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GEORGE THOMAS,
 Complainant,

v.

Secretary, DEPARTMENT OF
INDUSTRY, LABOR AND HUMAN
RELATIONS,

 Respondent.

Case No. 92-0066-PC-ER

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DECISION
AND
ORDER

The Department of Industry, Labor and Human Relations (DILHR) filed a motion to dismiss in the above-noted case based on res judicata principles. Each party filed written arguments on the motion. A brief procedural history is noted below and may be helpful in understanding the motion.

PROCEDURAL HISTORY

On April 30, 1992, Mr. Thomas filed a charge of discrimination with the Commission alleging that DILHR discriminated (including harassment) against him on the basis of his creed in regard to terms and conditions of employment. On February 18, 1993, a Commission Equal Rights Officer issued an Initial Determination (ID) which found **No Probable Cause** to believe DILHR discriminated against Mr. Thomas in the conditions of his employment because of his creed in regard to the internal complaint filed by Lois Hutchison and DILHR's subsequent handling of that complaint. The ID further found **Probable Cause** existed to believe DILHR discriminated against Mr. Thomas in the conditions of his employment because of his creed in regard to a January 7, 1992, meeting with Paul Christenson and Julia Strong. Mr. Thomas did not appeal the No Probable Cause portion of the ID.

On May 17, 1993, a prehearing/conciliation conference was held on the Probable Cause portion of the ID. Mr. Thomas was represented at the conference by an attorney, as was DILHR. Conciliation was unsuccessful. Mr.

Thomas' attorney indicated Mr. Thomas had a "right to sue" letter from the Equal Employment Opportunities Commission (EEOC), and would file in federal court.¹

The federal complaint was filed on June 10, 1993. Thomas v. DILHR, 93-C-0390C (Western District of Wisconsin). On March 11, 1994, the parties signed a document entitled "Stipulation and Motion to Dismiss". Complainant was represented by an attorney at this time and the stipulation states that Mr. Thomas and his attorney were fully aware of the legal consequences of entering into the stipulation and motion to dismiss and were doing so "freely and voluntarily". Basically, the stipulation removed the 5/9/94 federal court deadline for briefs on DILHR's motion to dismiss and removed the 3/9/94 starting date for trial. The parties agreed to dismissal of the case without prejudice initially to allow Mr. Thomas an opportunity to engage a new attorney. The stipulation further provided that if Mr. Thomas did not file to reopen the case within 20 days after the court's dismissal order, then the case would be dismissed with prejudice.

On March 16, 1994, the court's dismissal order was signed by Chief Judge Crabb, dated and docketed with the clerk of courts for the Western District of Wisconsin. The order was entitled: "Order Granting Motion to Dismiss Based on Stipulation and Motion to Dismiss". The order provided for initial dismissal without prejudice to be converted without further proceedings to dismissal with prejudice if Mr. Thomas did not file to reopen the case within 20 days of the date of the order. Mr. Thomas did not file to reopen the case. Accordingly, the dismissal order was converted to dismissal with prejudice and such order was filed with the clerk of courts for the Western District on April 8, 1994.

On April 20, 1994, the Commission received a letter from Mr. Thomas which requested a return of his case to the "jurisdiction of the Personnel Commission and that a hearing be scheduled." The Commission conducted a status conference on May 10, 1994, with Mr. Thomas and counsel for DILHR. A schedule was established for filing of DILHR's motion to dismiss and of the parties' related written arguments.

¹ A copy of the right-to-sue letter from EEOC was provided with DILHR's current motion to dismiss Mr. Thomas' Commission case. Also provided were copies of all federal court documents referenced in the Procedural History portion of this decision.

FINDINGS OF FACT

1. The charge of discrimination Mr. Thomas filed with the Commission contained allegations arising out of an informal complaint which one of his subordinates, Lois Hutchison, filed with DILHR's Affirmative Action Office. The subordinate alleged that Mr. Thomas' religious conduct at work (such as praying at meals) was offensive to some subordinate employees. Mr. Thomas' allegations stemmed from DILHR's handling of the subordinate's complaint and Mr. Thomas' counter charges and demands.
2. The federal complaint filed by Mr. Thomas contains allegations arising out of the same set of circumstances as described in the prior paragraph.

DISCUSSION

The relevant principles of res judicata were set forth in Schaeffer v. State Personnel Commission, 150 Wis. 2d 132, 138-139, 441 N.W. 2d 292, ____ (Ct. App. 1989), as follows:

Application of the doctrine of 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". . . . The purpose of the rule is to prevent multiple litigation of the same claim, and it is based on the assumption that fairness to the defendant requires that at some point litigation involving the particular controversy must come to an end. (Cites omitted.)

The Schaeffer court went on to say that for an earlier action to bar the later, the following factors must exist: 1) there must be an identity of parties (or their privies), 2) there must be an identity of claims or cause of action in the two cases, and 3) the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate his/her case before the federal court.

Mr. Thomas does not dispute that the federal and Commission cases shared an identity of parties, nor would such a contention prevail. Both cases

involved Mr. Thomas and the Secretary of DILHR as identified parties. Therefore, the first factor listed above is present here.

The meaning of the "identity of claims" phrase cited in the second factor listed above was discussed in Schaeffer, 150 Wis. 2d at 140-141. The court explained that Wisconsin follows the "transactional rule" of res judicata whereby "a basic factual situation generally gives rise to only one cause of action, no matter how many different theories of relief may apply." Both Mr. Thomas' Commission case and the federal case were based on the same basic factual situation, as noted in paragraphs 1 & 2 of the FINDINGS OF FACT. Therefore, the second factor listed above is present here.

Mr. Thomas was represented by an attorney in the federal court action up to and through signing the Stipulation and Motion to Dismiss. He had many choices at that juncture. He could have proceeded in federal court according to the briefing and trial schedule already established.² Instead, he chose to forego the existing schedule and seek dismissal, including dismissal with prejudice if he failed to timely reopen the federal case. The Commission further notes he represented in the agreement that he understood the consequences of signing the agreement, yet freely chose to sign it. There is no indication that Mr. Thomas had anything but a full and fair opportunity to litigate his federal court case.

Argument that different laws (state v. federal) were involved: Mr. Thomas argued that res judicata should not apply here because the federal case involved federal law whereas the Commission's case involves state law. In support of this argument, he notes that his Commission case was never consolidated with the federal case in federal court, that the Commission's Initial Determination rules on state law only (without ruling on his potential rights under federal law) and that the federal dismissal order does not specifically reference his Commission case.

² The Commission realizes that Mr. Thomas' attorney decided not to represent Mr. Thomas in federal court proceedings past execution of the Stipulation and Motion to Dismiss. However, Mr. Thomas could have proceeded with new counsel (and in fact an opportunity to seek new counsel was part of the signed agreement) or he could have proceeded pro se.

Mr. Thomas' arguments are contrary to case law and Wisconsin's use of the transactional view in applying the doctrine of res judicata. For example, the Schaeffer court dismissed a Commission case under circumstances similar to those in Mr. Thomas' case. The complainant in Schaeffer filed a charge of discrimination with the Commission which was later pursued in federal court while the Commission case was held in abeyance. The federal court dismissed the action. Thereafter, Schaeffer attempted to proceed to hearing on his Commission case. The Court of Appeals upheld the Commission's decision that the doctrine of res judicata applied, meaning the dismissal of the federal court case barred Schaeffer's right to proceed at the Commission level.

Argument that it was his legal counsel who chose to seek relief in federal court: Mr. Thomas feels res judicata should not apply because it was his attorney who chose to seek relief in federal court. The Commission rejects this argument. Strategic legal decisions are made by attorneys on behalf of their clients.

Dismissals with prejudice: Mr. Thomas' federal case was dismissed with prejudice. As noted by Wisconsin's Supreme Court, dismissals with prejudice are distinguished from dismissals without prejudice. In Bishop v. Blue Cross & Blue Shield, 145 Wis. 2d 315, 318, 426 NW2d 114, ____ (Ct. App. 1988), the court explained as follows:

Dismissals granted without prejudice differ from those granted with prejudice. In the former case, the defendant continues to be exposed to the risk of further litigation. ... [I]n cases where the dismissal is with prejudice, . . . [the] defendant is freed of [protected from] the risk of relitigation of the issues. (Cites omitted.)

It does not matter whether the case is dismissed with prejudice after a jury trial or upon agreement of the parties. The applicability of the doctrine of res judicata is the same in either event. Krebs and Crawley v. DILHR, 85-0131, 0162-PC-ER, 86-0031, 0032, 0099-PC-ER (3/11/94). One legal authority explained as follows:

Effect of termination "with prejudice." The term "with prejudice," expressed in a judgment of dismissal, has a well-


recognized legal import; it is, of course, the converse of "without prejudice" and indicates an adjudication of the merits, operating as res judicata, concluding the rights of the parties, terminating the right of action, and precluding subsequent litigation of the same cause of action, to the same extent as if the action had been prosecuted to a final adjudication adverse to the plaintiff. Accordingly, a judgment so rendered operates, in a subsequent action on the same cause of action, so as to conclusively settle not only all matters litigated in the earlier proceedings, but also all matters which might have been litigated therein. (Cites omitted.) 46 Am Jur 2d, JUDGMENTS, s. 482.


ORDER

That respondents' motion to dismiss is granted and this case is dismissed.

Dated June 23, 1994.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

George Thomas
2718 Crest Line Drive
Madison, WI 53704

Carol Skornicka
Secretary, DILHR
P.O. Box 7946
Madison, WI 53707-7946

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.

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.)