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PASTORI BALELE,

 Complainant,

v.

Chancellor, UNIVERSITY OF
WISCONSIN SYSTEM (Madison),

 Respondent.

Case No. 91-0002-PC-ER

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DECISION
AND
ORDER

This matter is before the Commission to resolve a dispute concerning further proceedings reflected in correspondence from the parties. This case involves a complaint of discrimination on the basis of race, color, and national origin, and retaliation, with respect to hire, filed January 3, 1991. Complaint also has been litigating this transaction in Dane County Circuit Court, Branch 14, Case No. 90 CV 3767.

In a letter filed January 21, 1992, complainant advises that he wishes to waive investigation of his complaint pursuant to §230.45(lm), Stats.,¹ and to proceed to hearing. Attached to this letter is a copy of a January 17, 1992, decision and order of the Circuit Court in Case No. 90 CV 3767, which makes certain findings and addresses a number of issues in the context of deciding several motions in that matter. Among other things, the Court held, with respect to complainant's federal Title VII claim, that the amendments to that law which took effect on November 21, 1991, "requires that a plaintiff exhaust his or her administrative remedies before appearing in district court with a

¹ 1991 Wisconsin Act 39, §3049, created §230.45(lm), stats., effective August 15, 1991, which provides as follows:

The commission shall waive the investigation and determination of probable cause of any complaint that is filed by a complainant under sub. (1) or s.101.10(12)(b) at the complainant's request. If the commission waives the investigation and probable cause determination, the commission shall proceed with a hearing on the complaint. The commission's waiver of an investigation and probable cause determination does not affect the commission's right to attempt to resolve the complaint by conference, conciliation or persuasion.

Title VII claim." p.13. After deciding that this requirement must be applied retroactively, the Court decided to dismiss complainant's Title VII claim, noting that "I have no jurisdiction to hear his Title VII claims before he exhausts his administrative remedies." p.16, n. 4. The Court also stayed proceedings on complainant's claims under 42 USC §§1981 and 1983 pending resolution of his claims at the administrative level, and decided a number of other issues.

By letter filed January 23, 1992, respondent objects to proceeding directly to hearing at this point, contending that there are "a number of outstanding procedural issues that need to be resolved before the case is ready for hearing." Respondent contends that if the Commission concludes that complainant is collaterally estopped with respect to certain facts found by the Court, respondent would be entitled to dismissal of the complaint as a matter of law. Respondent also asserts that the complaint was untimely filed with respect to the "whistleblower" allegation (Subchapter III, Chapter 230, Stats.), and fails to state a claim of retaliation under the Fair Employment Act (Subchapter II, Chapter 111, Stats.) because it fails to allege complainant engaged in any protected activities. Finally, the letter asserts respondent anticipates filing motions addressing these issues. In a letter filed January 24, 1992, complainant objects to respondent's letter.

It is clear that the Commission has the authority to apply the principles of res judicata and collateral estoppel to prevent the relitigation of issues that have been decided in a judicial forum. See Schaefer v. State Personnel Commn., 150 Wis. 2d 132, 441 N.W. 2d 292 (Ct. App. 1989). The creation of §230.44(lm), Stats., which permits a complainant to waive the investigation and probable cause determination and thereafter to proceed to a hearing does not affect this principle. See Schaefer, 132 Wis. 2d at 142 (language in §111.39(4)(b), Stats., that when the Commission finds probable cause and conciliation is unsuccessful, it "shall issue" a notice of hearing does not create a right to a hearing where the elements of res judicata are present). While §230.44(lm) gives the complainant the right to waive an investigation and probable cause determination, it does not give a complainant the right to waive issues such as res judicata, collateral estoppel, untimely filing, etc., that have the capacity to defeat a claim short of a hearing on the merits. Therefore, complainant's objection to respondent filing any such motions is overruled. It should be noted, particularly because many of the arguments

made by complainant in his letter of January 24, 1992, appear to run to the merits of the motions outlined by respondent in its letter filed January 23, 1992, that this decision does not address the merits of any such motions, but rather only determines that respondent has the right to file these motions and to submit arguments in support of them. Complainant can reiterate his substantive arguments in his brief in opposition to the motions.

ORDER

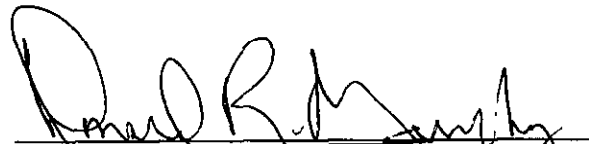
To the extent that complainant's letter dated and filed January 24, 1992, constitutes an objection to respondent's stated intention to file certain motions, as outlined in its letter dated January 22, 1992, and filed January 23, 1992, it is overruled. The following briefing schedule is established:

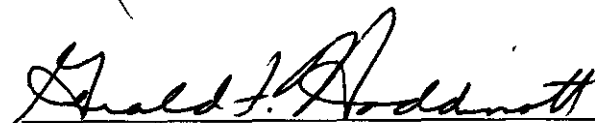
Respondent:	February 19, 1992
Complainant:	March 4, 1992
Respondent Reply (if any):	March 11, 1992

Dated: February 6, 1992 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT/gdt/1


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner