STATE OF WISCONSIN PERSONNEL COMMISSION

PASTORI BALELE,
Complainant,

v.

Secretary, DEPARTMENT OF ADMINISTRATION, Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS, and Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,
Respondents.

Case No. 93-0144-PC-ER

RULING ON RESPONDENTS' MOTION TO DISMISS
-and-
RULING ON COMPLAINANT'S MOTION FOR DIRECTED VERDICT

Complainant filed a charge of discrimination on August 31, 1993, alleging that respondents discriminated against him because of his color, race, and national origin or ancestry, as well as retaliated against him due to his participation in activities protected under the Fair Employment Act and under the whistleblower statute; all in relation to a decision in April 1993, to hire someone else for an Administrative Officer 1 vacancy at the Department of Administration (DOA). On September 7, 1993, an amended complaint was filed to include complainant's non-selection for the same position in 1992, when the position was classified as an Administrative Officer 2.

The Commission sent complainant a letter dated October 1, 1993, which stated as shown below in pertinent part:

> This letter is in response to your letter dated September 17, 1993 advising the Commission that you had filed a case in Dane County Circuit Court and that you wanted the Commission to proceed with its investigation. The Commission will hold in abeyance the investigation in case no. 93-0144-PC-ER pending the outcome of the Circuit Court proceedings. . .

The Commission checked with complainant on May 18, 1995, and was informed that his court case was still pending.

On September 26, 1996, a DOA employe, Donna Sorenson, informed the Commission that DOA records reflected that Mr. Balele's circuit court case was taken into federal court where it was dismissed on summary judgment in 1994. Ms. Sorenson on the same day sent the Commission copies of the complaint filed in circuit

court, the petition for removal to federal court, and the federal order granting a motion for summary judgment and dismissing the case.

A Commission staff person telephoned the United States District Court Clerk on October 1, 1996. The federal clerk said that complainant appealed the summary judgment dismissal to the Court of Appeals in July 1994, and that the Court of Appeals affirmed the dismissal in February 1996. Because it appeared that the court action had concluded, the Commission sent a letter to respondents on October 1, 1996, establishing a time table for respondents to submit an answer to the complaint.

Rather than filing an answer to the complaint, respondents filed a motion to dismiss on October 30, 1996, "based upon a recent decision of the U.S. Court of Appeals for the 7th Circuit." Mr. Balele filed a motion akin to a motion for directed verdict based on respondents' failure to file an answer to the complaint. Both parties presented written arguments with the final argument received by the Commission on December 16, 1996. The facts recited below appear to be undisputed, unless specifically noted to the contrary.

FACTS

1. The matters alleged in his complaint and amended complaint (93-0144-PC-ER, hereafter referred to as the "PC Case") are virtually identical to the matters alleged in the (state) circuit court case (93CV3598). The respondents named in the PC Case are also named in the circuit court case. (Attachment 2 to respondent's motion includes a copy of the complaint filed in the circuit court case.)

2. Respondents filed a petition for removal to federal court on October 20, 1993, in the U.S. District Court for the Western District of Wisconsin (Case No. 93C0723C, hereafter "Federal District Court Case"). (A copy of the removal petition appears as Attachment 3 to respondent's motion.) The removal petition contained the following information (by reference to the same numbering system as appears in the original).

> 1. A civil action has been commenced and is now pending in the Circuit Court for Dane County in the State of Wisconsin . . .
> 2. This action consists of a state law claim under the Fair Employment Act and Ch. 230, Wis. Stats., and a federal claim pursuant to 42 U.S.C. §§ 1981, 1983 & 1985, and the Civil Rights Acts of 1964 and 1991, alleging that the defendants, under color of state law, unlawfully discriminated against the plaintiff by denying him two positions for which he applied on the basis of his race and national origin. . . .

> 3. The United States District Court has jurisdiction of the federal claim pursuant to 28 U.S.C. §§ 1331 (Federal question) and 1343 (Civil rights and elective franchise), and over the state claim pursuant to the doctrine of pendent jurisdiction. (Emphasis added.)

4. The Federal District Court Case (93-C-723-C) was dismissed by Opinion and Order dated July 22, 1994. (This Order is marked as Attachment 4 to respondent's motion.) The Order contains the following language as to the scope of the decision (pp. 22-23):

> In his complaint, plaintiff contends that defendants' refusal to hire him for either of the two positions that he sought violated 42 U.S.C. §§ 1981, 1983 and 1985(3), by denying him his constitutional rights to equal protection and due process as well as his rights under the Wisconsin Fair Employment Act, Wis. Stats. Ch. 230. In addition, plaintiff contends that defendants violated Title VII of the Civil Rights Act, 42 U.S.C. 2000e, by discriminating against him and other minorities, and by retaliating against him for his prior civil rights litigation against state agencies and personnel. Plaintiff raises a First Amendment claim that his "negative" job performance evaluations and interview evaluations were linked to protected speech he made on the job. Plaintiff requests partial summary judgment on his §§ 1983 and 1985(3) claims. Defendants seek summary judgment on all of plaintiff's claims and for plaintiff's failure to plead compliance with Wisconsin's notice of claim requirement. (Emphasis added.)

The Order included an extensive discussion of complainant's Title VII claims and ultimately granted respondents' motion to dismiss the same (Order, pp. 35-42). Complainant's claim of retaliation for expressing views about awarding contracts to minority enterprises was also dismissed under a constitutional analysis (first amendment claim) (Order, pp. 43-45). In dismissing these claims the court specifically found that Mr. Balele failed to "provide sufficient facts to support a reasonable inference of racial animus on the part of any defendant" (Order, p. 38). Further, the court considered and rejected his claims of disparate treatment and retaliation based on the previous filing of complaints with the EEOC[1] (Order, pp. 39-42).

The court's one-paragraph discussion on the state claims is shown below (Order, p. 46):

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[1] Complainant requested that the complaints of discrimination filed with the Commission be cross-filed with the EEOC, and such request was effectuated.

> Neither Wisconsin's Fair Employment Act nor Wis. Stat. Ch. 230 provides a private right of action. *Mursch v. Van Dorn Co.*, 627 F. Supp. 1310, 1312-15 (W.D. Wis. 1986); *Bachand v. Connecticut General Life Ins. Co.*, 101 Wis. 2d 617, 624 (Ct. App. 1981). The defendants' motion for summary judgment will be granted on these claims.

5. The Court of Appeals for the Seventh Circuit issued an Order on January 11, 1996, which combined several of complainant's cases for decision including a review of the Federal District Court Case noted in the prior paragraph (re-designated at the appellate court as No. 94-2777). (The Court of Appeal's Order is designated as Attachment 5 to respondent's motion.) The portion of the Order relevant here is shown below (from pp.4-5 of Attachment 5).

> The district court entered summary judgment for defendants in appeal Nos. 94-2777, 95-1137, and 95-2948; and in 94-1117 the district court dismissed certain claims and held a bench trial as to the remaining claims, then entering judgment in favor of defendants. These orders resulted in five separate appeals. We originally consolidated appeal Nos. 95-1723 and 95-1137, but later dismissed 95-1723. (Footnote omitted.) As to the four remaining appeals, we now consolidate them for purposes of final disposition in this court. After a thorough review of the briefs, records, and various motions filed in this court, we affirm the judgments of the district court in appeal Nos. 94-2777, 95-1137, and 95-2948, for the reasons set forth in the decisions of the district court. . . .

OPINION

Respondents move for dismissal of this complaint under the doctrine of issue preclusion (res judicata) contending that complainant "is precluded from bringing this cause of action because all of the parties and issues are identical to, and have been conclusively adjudicated in, a federal action subsequently filed by the Complainant." Respondents cite *Schaeffer v. State Personnel Comm.*, 150 Wis. 2d 132, 441 N.W.2d 292 (Ct. App. 1989), in support of their contention. Complainant objects to dismissal contending that removal of his Circuit Court Case to federal court left his "pendent state claims" still pending before the Commission. He cites *Parks v. City of Madison*, 171 Wis. 2d 730, 492 N.W.2d 365 (Ct. App. 1992), in support of his contention.

In *Schaeffer*, the Wisconsin Court of Appeals applied the doctrine of issue preclusion under the following circumstances. Mr. Schaeffer filed a complaint with the Personnel Commission alleging handicap discrimination in connection with his termination. A Commission investigator issued an Initial Determination finding

probable cause to believe the alleged discrimination occurred, which entitled the employe to proceed to a hearing on the merits before a Commission hearing examiner. Before resolution of his case at the Commission, the employe filed a case in federal district court claiming handicap discrimination in regard to his termination. The Commission proceedings were stayed pending resolution of the federal litigation. The employer filed a motion for summary judgment in the federal court proceedings and both parties were given an opportunity to argue pertinent facts and law. The federal district court ultimately dismissed the claim on the summary judgment motion holding that Mr. Schaeffer had not "offered any facts in response to the defendants' motion from which a constitutional violation based on handicap discrimination could be inferred" (*Schaeffer*, p. 136). The decision was affirmed by the federal court of appeals on October 14, 1987, finding that Mr. Schaefer had "'submitted nothing . . . to produce any evidence to show that the . . . [employer's] decision not to retain him was biased in view of his past alcoholism . . .'" (*Schaeffer*, p. 137). Thereafter, Mr. Schaeffer asked the Commission to set his case for hearing, a request opposed by the employer based on the doctrine of issue preclusion. The Commission granted the employer's motion and dismissed the case, a decision which Mr. Schaeffer appealed to the Wisconsin circuit court. The Commission's dismissal was upheld by the circuit court and also by the state court of appeals.

In *Parks*, the Wisconsin Court of Appeals declined to apply the doctrine of issue preclusion under the following circumstances (discussed in relevant part). Mr. Parks filed a case in federal court alleging that his job suspension and termination violated his federal civil rights and also was "improper" under Wisconsin law.[2] The employer filed a motion to dismiss the federal claims. The federal district court granted the motion and dismissed the federal claims but declined pendent jurisdiction over the state claims and, accordingly, dismissed the state claims without prejudice. Mr. Parks pursued his state claims on a writ of mandamus. The state district court dismissed the state claims under the doctrine of issue preclusion. The Wisconsin court of appeals reversed holding that the doctrine of issue preclusion did not bar the state claims because the federal court exercised its discretion not to take pendent jurisdiction over the state claims and dismissed the state claims without prejudice.

The Wisconsin court of appeals in the *Parks* decision noted that the doctrine of issue preclusion is based upon the Restatement of Judgments. The court's decision not

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[2] The legal or statutory basis for Mr. Parks' claim that his termination was "improper" under state law is not revealed in the decision.

to apply the doctrine in Mr. Parks situation was based on an exception stated in the same authority. The court explained its rationale as follows (pp. 734-736):

> The general principles of the doctrine of *res judicata* are well known and well accepted, if not always easy to apply. The rule reflects two important policies: encouraging the finality of judgments and preventing repetitive litigation. *See Estate of Radocay*, 30 Wis.2d 671, 675, 142 N.W. 2d 224, 226 (1966). Accordingly, the rule bars relitigation of the same cause of action between the same parties where the first litigation resulted in a valid, final judgment on the merits. *Juneau Square Corp. v. First Wis. Nat'l Bank*, 122 Wis. 2d 673, 682, 364 N.W.2d 164, 169 (Ct. App. 1985). In order for the first action to bar the second, however, there must be an identity of parties and an identity of the causes of actions or claims in the two cases. *DePratt v. West Bend Mut. Ins. Co.*, 113 Wis. 2d 306, 311, 334 N.W.2d 883, 885 (1983).
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> Wisconsin has adopted the "transactional analysis" of the RESTATEMENT (SECOND) OF JUDGMENTS § 25 cmt. a (1982), as a guide for applying the rule. *DePratt*, 113 Wis. 2d at 311, 334 N.W.2d at 886. Under this analysis, all claims arising out of one transaction or factual situation are treated as being part of a single cause of action, and they are required to be litigated together. *Juneau Square*, 122 Wis. 2d at 682, 364 N.W.2d at 169. "Application of the rule of res judicata does not depend upon actual litigation of an issue. The earlier judgment is conclusive as to 'all matters which were litigated or which might have been litigated' in that proceeding." *Jantzen v. Baker*, 131 Wis. 2d 507, 512, 388 N.W.2d 660, 662 (Ct. App. 1986) (quoting *DePratt*, 113 Wis. 2d at 310, 334 N.W.2d at 885). (Emphasis from *Jantzen*.)
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> Thus, if the present claim arose out of the same "transaction" as that involved in the former action, it is barred "even though [the plaintiff] is prepared in the second action: (1) to present evidence or 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." *DePratt*, 113 Wis.2d at 312, 334 N.W. 2d at 886.
>
> Parks concedes that the present suit arises from the same transaction as that involved in the federal action; there is, therefore, no issue as to the identity of the parties or claims. He argues, however, that his action is not barred because it fits an exception to the RESTATEMENT rule providing that:
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> > If . . . the court in the first action would clearly not have had jurisdiction to entertain the omitted theory or ground (or, having jurisdiction, would clearly have declined to exercise it as a matter of discretion), then a second action in a competent court presenting the omitted theory or ground should be held not precluded. RESTATEMENT (SECOND) OF JUDGMENTS §25 cmt. e (1982) (emphasis added).

The motion presently before the Commission presents circumstances more akin to those in *Schaeffer* than those presented in *Parks*. Specifically, the federal court in Mr. Balele's case exercised pendent jurisdiction over the state claims and dismissed the state claims. Accordingly, the RESTATEMENT exception applicable in *Parks*, does not apply to the circumstances in Mr. Balele's case.

Complainant contends that the federal courts' dismissal of his state claims "was void because the district court did not follow the Wisconsin Supreme Court mandates in its several case laws. *Parks v. City of Madison*, 171 Wis. 2d 737." The Commission first notes that the doctrine of issue preclusion applies even if the result in federal court were erroneous. *See*, *Herman v. Kinnard Buick Co.*., 5 Wis. 2d 480, 485, 93 N.W.2d 340 (1958); *Kriesel v. Kriesel*, 35 Wis. 2d 134, 139, 159 N.W.2d 416 (1967) ("'a judgment of a court which had jurisdiction of the subject matter cannot be impeached and is immune from and not subject to collateral attack, even though patently erroneous.'" (citation omitted)). Also see, 46 AM. JUR.2d *Judgments* §498.

Further, complainant's contention that the federal courts' dismissal of his state claims "was void because the district court did not follow the Wisconsin Supreme Court mandates in its several case laws. . . " is incorrect. His assertion is based upon a misinterpretation of the discussion in *Parks* where the Court stated, pp. 736-737, as shown below:

> [The RESTATEMENTS] exception is explained in the context of successive federal and state actions in an illustration to the text:
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> > A commences an action against B in a federal court for treble damages under the federal antitrust laws. After trial, judgment is entered for the defendant. A then seeks to commence an action for damages against B in a state court under the state antitrust law grounded upon substantially the same business dealings as had been alleged in the federal action. Even if diversity of citizenship . . . did not exist, the federal court would have had "pendent" jurisdiction to entertain the state theory. *Therefore unless it is clear that the federal court would have declined as a matter of discretion to exercise that jurisdiction, . . . the state action is barred.* RESTATEMENT (SECOND) OF JUDGMENTS § 25 cmt. E, illus. 10 (1982) (emphasis added).
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> The illustration derives from *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-27 (1966), where the court stated:

> Pendent jurisdiction [over a state claim] exists whenever there is a [federal] claim . . . and the relationship between that claim and the state claim permits the conclusion that the entire action . . . comprises but one . . . "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of operative fact . . . such that [the plaintiff] would ordinarily be expected to try them all in one judicial proceeding . . . .. [Pendent jurisdiction] need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not a plaintiff's right . . .. *Certainly, if the federal claims are dismissed before trial . . . the state claims should be dismissed as well . . . without prejudice and left for resolution to state tribunals.* (Emphasis added.)

> Based on *Gibbs* and the RESTATEMENT comments and commentary, (citation omitted) federal courts consistently have held that when a federal claim is dismissed on a motion for summary judgment, the exercise of sound discretion requires dismissal of the state claims as well, without prejudice to the plaintiff's right to litigate them in the proper state forum. (Citation omitted.) Most particularly, the Court of Appeals for the Seventh Circuit has stated that "[t]he rule in pendent jurisdiction is that if the federal claim to which the state-law claim is pendent is dismissed before trial, the court will decline jurisdiction over the state-law claim and remit the claimant to the state courts." (Citation omitted.) ("[W]hen the federal claims are disposed of before trial, the state claims should be dismissed without prejudice almost as a matter of course.")
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> Most state courts, too, have held that where it is clear that the federal court would have declined jurisdiction over related state claims which could have been raised in the federal action through pendent jurisdiction, but would have been dismissed, a later action in a state court on the state claims is not barred by *res judicata*. (Citation omitted.) We adopt that rule, and it requires reversal of the circuit court's decision on this issue.

The above-noted excerpt does contain the sentence: "*Certainly if the federal claims are dismissed before trial . . . the state claims should be dismissed as well . . . without prejudice and left for resolution to state tribunals.*" Mr. Balele interprets such language as a Wisconsin Supreme Court mandate for federal courts to dismiss state claims without prejudice when the federal case is resolved "before trial" on a motion for summary judgment. His interpretation is incorrect. First, the Wisconsin Supreme Court has no jurisdiction to dictate procedure to federal courts. More importantly, Mr. Balele's interpretation would mean that the Wisconsin Court of Appeal's decision in *Parks* overruled its prior decision in *Schaeffer* (and the prior case law upon which

Schaeffer was based). The *Schaeffer* court expressly reaffirmed that a summary judgment is subject to the doctrine of issue preclusion. *Id.*, 150 Wis. 2d at 138-139 ("'A summary judgment . . . is sufficient to meet the requirements of a conclusive and final judgment.'" (citation omitted.)) The *Parks* decision did not intend to overrule *Schaeffer* as shown by the fact that the court viewed *Parks* as a case of first impression. *Parks*, p. 734.

The federal court's exercise of pendent jurisdiction and resulting dismissal of the state claims makes Mr. Balele's situation similar to the situation in *Schaeffer*, and dissimilar to the situation in *Parks*. Under these circumstances, Mr. Balele would be expected to try all claims in the already-completed federal proceeding. While it is true that his case was dismissed in federal court short of a full trial, such dismissal did not occur until after the court reviewed the relevant facts and law in the context of a motion for summary judgment. In short, Mr. Balele already has had a full and fair opportunity to litigate his state claims.

There is no need for the Commission to address Mr. Balele's motion for a directed verdict because respondents' motion has been granted. However, the Commission notes that it was appropriate for respondents to file their motion to dismiss instead of an answer because the motion had the potential of dismissing the entire case. Had respondents been unsuccessful, the Commission would have issued an order for respondents to file an answer.

ORDER

That respondent's motion to dismiss be granted and that this case be dismissed under the doctrine of issue preclusion.

Dated: March 26, 1997.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

JMR
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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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.) 2/3/95