug abuse programs when considering the plaintiff's retention in the Wisconsin National Guard. On October 14, 1987 the Seventh Circuit Court of Appeals affirmed the district court; no further federal proceedings were contemplated, and the Commission ordered the charge of discrimination dismissed on the ground of res judicata for the reasons stated in the Commission's decision of June 24 and August 7, 1987.

The present proceeding is for administrative review of the Personnel Commission's Final Order of dismissal dated November 18, 1987, under Wis. Stats. sections 111.395, 227.52, 227.57.

FACTS

The petitioner accepted the Commission's Findings of Fact contained in its decision, which are summarized below.

On March 24, 1982 Mr. Jerry Schaeffer filed a charge of discrimination with the Personnel Commission alleging that the Department of Military Affairs unlawfully dismissed him from the Wisconsin Army National Guard, because of his status as a recovering alcoholic. After finding probable cause to believe discrimination had occurred, the Commission stayed its proceedings, pending the outcome of the federal court proceedings begun by Schaeffer in September, 1985. The amended federal complaint alleged unlawful termination from the National Guard because of his condition as a recovering alcoholic, or because of

his expressed concern about the problem of drug and alcohol abuse among guard members or both. (Return Document 7 at 2; Return document 13, Ex. 1, paras. 12, 34).

The federal defendants moved for summary judgment with five affidavits supporting their arguments. The complainant admitted all findings of fact proposed by the defendants. On summary judgment, Schaeffer did not submit any opposing evidentiary documents or affidavits supporting his claim of handicap discrimination or violation of free speech rights.

Magistrate James Groh summarized the evidence, finding that only one of the board members, Mr. Young, had personal knowledge of the plaintiff's recent performance, and he did not inform the other board members that the plaintiff was a recovering alcoholic or that he offered to set up an alcohol and drug abuse program. The Guard's decision to deny retention was first by a unanimous and then by a 5-4 vote. The magistrate recommended the motion for summary judgment be granted, and the district court concurred.

Schaeffer argues that the magistrate erred in ignoring the possibility that Mr. Young's statements to the Board were tainted by his knowledge of the complainant's alcoholism, and therefore complainant should have an opportunity to bring this out through testimony at trial. The district court found that no reasonable jury could conclude that Schaeffer's non-retention was based on his status as an alcoholic and any finding to that effect would be sheer speculation.

The District Court entered judgment in favor of defendants

on December 16, 1986. The complainant appealed to the Seventh Circuit, and the Appellate Court affirmed the dismissal of Schaeffer's complaint, because he failed to produce any evidence showing that the Board's decision not to retain him was biased, based on his past alcoholism and his wish to counsel National Guard members about drug and alcohol abuse.

Shortly after the District Court judgment, the complainant asked the Commission to set a hearing on his handicap discrimination claim. While the federal appeal was pending, the Department of Military Affairs moved to dismiss the administrative proceedings. The Commission found that the doctrine of res judicata applied, dismissed Schaeffer's complaint, and ordered the proceedings stayed until the Seventh Circuit made its decision.

OPINION

Schaeffer raises three reasons why res judicata should not apply in this case: one, because there is not an identity of causes on action or record in the two forums; two, he was denied a full and fair opportunity to litigate his claim in federal court; and three, summary judgment in another forum should not be used to deny him a hearing before the state administrative agency.

A. Identity of Causes of Action and Record

The doctrine of res judicata dictates that a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated, or which might have been

litigated, in the former proceedings. In the instant case, the Personnel Commission entered a decision and order concluding that the prior summary judgment of the U.S. District Court, affirmed on appeal, barred the handicap discrimination claim. The Court of Appeals affirmed the District Court.

Res judicata requires that, for the prior action to bar the current action, there must be an identity of parties and an identity of causes of action or claims in the two cases. Landess v. Schmidt, 115 Wis.2d 186, 340 N.W.2d 213, 216 (Ct. App. 1983). Both requirements of res judicata are met in this case.

First, the parties, Jerry Schaeffer and the federal defendants, Raymond Matera, Barry Young, and Richard Fuszard (all employees of the Department of Military Affairs) are the same in both cases and the petitioner acknowledges this.

Second, the causes of action are the same. A given factual situation generally allows for only one cause of action, no matter how many legal theories of relief may apply. Juneau Square v. First Wisconsin Nat. Bank of Mil., 122 Wis.2d 673, 683-84, 364 N.W.2d 164 (Ct. App. 1985). The allegations petitioner sets forth in his state administrative charge of discrimination and in his federal amended complaint are the same. Schaeffer alleged in both that he is a recovering alcoholic who has not had a drink since 1974; that he disclosed his drinking problem to Adjutant General Raymond A. Matera in August 1981; that he offered to assist Matera in setting up an awareness and recovery program; that he suffered adverse employment consequences since that disclosure; that he was isolated at work, excluded from conferences, seminars and general meetings, and denied

promotions; that he was notified he would not be selected for retention in the guard; that he was discriminated on the basis of his handicap, alcoholism; and finally, that he had been given an adverse employment evaluation after his disclosure, alleging this was a drastic change from previous evaluations. Clearly, there is an identity of causes of action as that term is used in res judicata case law.

Because the state claim arose from the exact same conduct alleged in the federal suit, relitigation of this claim by the Personnel Commission is precluded by the doctrine of res judicata. I do not find it significant that the Commissioners' described Schaeffer's federal causes of action in the conjunctive rather than the disjunctive. The point remains that Schaeffer made two claims in federal court neither of which were proven and both of which were dismissed on the merits. Regardless of how those claims were described by the Commission, the doctrine of res judicata precludes him from relitigating either of the same claims in a different forum.

Complainant's assertion that the factual records are different in federal court and in the administrative agency is without merit. I do not find a significant difference between the petitioner admitting that the facts alleged in his claims in the two forums are the same (with the exception of the allegation that his claim could rest on a denial of free speech rather than handicap discrimination), but the factual record before the two forums was not the same. Even though the proceedings would have been different if the content of the Commission's Initial

Determination had been presented in affidavit form to the District Court, res judicata still applies because there is one set of operative facts alleged in both the state and federal complaints, and one cause of action. Juneau Square Corp. v. First Wisconsin National Bank, 122 Wis.2d 673, 364 N.W.2d 164 (Ct. App. 1985). A party may not avoid the consequences of res judicata simply by asserting that different facts will be presented each time the same claim is litigated.

The purpose of res judicata is to prevent repetitive litigation. When a judgment has been rendered in favor of a party, a subsequent action by the plaintiff on the same cause of action is barred. DePrott v. West Bent Mutual Ins. Co., 113 Wis.2d 306, 310, 324 N.W.2d 883 (1983). The need for finality of a case outweighs the wish of a plaintiff to relitigate the same cause of action when they have been given a full opportunity to present their claim before a court.

B. Petitioner Was Given a Full and Fair Opportunity to Present His Claim to the District Court

In order to prevent a motion for summary judgment from being granted in either federal or state court more than affidavits stating petitioner's allegations are required. Boruski v. U.S., 803 F.2d 1421, 1428 (7th Cir. 1986). The petitioner should have addressed, but did not, more than purely legal arguments in response to the defendants' Motion for Summary Judgment in the District Court. Even though, "Wisconsin law does not treat res judicata as an ironclad rule which must be implacably applied wherever its literal requirements are met," Patzer v. Board of Regents, 763 F.2d 8851 (7th Cir. 1985), evidence should have been

provided, creating a prima facie case and countering the magistrate's proposed findings of fact. On summary judgment, if a plaintiff fails to submit any affidavits raising a genuine issue of material fact, the plaintiff's appeal will fail. Kazuk v. Bakery and Confectionary Union, 791 F.2d 548, 588 (7th Cir. 1986). The opportunity to present countervailing facts was available to the complainant, unfortunately for him, he did not present any evidence which might have prevented the motion for summary judgment from being granted.

Schaeffer's claim that he did not have a full opportunity to litigate his claim in federal court is not substantiated. There has been no showing that there was any impediment to complainant submitting available evidence that would have established a triable issue on his handicap discrimination cause of action. While it may be true that he did not avail himself of the opportunity to fully litigate this issue, there is no indication that Schaeffer was in any way hindered or precluded from doing so.

C. Summary Judgment in Favor of the Defendant Meets the Requirement of a Conclusive and Final Judgment on the Merits Precluding any Subsequent Action.

Schaeffer argues that because the state administrative procedure does not provide for a summary judgment procedure, that a summary judgment of dismissal from another forum should not be used to deprive him of his administrative hearing. This argument ignores two crucial realities. One is that complainant made a tactical choice to litigate his claim in federal court where summary judgment is a well-recognized procedure available to both

sides. Second is that Wisconsin case law recognizes that summary judgment is sufficient to meet the requirements of a conclusive and final judgment for res judicata analysis. DePratt v. West Bend Mutual Ins. Co., 113 Wis.2d 306, 334 N.W.2d 883 (1983).

Because the petitioner chose to proceed through the federal court, he risked not having a trial based on the merits of the case, and as a result of a final judgment dismissing his discrimination claim on the merits, is now precluded from receiving a subsequent hearing in front of the Personnel Commission.

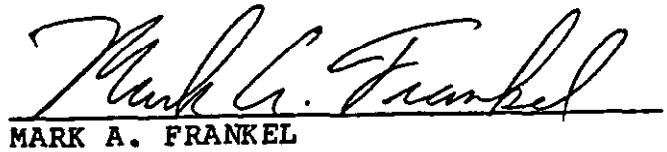
In the case of Hussein v. Oshkosh Motor Truck Co., 816 F.2d (7th Cir. 1987), case which the plaintiff finds analogous to his case, a jury claim had been dismissed erroneously under 42 U.S.C. sec. 1981 and the Court heard a non-jury claim under Title VIII of the Civil Rights Acts of 1974. In the instant case there was no judicial error in the dismissal of the plaintiff's jury claims. The doctrine of res judicata and collateral estoppel promote judicial economy by bringing litigation to a final conclusion and prevent misallocation of resources by precluding a second suit to a party who already received a fair trial on the issues. Kichefski v. American Family Mutual Insurance Co., 132 Wis.2d 74, 390 N.W.2d 76, 78 (Ct. App. 1986). In this case, I believe the petitioner has been given a full opportunity for both a fair trial and appellate review on the issues underlying his claims.

ORDER

For the above stated reasons, complainant's petition for

administrative review is hereby **DISMISSED** on the grounds of res judicata

BY THE COURT



MARK A. FRANKEL
CIRCUIT JUDGE

DATED: 6-22-88

cc: Atty. Jacqueline Macaulay
AAG Bruce A. Olsen