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COLLEEN DUGAN,

                    Complainant,

v.

Secretary, DEPARTMENT OF  
TRANSPORTATION, and  
Administrator, DIVISION OF MERIT  
RECRUITMENT AND SELECTION,

                    Respondents.

Case No.      88-0169-PC-ER

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RULING ON  
MOTION TO  
DISMISS

This matter is before the Commission on the motion to dismiss filed by respondent DOT on January 22, 1992.

This complaint, as amended, alleges that complainant was removed from a certification list for Electronic Technician 4 (ET 4) because of handicap. It alleges that a DOT supervisor (Geoff Snyder) alleged complainant had cheated on the ET 4 exam because he was concerned about having to supervise her because of her handicap. The complaint further alleges that other persons within DOT and DMRS cooperated with Mr. Snyder to remove her from competition for the position in question.

In addition to filing this complaint of discrimination with respect to her removal from the ET 4 certification list, complainant also filed an appeal under §§ 230.44(1)(a), and 230.17(2), Stats. The latter subsection provides, in part:

If the administrator [of DMRS] refuses ... to certify an eligible ... applicants may appeal to the commission the decision of the administrator to refuse ... to certify under s. 230.44(1)(a).

This appeal was assigned No. 88-0043-PC, and after a hearing<sup>1</sup> the Commission issued a decision and order on January 13, 1989, upholding the action of DMRS in removing Ms. Dugan from the certification and dismissing her appeal. In summary, the Commission concluded that DMRS had an appropriate basis for

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<sup>1</sup> The hearing was conducted on a consolidated basis with Fisher v. DMRS, 88-0044-PC.

removing Ms. Dugan from the certification pursuant to §§ 230.17(1), Stats and ER-Pers 6.10(7), Wis. Adm. Code, because she had been observed exchanging answers with another examinee.

Respondent DOT contends that complainant's claim is barred by the principles of res judicata and collateral estoppel as a result of the Commission's decision of her appeal case. The definition of these doctrines was set forth in Crowell v. Heritage Mut. Ins. Co., 118 Wis. 2d 120, 122, 346 N.W. 2d 327, n. 1 (Ct. App. 1984) as follows:

"Under the doctrine of res judicata, a judgment 'on the merits' in a prior suit involving the same parties ... bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit." (citation omitted)

While these doctrines potentially can be applied with respect to administrative proceedings, before res judicata comes into play as a bar there must be "an identity between the causes of action or the issues sued on." Fischer v. UW-Madison, 84-0097-PC-ER (12/18/86) (citation omitted). Res judicata is not applicable to this case, because the appeal proceeding concerned the issue of whether the action of DMRS in removing Ms. Dugan from the register violated standards established by the civil service code, while the complaint in this case raises issues of whether an agent of DOT pursued an allegation that complainant had cheated on the ET 4 exam, and subsequently conspired with a DMRS agent to have her removed from the register, because of her handicap.

As noted in Crowell, application of the doctrine of collateral estoppel does not require that the proceedings involve the same claims. There is no reason why collateral estoppel cannot be applied here with respect to the findings made in the decision of the appeal (No. 88-0043-PC). To reiterate, however, accepting these findings does not compel dismissal of this complaint (No. 88-0169-PC-ER). These findings establish essentially that DMRS had a valid basis for removing complainant from the register. However, this does not rule out the possibility that respondent's agent reported her because of a bias against her because of her handicap or that he conspired with DMRS to have her removed from the register. Therefore, while the findings from the decision of the appeal case may have an effect on the merits and the potential

remedy in the discrimination complaint, they cannot dictate its dismissal at this point.

Finally, while respondent DOT argues it should be dismissed as a party because it has been established that DMRS and not DOT removed complainant from the register, there remain the allegations that DOT management was motivated by a discriminatory intent in reporting Ms. Dugan's actions and in acting in concert with DMRS to have her removed from the register.

ORDER

Respondent DOT's motion to dismiss is denied. Those findings contained in the Commission's January 13, 1989, decision in Case No. 88-0043-PC which are relevant to this complaint will be given preclusive or binding effect with respect to this complaint.

Dated: April 17, 1992 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

AJT/gdt/2

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner