

FERNANDO DELGADILLO,
Complainant,

v.

**Chancellor, UNIVERSITY OF
WISCONSIN-MADISON,**
Respondent.

**RULING
ON MOTION
TO DISMISS**

Case No. 99-0005-PC-ER

This matter is before the Commission on the respondent's motion to dismiss for issue preclusion and claim preclusion. The parties have filed written arguments and the following facts are undisputed.

FINDINGS OF FACT

1. Complainant began working for the Department of Preventive Medicine in the University of Wisconsin-Madison Medical School in January of 1997.
2. In the fall of 1998, he was notified that his position would not be renewed.
3. In January of 1999, complainant filed a charge of discrimination relating to the non-renewal decision with the Equal Employment Opportunity Commission (EEOC) and cross-filed the complaint with the Personnel Commission. Complainant alleged respondent had discriminated against him on the basis of national origin and age and had retaliated against him for engaging in fair employment activities.
4. The Personnel Commission held its case (Case No. 99-0005-PC-ER) in abeyance.
5. At complainant's request, the EEOC issued complainant a notice of right to sue in April of 1999.
6. Complainant filed an action in Milwaukee County Circuit Court on May 24, 1999, against the University of Wisconsin-Madison Medical School and D. Paul

Moberg, Ph. D., arising from the failure to renew his employment contract in the fall of 1998. In that action, complainant claimed, *inter alia*, that the defendants had discriminated against him on the basis of both race and age.

7. Complainant's circuit court action was removed to federal court where it was captioned *Fernando Delgadillo, PhD., Plaintiff, vs. Board of Regents of the University of Wisconsin System, and D. Paul Moberg, Ph.D., Defendants*, and assigned Case No. 99-C-1060 in the United States District Court for the Eastern District of Wisconsin.

8. In a 25 page document dated August 7, 2002, Chief Judge Stadtmueller issued an order granting in part and denying in part the defendants' motion to dismiss and granting the defendants' motion for summary judgment with respect to complainant's remaining claims. The court granted the defendants' motion to dismiss with respect to complainant's Title VII claim of race discrimination against the Board of Regents because complainant "failed to file suit within ninety days of receiving his latest right-to-sue notice." The court denied the defendants' motion to dismiss in all other respects. However, the court went on to grant summary judgment to the defendants for complainant's §1981 claims because complainant "failed to show that the defendants' legitimate reason for failing to renew Delgadillo's employment contract is pretextual."

9. Complainant now seeks to pursue this complaint before the Personnel Commission.

CONCLUSIONS OF LAW

1. The burden of proving claim preclusion is upon the party asserting its applicability. *Alexopoulos v. Dakouras*, 48 Wis. 2d 32, 37, 179 N.W.2d 836 (1970)
2. Respondent has sustained that burden.
3. The doctrine of claim preclusion applies to the matter before the Personnel Commission.

OPINION

Under the doctrine of claim preclusion, "a final judgment is conclusive in all subsequent actions between the same parties [or their privies] as to all matters which were litigated or which might have been litigated in the former proceedings." *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995) (citations omitted). In order for the earlier proceedings to act as a claim-preclusive bar in a subsequent action, the following three factors must be present: (1) identity between the parties or their privies in the prior and present suits; (2) prior litigation resulted in a final judgment on the merits by a court with jurisdiction; and (3) identity of the causes of action in the two suits. *Sopha v. Owens-Corning Fiberglas Corp.* 230 Wis. 2d 212, 233-34, 601 N.W.2d 627 (1999).

I. Identity between parties

For purposes of claim preclusion, "privity exists when a person is so identified in interest with a party to former litigation that he or she represents precisely the same legal right in respect to the subject matter involved." *Pasko v. City of Milwaukee*, 2002 WI 33, ¶16, 252 Wis. 2d 1, 643 N.W.2d 72 (2002). The UW-Madison is the sole respondent in the present case while the Board of Regents of the University of Wisconsin System was the defendant in the federal proceedings. Complainant's only argument relating to the first factor is that the complaint before the Personnel Commission focuses on Paul Moberg, an employee of the UW Medical School, rather than on the entire University of Wisconsin System or the "regional Madison undergraduate campus." (Brief, p. 4) The distinction that complainant draws is immaterial. Because UW-Madison is a unit within the larger University of Wisconsin System, there can be no question that there is "identity between the parties or their privies" in the two proceedings. *See, generally, ch. 36, Stats.*

II. Final judgment in prior litigation

The federal court reached a judgment on the merits of the complainant's §1981 claim after the court determined that complainant's Title VII claim was not timely filed. Complainant had a full opportunity to present to the court whatever facts he desired in opposition to the summary judgment motion in that case. What he submitted was not persuasive to the court. *Schaeffer v. State Personnel Commission*, 150 Wis. 2d 132, 441 N.W.2d 292 (Ct. App. 1989). Therefore, the second factor for applying the claim preclusion doctrine is present here.

III. Identity of causes of action

Wisconsin has adopted a transactional approach to determine whether there is an identity of causes of action:

The present trend is to see [a] claim 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 invaded; 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.

DePratt v. West Bend Mut. Ins. Co., 113 Wis. 2d 306, 311, 334 N.W.2d 883 (1983)(footnote and citations omitted). Thus, for purposes of claim preclusion "a basic factual situation generally gives rise to only one cause of action, no matter how many different theories of relief may apply. . . . The cause of action . . . is the fact situation on which [the first] claim was based." *Marshall-Wisconsin v. Juneau Square*, 130 Wis. 2d 247, 265-66, 387 N.W.2d 106 (Ct. App. 1986 (footnote omitted), *aff'd in part, rev'd in part*, 139 Wis. 2d 112, 406 N.W.2d 764 (1987).

Applying the transactional analysis to the facts of the present case, there can be no dispute that the complainant's claims arise from the same decision not to renew his contract that was the basis for the federal proceeding.

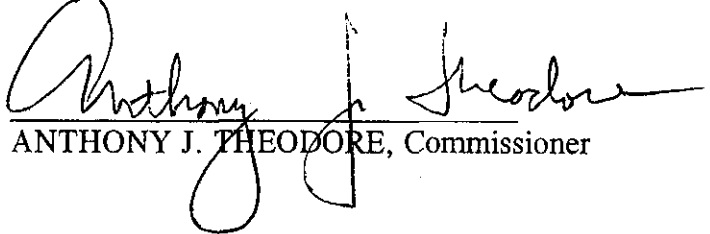
Because all three factors are present in this matter, claim preclusion applies.

ORDER

This matter is dismissed due to the application of the doctrine of claim preclusion.

Dated: April 30, 2003

STATE PERSONNEL COMMISSION


ANTHONY J. THEODORE, Commissioner

KMS:990005Cru13

Commissioner Theodore is the sole sitting commissioner; the other two commissioner positions are vacant. Therefore, Commissioner Theodore is exercising the authority of the Commission. See 68 Op. Atty. Gen. 323 (1979).

Parties:

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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.

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