STATE OF WISCONSIN PERSONNEL COMMISSION

PAUL G. HILMES,

Complainant,

v.

Executive Director, WISCONSIN LOTTERY, [Chairperson, WISCONSIN GAMING COMMISSION],

Respondent.

Case No. 91-0093-PC-ER

RULING ON MOTION TO DISMISS

This matter is before the Commission on respondent's Motion to Dismiss for failure to state a claim upon which relief can be granted, filed June 18, 1993. This case involves a charge of discrimination filed July 24, 1991. Complainant alleges that respondent discriminated against him by issuing a policy, dated June 7, 1991, which in essence prohibits Field Sales Representatives (FSR's) from taking their state vehicles home with them at night except under certain limited circumstances. Complainant alleges that this directive constituted a change in agency policy that had previously been in effect, that it has caused him great personal hardship, and that the policy change "has been enacted to retaliate against me because I testified against Lottery management at a Legislative Audit Bureau hearing in February 1991 and because I requested a Department of Labor investigation regarding Fair Labor Standard Act." The complaint contends that "[t]his is blatant whistleblower retaliation as listed in State Statutes 230.80-230.83."

Respondent relies on a number of theories in support of its motion to dismiss. Respondent contends that the complaint fails to state a claim under the whistleblower law because complainant did not comply with §230.81(1)(a) or (b), stats., by disclosing information in writing either to his supervisor or to a governmental unit to which he had been referred by this Commission. However, complainant's allegation that he testified before a legislative committee brings him under the coverage of §230.81(3), stats., as a "disclosure

of information ... to a legislative committee ... [which] is protected under §230.83," which provides protection independent of §230.81(1).

Respondent also contends that complainant did not make a covered disclosure because he did not testify about alleged governmental misconduct, but merely provided information about his job to the U.S. Department of Labor and the Legislative Audit Bureau. This contention raises factual issues which cannot be resolved on a motion of this nature.

Respondent further contends that this claim is barred because of §230.83(2), which provides that the protection of the law "does not apply to an employe who discloses information if the employe knows or anticipates that the disclosure is likely to result in the receipt of anything of value for the employe." Respondent argues that appellant provided information about his work in anticipation that the Department of Labor would determine that his position was "non-exempt," and he would be paid time and one-half for overtime. Again, this contention raises factual issues concerning the nature of the disclosures made by complainant which cannot be resolved on this motion.

Respondent also bases its motion on the legal doctrine of res judicata. This principle operates to bar subsequent litigation between two parties when there has been a final judgment rendered in another litigation involving the same parties and claims. See Schaeffer v. State Personnel Commission, 150 Wis. 2d 132, 138, 441 N.W. 2d 292 (Ct. App. 1989) ("res judicata renders a final judgment '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.'" (citation omitted))

Respondent's res judicata theory is premised on an April 30, 1992, decision of the United States District Court for the Western District of Wisconsin in Irwin et. al. v. State of Wisconsin et al., No. 91C0711C, granting defendants' motion for summary judgment in most respects. The district court's judgment was affirmed on appeal to the United States Court of Appeals for the Seventh Circuit. Complainant was a named plaintiff in this litigation which involved a claim for overtime compensation and certain other remedies under the FLSA, as well as constitutional and state law whistleblower claims. One of the plaintiffs' claims was that "defendants discriminated against them for filing the lawsuit by eliminating geographical drop-off sites for lottery

offices at the end of each scheduled retail route and increasing the number of miles plaintiffs had to drive on their own time and money at the beginning and end of each route." slip opinion, p. 46. After discussing the parties' submissions on the motion, the court held:

> Although the elimination of the drop-off sites occurred after the suit was filed, it appears to be a continuation of the efforts of the lottery board to come into compliance with state policy regarding use of state-owned vehicles, in order to avoid giving up control of its fleet. This, along with plaintiffs' failure to show that the change in policy discriminated against them [as compared to other field sales representatives], defeats plaintiffs' claim that elimination of the drop-off sites was a retaliatory action.

id., p. 48.

Complainant's claim in the case before this Commission also involves the allegation that respondent's change in its fleet policy was intended to be retaliatory. His complaint alleges:

> This policy has been changed to directly punish me and other Field Sales Reps ... This change of policy has been enacted to retaliate against me because I testified against Lottery Management at a Legislative Audit Bureau hearing in February 1991 and because I requested a Department of Labor investigation regarding Fair Labor Standards Act ....

In order for res judicata to apply there must be an identity between the claims or causes of action involved in the two pieces of litigation. Schaeffer at 139. In Wisconsin, a "transactional" view of a claim or cause of action is utilized. DePratt v. West Bend Mutual Ins. Co., 113 Wis. Id 306, 334 N.W. 2d 883 (1983). In that case, the court cited the Restatement (Second) of Judgments as follows:

> The present trend is to see [the] claims in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been awarded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

113 Wis. 2d at 311. The court went on to note that "Section 25 of the Restatement states that a plaintiff's second claim is barred even though he or she is prepared in the second action: (1) to present evidence on grounds or

theories of the case not presented in the first action; or (2) to seek remedies or forms of relief not demanded in the first action." id., 312.

Applying these principles to the instant case, we have a situation where the only factual difference between complainant's claim in this proceeding before this Commission and the relevant part of his claim in the federal judicial proceeding is that here he alleges in his complaint that his employer changed its fleet policy in retaliation because "I testified against Lottery management at a Legislative Audit Bureau hearing in February 1991 and because I requested a Department of Labor investigation regarding Fair Labor Standard Act." In his federal claim he alleged that his employer took this action (changing its fleet policy) in retaliation for his (along with other employes) having filed their FLSA lawsuit. Since both claims flow from the same action by the employer, and both allege the employer was motivated, at least in part, to retaliate against complainant for having pursued his rights under the FLSA, these circumstances fall within the principle, as set forth in DePratt that these proceedings involve basically the same claim, although they may rely on different "'substantive theories,'" may allege invasions of different "'primary rights,'" may rely on "'variations in the evidence,'" 113 Wis. 2d at 311, and complainant may intend in this (second) proceeding "'to present evidence or grounds or theories of the case not presented in the first action.'" 113 Wis. 2d at 312.

This conclusion also is supported by Juneau Square Corp. v. First Wis. Natl. Bank, 122 Wis. 2d 673, 683-84 364 N.W. 2d 164 (Ct. App. 1985), which reinforced the "transactional view" of claims with respect to res judicata. The Court rejected the contention that:

> [R]es judicata does not bar the instant lawsuit because none of the asserted causes of action requires proof of the essential element (restraint upon competition) of the federal claim ... For purposes of res judicata, a basic factual situation generally gives rise to only one cause of action, no matter how many different theories of relief may apply. Applying the transactional analysis to the instant case, all of Juneau Square's asserted state claims arise out of the same conduct of the defendants-respondents that was alleged in the federal suit. The facts set forth in both the federal and state complaints are essentially the same. The matters raised in the state action are matters which could, and should, have been raised in the previous litigation. (emphasis added)

The same principle applies to the case before this Commission. The only factual differences between complainant's claims that the change in fleet policy was retaliatory is that in this proceeding he is alleging that he was retaliated against for requesting the Department of Labor investigation and for his legislative testimony, while in his federal litigation he alleged it was because of the filing of that lawsuit. There is no apparent reason why he could not have made the same allegations in the federal proceeding about the legislative testimony and the call for a Department of Labor investigation he is making here. This point is illustrated by the fact that in the federal litigation, the plaintiffs raised and litigated a state whistleblower claim (apparently under the principle of pendent jurisdiction) relating to a memorandum issued by the employer requiring lottery employes to direct all communications regarding issues in the lawsuit to agency attorneys.

ORDER

Because the Commission concludes that the judgment in Case No. 91C711 is res judicata with respect to this complaint, it is dismissed.

Dated: September 24, 1993 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:rlr

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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* Pursuant to the provisiions of 1991 Wis. Act 269 which created the Gaming Commission effective October 1, 1992, the authority previously held by the Executive Director of the Wisconsin Lottery with respect to the positions that are the subject of this proceeding is now held by the Chairperson of the Gaming Commission.

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.