STATE OF WISCONSIN PERSONNEL COMMISSION

PASTORI BALELE,

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN SYSTEM (Madison),

Respondent.

Case No. 91-0002-PC-ER

RULING ON MOTION TO DISMISS AND FOR SUMMARY DISPOSITION ON THE MERITS

This matter is before the Commission on respondent's motions to dismiss and in the alternative for summary disposition on the merits filed February 19, 1992. Both parties have filed extensive briefs and supporting documents with respect to the motions, and complainant has asked for summary judgment on his own behalf.

Respondent asserts the following grounds for these motions:

1. Complainant is collaterally estopped from asserting that the facts in this case are different than the ones found by the Dane County Circuit Court to be undisputed in the case entitled Pastori M. Balele v. Francis George, Robin Gates, Larry Eisenberg, Dexter Thusius and Board of Regents of University of Wisconsin System, Case No. 90-CV-3767

2. Complainant is barred by the statute of limitations from asserting a whistleblower claim under subch. III of Ch. 230, Stats.

3. The charge of discrimination fails to state a claim that complainant was retaliated against because of activities protected under the Wisconsin Fair Employment Act.

4. In the alternative, the undisputed facts entitle respondent to dismissal on the merits as a matter of law

COLLATERAL ESTOPPEL

The complaint in this case alleges that complainant was discriminated against on the basis of color, national origin or ancestry, race, retaliation based on fair employment activities and "whistleblowing" (i.e., engaging in protected activity under §230.81, stats.), all in connection with his unsuccess-

ful application for the position of Director, Office of Purchasing Services at the UW-System.[1] This complaint was filed with this Commission on January 3, 1991. However, complainant proceeded to litigate essentially the same claims in Dane County Circuit Court, Branch 14 (No. 90CV3767). On January 17, 1992, the Court entered a decision and order with respect to certain motions, including defendant's motions to dismiss for failure to state a claim and for summary judgment. The Court decided with respect to complainant's race and national origin claim under Title VII that recent amendments in the law required complainant to exhaust his administrative remedies. Therefore, the Court dismissed the Title VII claim, and stayed proceedings on certain of the 42 USC §§1981, 1983 and 1985 claims "pending resolution of Mr. Balele's Title VII claims at the administrative level." Defendant's motions for summary judgment were denied.[2]

Before discussing the legal issues involved, the Court entered a number of findings, prefaced by the following comment: "The following facts are undisputed and, I believe, will continue to remain undisputed. They may, however, later prove to be incomplete." These findings concern the hiring process that lies at the center both of the judicial proceeding and this matter. Among other things, the Court found that the individual defendants (George, Thusius, Gates and Eisenberg) met to: "discuss the criteria on which the candidates would be evaluated to assign weights to each category of comparison." The Court also found that" "[e]ach of the three reviewers received a copy of the 60 applications received in response to the advertisement, and ranked the applicants against the four evaluation criteria according to their own method." The Court went on to make specific findings about how each defen-

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[1] The complaint also asserts it is brought under "Title VII of the Civil Rights Act of 1964, as Amended, Title 42 of the United States Code, sec. 1981 et seq.; sec. 1983 et seq.; sec. 1985 et seq. and sec 2000 e, et seq.," as well as under certain constitutional provisions. The Commission's jurisdiction is limited strictly to those areas enumerated by the legislature at §230.45, Stats.: "Powers and duties of personnel commission." This does not include federal claims and therefore the Commission has no jurisdiction over the federal claims asserted by complainant. See, e.g., American Brass Co. v Wisconsin State Board of Health, 245 Wis. 440, 448, 15 N.W. 2d 27 (1944) ("administrative agencies have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds."). The Commission likewise lacks authority to apply federal law to this case as complainant requests.

[2] There were other orders entered which are not material to this matter.

dant evaluated complainant and the three candidates who came out on top and therefore qualified for the final interview process. These findings included the specific basis for the ratings of the candidates on each of the criteria. From these findings, it reasonably could be inferred that there was a legitimate basis for ranking other candidates higher than complainant (although the Court did not specifically so state). For example, with respect to supervisory experience the Court found:

> Each of the raters assessed plaintiff's supervisory experience to be inferior to the interviewed candidates. Between the years 1981-1985, plaintiff supervised between one and four temporary employes (Plaintiff's deposition 61; Olsen affidavit para. 2). Since 1985, he had not supervised any employes (Plaintiff's deposition 12, 61-61; Olsen affidavit para. 2). By contrast, the successful candidate, Janet Abrahamsen, had supervised purchasing employes in two sections of the Bureau of Procurement, and had supervised a large number of employes at the Department of Revenue since at least 1982 (Plaintiff's deposition 11, 84-85, 89-90; Deposition Ex. 11, p. 2; Olsen affidavit paras. 2, 3).

In support of its application of collateral estoppel with respect to the Court's findings, respondent cites Landess v. Schmidt, 115 Wis. 2d 186, 197, 340 N.W. 2d 213 (Ct. App. 1983), which cited the Restatement (Second) of Judgments §27 (1982) as follows:

> 'When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.' (footnote omitted)

While the Circuit Court did not enter a judgment, respondent further cites the Restatement (Second) of Judgments, §13, as follows:

> The rules of res judicata are applicable only when a final judgment is rendered. However, for purposes of issue preclusion (as distinguished from merger and bar), "final judgment" includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded preclusive effect.

46 AM JUR JUDGMENTS §457 provides, in part:

> However, the scope of the term "final judgment,' within the meaning of the rule here under consideration, has been

> declared not to be confined to a final judgment in an action, but to include any judicial decision upon a question of fact or law which is not provisional and subject to change in the future by the same tribunal.

In this regard, it is noteworthy that the Court prefaced its findings, which are now sought to be accorded preclusive effect, with the following caveat: "The following facts are undisputed and, I believe, will continue to remain undisputed. They may, however, later prove to be incomplete." (emphasis added). The underscored language is consistent with a perception by the Court that these findings were tentative and would be subject to change at a later point in the process — i.e., presumably after complainant had exhausted his administrative remedies and returned to the Court for further proceedings on the stayed claims. If this were not the case, and the Court had viewed these findings as final, it is unlikely that the Court would have said it believed the findings would "continue to remain undisputed," and might later prove to be incomplete.

The foregoing conclusion is basically consistent with Schneider v. Mistele, 39 Wis. 2d 137, 141, 158 N.W. 2d 383 (1968), where the Supreme Court held:

> It is particularly true that a prior judgment is not res judicata or an estoppel bar as to any matter which the court in the earlier case expressly refused to submit to the jury and expressly directed should be litigated in another forum or in another action. (footnote omitted)

In the instant case, the Court did make certain findings prior to deciding to stay proceedings on certain claims and to dismiss others. However, these findings were prefaced by remarks that, as noted above, indicated that the findings were tentative and subject to possible change or addition.

Another reason not to give preclusive effect to these findings is that, because the Court retained jurisdiction over part of the case, there apparently is no appealable order Under certain circumstances, the absence of appealability can prevent the application of collateral estopped. See AM JUR 2 Judgments §462; Bakula v. Schwab, 167 Wis. 546, 557, 168 N.W. 378 (1918). But see Schofield v. Rideout, 233 Wis. 550, 551-55, 290 N.W. 155 (1940). In this case, the application of collateral estoppel would be somewhat anomalous under the circumstance that the Court stayed proceedings on part of the case and retained jurisdiction for the express purpose of permitting complainant to

exhaust his administrative remedies. Complainant apparently has no opportunity to challenge the findings that were made until after he completes the administrative proceedings and returns to complete the judicial proceeding. In the meantime, respondent seeks to make dispositive use of these findings in the administrative proceeding.

The final reason the Commission declines to apply collateral estoppel with respect to these findings is that it cannot be concluded that these findings were essential to the decision reached by the Court. See Schofield v. Rideout, 233 Wis. 550, 555, 290 N.W. 155 (1940):

> The rule is well established that a finding in a former case does not create an estoppel if the fact found did not necessarily determine that case. The judgment must rest upon the fact found or the fact is open to relitigation. (citations omitted)

The actual decisions the Court reached in Mr. Balele's judicial proceeding were: 1) the Title VII claim had to be dismissed because of failure to have exhausted administrative remedies; 2) it was appropriate to stay proceedings with respect to his 42 USC §§1981, 1983 and 1985 claims against the individual defendants, 3) the 42 USC §§1981, 1983 and 1985 claims against the Board of Regents had to be dismissed because the Board is not a "person" within the meaning of §§1983 and 1985; 4) the "whistleblower" claim under §230.83, Stats., had to be dismissed for failure to have complied with the notice requirement of §893.82(3), Stats.; 5) the state law claims under §§230.18, 230.43, and 230.83, Stats., had to be dismissed on the ground of sovereign immunity. None of these legal decisions depended on the specific findings concerning the process that was followed in the personnel transaction in question, how the candidates were evaluated, etc. Therefore, while these findings may become necessary with respect to possible further proceedings before the Court, they cannot be characterized as such with the case in its current posture,

SUMMARY JUDGMENT

The Wisconsin Administrative Procedure Act does not provide explicitly for a summary judgment procedure. However, since an evidentiary hearing in a contested case is only required when "[t]here is a dispute of material fact." §227 42(1)(d), Stats., if it can be determined that there are no disputed issues of material fact, the Commission can issue a decision without an evidentiary hearing in what amounts functionally to a summary judgment proceeding.

Southwick v. DHSS, 85-0151-PC (4/16/86). However, certain factors must be kept in mind in evaluating such a motion in a case of this nature. First, this case involves a claim under the Fair Employment Act with respect to which complainant has the burden of proving that a hiring decision, which typically has a multi-faceted decisional basis, was motivated by an unlawfully discriminatory intent. Second, complainant is unrepresented by counsel who presumably would be versed in the sometimes intricate procedural or evidentiary matters that can arise on such a motion. Third, this type of administrative proceeding involves a less rigorous procedural framework than a judicial proceeding. Therefore, particular care must be taken in evaluating each party's showing on the motion to ensure that complainant's right to be heard is not unfairly eroded by engrafting a summary judgment process designed for judicial proceedings.

The methodology to be applied on a motion for summary judgment was set forth in In re Cherokee Park Plat, 113 Wis 2d 112, 116, 334 N.W. 2d 580 (Ct. App. 1983) as follows:

> [T]he court, trial or appellate, first examines the pleadings to determine whether claims have been stated and a material factual issue is presented. If the complaint ... states a claim and the pleadings show the existence of factual issues, the court examines the moving party's affidavits for evidentiary facts admissible in evidence or other proof to determine whether that party has made a prima facie case for summary judgment. To make a prima facie case for summary judgment, a moving defendant must show a defense which would defeat the claim. If the moving party has made a prima facie case for summary judgment, the court examines the affidavits submitted by the opposing party for evidentiary facts and other proof to determine whether a genuine issue exists as to any material fact, or reasonable conflicting inferences may be drawn from the undisputed facts, and therefore a trial is necessary.
>
> Summary judgment methodology prohibits the trial court from deciding an issue of fact. The court determines only whether a factual issue exists, resolving doubts in that regard against the party moving for summary judgment. (citations omitted)

Initially, complainant has not established that his claim of "whistleblower" retaliation under Subchapter III, Chapter 230, Stats., is timely. The complaint was filed on January 3, 1991, and the date of the most recent act of discrimination asserted is June 15, 1990, which is more than 60 days before the date of filing. Therefore, the complaint is untimely under §230.85(1), Stats.

Furthermore, neither the complaint nor the other documents submitted in connection with the motion establish a claim of FEA retaliation under §111.322(3), Stats., which provides that it is an act of employment discrimination: "To discharge or otherwise discriminate against any individual because he or she has opposed any discriminatory practice under this subchapter or because he or she has made a complaint, testified or assisted in any proceeding under this subchapter." (emphasis added). Complainant has not alleged he engaged in such activity. Rather, he alleges he engaged in activities on behalf of minority vendors in connection with his employment within the Department of Administration procurement program. This is not a protected activity under §111.322(3), Stats.

The complaint does states a claim under the Fair Employment Act (FEA) of discrimination on the basis of color, national origin or ancestry, and/or race, inasmuch as the allegations of the complaint include the following:

1) Complainant is black and of African origin;

2) In response to an announcement of examination, he applied for a position for which he was qualified;

3) Following screening by an all-white panel, complainant was not hired, but a white candidate with inferior qualifications was hired.

Respondent, in connection with this motion, has established a facial defense to the claim. In summary, respondent has established that there was a facially legitimate basis for the raters' evaluation of the selected candidate as better qualified than complainant on each of the criteria developed by the raters to screen the applicants. At this point the Commission must examine complainant's materials to determine "whether a genuine issue exists as to any material fact, or reasonable conflicting influences may be drawn from the undisputed facts." In re Cherokee Park Plat, 113 Wis. 2d at 116.

Complainant makes a number of contentions which facially are probative of pretext and therefore contribute to a disputed factual issue concerning the subjective intent of those who participated in the selection process. Without attempting to enumerate all of his contentions, these include:

1) Complainant alleges basically that the successful candidate was "preselected," and concomitantly that respondent wanted to eliminate him from competition through the initial screening. In connection with this allegation, he cites a provision from the Wisconsin Staffing Manual that frowns on the use of a candidate's former supervisors on a rating panel, and points out that

two of the three evaluators either were or had been involved in his supervision.

2) Complainant asserts (and this is consistent with the findings of the Circuit Court and the affidavits of the raters) that the raters met with Mr. George prior to the examination to determine the criteria that would be used to screen candidates, and the weights to be assigned to the criteria. It can be argued that the use of this approach (as opposed to the development of the exact criteria and weights by a third party such as a personnel specialist) is consistent with complainant's preselection/conspiracy theory.

3) Complainant asserts that his performance evaluations improved substantially when Mr. Warner became his immediate supervisor, and that this is probative of animus harbored by Mr. Eisenberg and Mr. Gates because of his race.

4) Complainant asserts that notwithstanding that respondent's affirmative action plan identified an under-utilization for racial minorities in the job group in question, and that there were minorities among the applicants, respondent failed to have utilized any minorities on the panel, which was inconsistent with established AA/EEO procedures.

5) Complainant takes issue with the panel evaluation in a number of respects. For example, he asserts that the evaluators failed to give him adequate credit for his work experience in Africa set forth in his resume, and downgraded him for clerical error in his exam materials in violation of state exam guidelines.

Based on all the circumstances, including consideration of the factors that this is an administrative proceeding and that complainant is an unrepresented party who bears a substantial burden of proof, the Commission concludes that this is an inappropriate case to resolve substantively via summary judgment See Kemp v. Miller, 154 Wis. 2d 538, 561-62, 453 N.W. 2d 872 (1990).

> On a motion for summary judgment, a court does not decide whether the evidence presented on the motion is sufficient to support a jury verdict in favor of the nonmoving party but, instead, decides whether the moving party has established a record sufficient to demonstrate to the satisfaction of the court that there is no triable issue of material fact on any issue presented in the case. Summary judgment should not be granted if there is any reasonable doubt concerning the existence of a factual issue or if reasonable inferences leading to conflicting results can be drawn from undisputed facts. (citations omitted)

Also, while summary judgment is not per se inappropriate in this type of discrimination case, Wisconsin courts have recognized that issues of subjective intent are particularly difficult to resolve by summary judgment, see e.g., Doern v. Crawford, 30 Wis, 2d 206, 214, 140 N.W. 2d 193 (1966) ("upon this record the issue of Paulson's intent is not one that properly can be decided on a motion for summary judgment Credibility of a person with respect to his subjective intent does not lend itself to be determined by affidavit.") For the same reasons, complainant's request for summary judgment also must be denied.

ORDER

Respondent's motions to dismiss and in the alternative for summary disposition on the merits filed February 19, 1992, are granted to the extent that the claim of "whistleblower" retaliation is dismissed as untimely filed, and the claim of FEA retaliation is dismissed for failure to state a claim, but the motions are are otherwise denied. Complainant's request for summary judgment is denied. In light of the complainant's waiver of investigation dated January 21, 1992, the Commission will close the investigation file, open a hearing file and will schedule a prehearing conference.

Dated. June 11, 1992 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT/gdt/2

DONALD R. MURPHY, Commissioner