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PASTORI BALELE,

Complainant,

v.

Secretary, DEPARTMENT OF
ADMINISTRATION,

Respondent.

Case No. 94-0090-PC-ER

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RULING
ON
MOTION TO STRIKE
ELEMENTS
OF COMPLAINT

This matter is before the Commission on respondent's motion to strike, on res judicata or collateral estoppel grounds, certain elements (those set forth in paragraphs C5-C18) of this complaint of discrimination.

The complaint in paragraph C1 alleges discrimination on the basis of retaliation (fair employment activities and whistleblowing are checked on the complaint form) and discrimination on the basis of race, sex, handicap and national origin with respect to respondent's failure to "initiate, support and reclassify his position," while it did so with respect to a white female of American origin. This paragraph also alleges "that DOA present adverse action ... was a continuation of violating Balele's Constitutional and Statutory rights since 1987." Paragraphs C2-C4 provide more information about the classification transactions.

Paragraph C5 begins: "Abrahamsen [Director of the Bureau of Procurement and allegedly respondent's main actor against complainant] hatred, which she translated in adverse actions against Balele on said bases, dated way back in 1987 when Balele was under her direct supervision." The complaint goes on in this and succeeding paragraphs through C18 to allege a series of incidents involving certain of his activities in support of equal opportunity, and adverse actions and reactions by DOA management over the years. Paragraphs C19-C31 deal with more recent incidents, including changes in job assignments that relate directly to the position classification claim. Respondent's motion to strike pertains only to paragraphs C5-C18, noting that paragraphs C1-C4 and C19-C31 "provide further bases for his [complainant's] claim of discrimination and retaliation."

Respondent's contention that paragraphs C5-C18 should be stricken on res judicata or collateral estoppel grounds rests on a decision rendered by the United States District Court for the Western District of Wisconsin in Balele v. Klausner, 93-C- 723-C, on July 22, 1994. The Court granted the defendants' motion for summary judgment. The Court summarized plaintiff's claims as follows:

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. Stat. 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 in his favor on his §§ 1983 and 1985(3) claims. Opinion, 22-23.

The Court held that the plaintiff failed "to provide any evidence that his national origin or his ethnicity played any role in his failure to get the positions for which he applied," Opinion, 30, and that "[c]onsidered individually or in combination, none of plaintiff's allegations provide any reasonable basis to infer racial or ethnic animus on the part of any individual defendant, much less conspiratorial animus attributable to the rest of the defendants." id. The Court thus concluded that plaintiff's 42 U.S.C. §§ 1981, 1983, and 1985(3) claims could not withstand the defendants' motion for summary judgment.

With respect to plaintiff's Title VII claim, the Court held that plaintiff had not satisfied his burden of proof with respect to the establishment of a prima facie case under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed. 2d 668, 93 S. Ct. 1817 (1973), and that even if he had, there was no evidence that the defendants' reasons for not hiring him were pretextual, and that he "has failed to provide sufficient facts to support a reasonable inference of racial animus on the part of any defendant." Opinion, 38. The Court held with respect to plaintiff's Title VII employment retaliation claim that he "identified no

causal link between his prior or concurrent discrimination claims and the defendants' failure to promote him."

The Court also rejected plaintiff's First Amendment claim, which it characterized as follows:

Plaintiff contends that Abrahamsen retaliated against him after plaintiff had expressed his views about awarding contracts to minority enterprises. Plaintiff alleges that after these incidents, Abrahamsen made negative comments about him on his performance evaluation and that "plaintiff's life in this office became miserable." Opinion, 43.

The Court held that plaintiff failed to establish that his speech was constitutionally protected, and that he also "failed to demonstrate that his political views played a substantial role in the defendants' decision not to hire him into an AO1 or AO1 [sic] position ... [p]laintiff has not set forth facts from which the Court could reasonably infer that his speech was a substantial factor in defendants' decision." Opinion, 45.

It is clear that the resolution of a federal action by summary judgment can have *res judicata* effect on a state administrative proceeding if the requisite criteria for *res judicata* are satisfied. Schaeffer v. State Personnel Commission, 150 Wis. 2d 132, 441 N.W. 2d 292 (Ct. App. 1989). "For the earlier action to bar the later, there must be an identity of parties (or their privies) and an identity of claims or causes of action in the two cases." 150 Wis. 2d at 139 (citation omitted). In the instant case, there is no question that there is an identity of parties, but there is a question raised about whether the claims in the two proceedings are the same.

There are obvious differences between the two claims, in that the thrust of the federal case was DOA's failure to promote plaintiff to A01 and A02 positions in 1991 and 1993 while the thrust of the instant complaint concerns respondent's failure in 1994 to reclassify the AA3 position occupied by complainant, a claim he did not raise and could not have raised in his federal case. The common factual nexus between these two proceedings involves the allegations in paragraphs C5-C18 of this complaint, which are essentially identical to matter pled in his federal court complaint. These allegations primarily involve a mixture of background information, specific incidents involving complainant's superiors which purportedly demonstrate their animosity toward him, and examples of complainant's advocacy for equal

rights and fair treatment for minorities which allegedly upset his supervisors. However, it is not clear whether some of the allegations are meant to be examples of his supervisor's animosity or actually are meant to be separately cognizable claims of discrimination. For example, paragraphs C12-C14 include allegations about a remark in a performance evaluation that complainant's "accent was a problem." Complainant specifically alleges that this remark was "simply to harass Balele because of said bases." However, in his proposed issues for hearing, complainant refers only to the classification matter:

1. Whether DOA and its agents retaliated against the complainant when they failed to initiate, support and reclassify complainant's position; but initiated, supported and reclassified *Wipperfurth's position*.
2. Whether DOA and its agents discriminated against the complainant because of his race, sex, handicap, and national origin when DOA and its agents failed to initiate, support and reclassify complainant's position; but initiated, supported and reclassified *Marcy Wipperfurth's position*. Conference Report dated August 10, 1994.

In any event, even to the extent that there are matters reflected in paragraphs C5-C18 that should be considered as separately cognizable claims in this proceeding, they were resolved in the Court's decision dismissing complainant's complaint on the motion for summary judgment. The Court refers to most of the allegations in question in the context of discussing the evidence he (complainant) had alleged in support of his nonpromotion claims. However, in discussing his First Amendment claim, the Court appears to view some of these incidents as part of the claim per se:

Analogous to plaintiff's retaliation claim brought under Title VII is his claim that defendant Abrahamsen violated his First Amendment right to speak out on a matter of public concern. This claim arises out of a dispute between plaintiff and Abrahamsen concerning the Protected Workshop program and the record of various state agencies in awarding business to minorities. Plaintiff contends that Abrahamsen retaliated against him after plaintiff had expressed his views about awarding contracts to minority enterprises. Plaintiff alleges that after these incidents, Abrahamsen made negative comments about him on his performance evaluation and that "plaintiff's life in the office became miserable." Even minor forms of retaliation can support a First Amendment claim Opinion, p.43.

Since the Court dismissed complainant's First Amendment claims, along with all the other claims raised in the complaint, the Court's decision is res judicata with respect to any separately cognizable claims set forth in paragraphs C5-C18 in the instant complaint which complainant may be attempting to raise in this proceeding.¹

To the extent that he is adding additional bases of discrimination (sex, handicap and whistleblower retaliation) to the present complaint, these appear to run to the new claim (regarding position classification), and complainant has made no showing that these could not have been alleged in connection with any claims found in paragraphs C5-C18 in his federal court proceeding. Finally, complainant's argument that his pending appeal of the federal court decision precludes the application of res judicata and collateral estoppel must be rejected because it is contrary to Wisconsin law. Smith v. Schreiner, 86 Wis. 19, 56 N.W. 160 (1893); Luebke v. Marine Natl. Bank of Neenah, 567 F. Supp. 1460 (E.D. Wis. 1983).

While the matters set forth in paragraphs C5-C18 cannot be raised here as separately cognizable claims, this does not mean that all evidence concerning these matters must be excluded from the hearing on the ground of collateral estoppel, as is implicit in respondent's position on this motion.

Under the doctrine of collateral estoppel, a judgment on the merits in a prior litigation involving the same parties "precludes litigation 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." Manu-Tronics v. Effective Management Syst., 163 Wis. 2d 304, 312, 471 N.W. 2d 263 (Ct. App. 1991) (citation omitted). While issues which may be foreclosed include issues of ultimate fact, evidentiary fact, or of law,² it is necessary that there be an identity of issues: "If the controlling facts and applicable legal rules remain unchanged there is an identity of issues which would permit the application of collateral estoppel. In contrast to res judicata, the issues must be actually litigated in the first proceeding, and not just capable of litigation." id., 163 Wis. 2d at 316 (citation omitted).

¹ As discussed above, complainant's proposed statement of issue is inconsistent with raising these matters as separate claims.

² See also Heggy v. Grutzner, 156 Wis. 2d 186, 195, 456 N.W. 2d 845 (Ct. App. 1990).

In the instant case, the issues raised by paragraphs C5-C18 of the complaint are not identical to the corresponding issues decided by the Court in the federal litigation. The Court concluded, among other things, that these factual allegations did not reflect any evidence of racial or ethnic bias. In this case before this Commission, complainant's allegations contained in paragraphs C5-C18 of his complaint presumably relate not only to his charges of race and national origin discrimination, which figured in his federal lawsuit, but also to his charges of sex and handicap discrimination, which were not present in his federal case. As the Court stated in Manutronics, id., "In contrast to res judicata, the issues must have been actually litigated in the first proceeding and not just be capable of litigation." Since the Court never decided the issues of whether the allegations in question provide any evidence of sex or handicap discrimination, collateral estoppel cannot be used in this proceeding to strike these paragraphs from the complaint for all purposes, as sought by respondent. With respect to the retaliation aspect of this case, while the Court concluded there was no nexus between any protected or potentially protected activities and respondent's hiring decisions, this is not the same issue as is presented here -- i.e., whether there is a nexus between those activities set forth in C5-C18 and respondent's alleged actions with respect to complainant's position reclassification.

ORDER

Paragraphs 5-18 of this complaint, to the extent that they can be considered as separately cognizable claims, are stricken as such. However, to the extent complainant may attempt to assert the factual material alleged therein as evidentiary support for his claim relative to the classification of his position, they are not precluded by the doctrine of collateral estoppel from receiving such consideration to which it may be entitled with respect to his claims, except as to race and national origin.

The Commission also has considered the proposed issues for hearing. There is not a great deal of difference between the proposed issues. The Commission establishes the following issues for hearing:

1. Whether the respondent retaliated against the complainant for activities protected by the Fair Employment Act and/or the whistleblower law when the respondent did not:

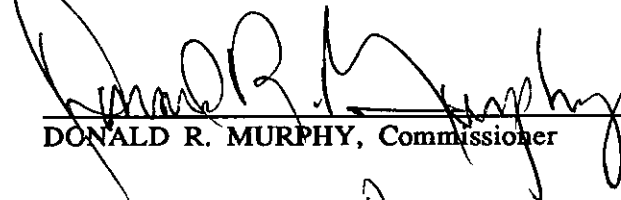
- a. initiate, request, and/or support reclassification of the complainant's position in a manner similar to Marcy Wipperfurth's; and/or
 - b. reclassify the complainant's position in a manner similar to Marcy Wipperfurth's.
2. Whether the respondent discriminated against the complainant on the bases of race, sex, handicap, and national origin when the respondent did not:
- a. initiate, request, and/or support reclassification of the complainant's position in a manner similar to Marcy Wipperfurth's; and/or
 - b. reclassify the complainant's position in a manner similar to Marcy Wipperfurth's.

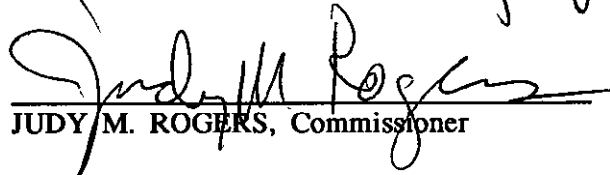
Dated: February 20, 1995

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT:jan


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner