No. 83-

In the Supreme Court of the United States

October Term, 1983

GARY McDONALD,

Petitioner,

vs.

CITY OF WEST BRANCH, MICHIGAN; PAUL LONGSTREET, CHIEF OF POLICE; BERNARD C. OLSON, CITY MANAGER; CHARLES W. JENNINGS, CITY ATTORNEY; DEMETRE J. ELIAS, CITY ATTORNEY; UNITED STEEL WORKERS OF AMERICA, DISTRICT 29,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED*

1. Should unappealed arbitration awards—as distinguished from state court decisions—be given preclusive effect in cases brought under 42 U.S.C. §1983?

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*All parties to the proceeding in the Court of Appeals are listed in the caption.

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit dated April 19, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 709 F.2d 1505 and is printed in Appendix A at pp. A1-A5. It reversed the judgment of the United States District Court which is printed in Appendix B at pp. A6-A7. The District Court did not write a formal opinion. Its oral order denying defendants' motion for directed verdict is printed in Appendix C at pp. A8-A11. Its order denying defendant Longstreet's motion for judgment notwithstanding the verdict is printed in Appendix D at pp. A12-13.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 19, 1983. Petition for rehearing was denied on May 16, 1983. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATUTES INVOLVED

42 U.S.C. §1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. §1738

State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE[1]

On November 25, 1976, petitioner Gary McDonald was fired from his position as a West Branch, Michigan, police officer. He believed there was no just cause for his firing and that the firing was retaliation for activities protected by the First Amendment. McDonald filed a griev-

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1. The transcript of the first five days of proceedings contains pages which are numbered 1 through 781. Those pages will be designated "Tr. ....." The transcript of the last two days of proceedings contains different pages which are also numbered 1 through 252. To avoid confusion, these pages will be designated "DTr. ....."

ance under the union collective bargaining agreement to challenge whether there was contractually required "proper cause" for his discharge. The City prevailed at arbitration. McDonald then filed a civil action under 42 U.S.C. §1983 to establish that the firing violated his First Amendment rights. In the civil action, the District Court declined to give the arbitration decision preclusive effect, but received it in evidence together with the arbitration transcript and testimony regarding the arbitration process. The jury rendered a verdict for McDonald finding that the Chief of Police had discharged him in violation of his First Amendment rights.

McDonald's grievance alleged that he had been discharged without "proper cause" in violation of Article III of the collective bargaining agreement.[2] (P. Ex. 8A). The arbitrator treated the grievance as raising only one issue: "Was the discharge of Officer Gary McDonald for just cause?" (P. Ex. 35 at p. 2). McDonald did not raise the issue of whether his discharge also violated his First Amendment rights. The arbitrator's authority was expressly limited to contractual issues and he did "not have authority to alter, add to, delete from, disregard or amend" the agreement. (P. Ex. 42 §21.2 - Step 5).

The arbitrator sustained McDonald's discharge solely on one charge—the charge that he had made "a sexual assault on a minor female." (P. Ex. 35 at pp. 12-13). However, until the arbitration hearing itself, defendants had refused to inform McDonald who it was he was supposed to have assaulted and when and where he was supposed to have assaulted her. (Tr. 166, 235-236, 261-262, 535-536, 706-707, 715-716, 719-720, DTr. 89, 117).

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2. Article III provides in relevant part that the City had the right "to discharge employees for proper cause." (P. Ex. 42 §3.0).

The original discharge notice did not even mention a sexual assault but only "conduct unbecoming an officer." (P. Ex. 8). The subsequent list of "specific incidents of misconduct" referred to "a sexual assault upon a minor female" but failed to indicate when, where or upon whom the assault had allegedly been made. (P. Ex. 9). McDonald made at least six separate requests for the particulars of the charges against him. He made such requests at the time he was discharged (Tr. 155, 567), by phone the following day (Tr. 156-157, 239), at a City Council meeting held December 6, 1976 (Tr. 159, 639), at a grievance committee hearing held December 29, 1976 (Tr. 160, 703-704, P. Ex. 49B), at a City Council hearing held January 27, 1977 (Tr. 161, 399-400, 534-536, 619-621, 639-640, P. Ex. 49A), and at a hearing on March 15, 1977. (Tr. 162-163, 688). He had asked the Chief of Police, the City Manager, the Mayor, the City Council, and both City Attorneys for the name of the "minor female" and the date and place of the alleged "sexual assault." (Tr. 155-163, 239, 261-262, 399-400, 534-576, 619-621, 639-640, 688, 703-704, P. Ex. 49A, P. Ex. 49B). Despite these requests, the City failed to identify the alleged victim and the date and location of the alleged assault until the arbitration hearing itself.

The City refused to tell McDonald the name of the person he was supposed to have assaulted because the City Manager thought it would "give the Union an unfair advantage" if the City had "to show [its] hand." (Tr. 567-568). The refusal was based on the advice of the City Attorney who believed the information should be withheld because "there had been rumors before [that] people had been constantly intimidated." (DTr. 89, 87, Tr. 716).

McDonald was advised by the Union's attorney that he did not have the right to appeal the arbitrator's decision and he did not do so. (Tr. 246). Instead, McDonald brought

suit under 42 U.S.C. §1983 asserting jurisdiction under 28 U.S.C. §1343. He alleged that he was discharged in retaliation for exercising his First Amendment rights to freedom of speech and assembly and his right to petition the government for redress of grievances. (App. at A2, Complaint ¶11 b). McDonald also alleged that his discharge had deprived him of property without due process.[3]

The District Court declined to give the prior arbitration award preclusive effect. (Tr. 68-69, DTr. 3-7). Instead, relying on this Court's opinion in *Alexander v. Gardner-Denver Co.*, the court received the arbitrator's decision in evidence and permitted the parties to introduce extensive evidence about the arbitration process. (*E.g.*, Tr. 165-168, 237-247, DTr. 79-101, P. Ex. 34, P. Ex. 35). Both attorneys discussed the decision and transcript in their closing argument. (*E.g.*, DTr. 184, 198). The jurors had the decision and transcript with them in the jury room during their deliberations. (DTr. 202, 259).

After a six-day trial, the jury found that Chief of Police Longstreet had discharged McDonald for exercising his First Amendment rights. (App. at A15). It awarded McDonald actual and punitive damages against the Chief. (App. at A16). The jury found against McDonald with regard to the remaining defendants. (App. at A2). The District Court entered judgment on the verdict. (App. at A6-A7).

On appeal, the United States Court of Appeals for the Sixth Circuit reversed, holding that "the district court should have applied res judicata and collateral estoppel principles to dismiss the Section 1983 action." (App. at A3). Rehearing was denied on May 16, 1983. (App. at A14).

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3. McDonald's complaint also alleged that the union had breached its duty under state law to adequately represent him. The trial court declined to exercise pendent jurisdiction over this state law claim, and it is not before this Court. (App. at A2).

REASONS FOR GRANTING THE WRIT

I

The Decision Below Erred in Its Resolution of an Important Issue Significantly Affecting the Administration of Justice—Whether Arbitration Awards Should Be Given Res Judicata Effect in §1983 Cases.

The question presented is whether unappealed arbitration awards—as distinguished from state court decisions—should be given preclusive effect in employment cases brought under 42 U.S.C. §1983. This is an important question of federal law which should be settled by this Court. Public sector grievance arbitration has become commonplace. Believing that constitutional as well as contractual rights have been violated, public employees frequently pursue both arbitration and an action under §1983. It is crucial that this Court give early and definitive guidance to litigants and the lower courts as to the effect, if any, to be given arbitration awards in subsequent §1983 actions.

Grievance arbitration has become a standard feature of public sector employment relations. More than thirty states and the District of Columbia permit or require grievance arbitration for some or all public employees. In several states, every collective bargaining agreement must provide for grievance arbitration. *E.g.*, Minn. Stat. §179.70(1). In other states, grievance arbitration is a mandatory subject for bargaining. *E.g., Pontiac Police Officers Association v. City of Pontiac,* 397 Mich. 674 (1976). Even states without public employee collective bargaining have approved grievance arbitration under "meet-and-confer" statutes. *E.g.*, Kan. Stat. Ann. §75-

4330(b). Arbitration provisions are contained in standard forms for public employee collective bargaining agreements. *E.g.,* 1 *Pub. Employee Bargaining Rep. (CCH)* ¶¶4760.18 (Teachers), 4780.25 (Police), 4810.04 (Firefighters), 4820.06 (Nurses), 4870.16 (Turnpike Employees); 1 *Pub. Personnel Admin. (P-H)* ¶¶6601 *et seq.* (1974).

As in the private sector, the grievance arbitrator is limited to interpretation of the contract and must not add to or subtract from it. *E.g.,* Fla. Stat. §447.401. Therefore, a public employee who wishes to vindicate his constitutional as well as his contractual rights must pursue both his remedy under the arbitration agreement and his remedy under 42 U.S.C. §1983. Since arbitration ordinarily is completed first, the District Court trying the §1983 case must determine what preclusive effect, if any, to give the arbitration award. *See, e.g., Kern v. Research Libraries,* 27 FEP Cases 1007, 1008 (S.D. N.Y. 1979). Faced with this recurring question, the District Courts need the definitive answer which only this Court can provide. Just as it was necessary in *Alexander v. Gardner-Denver, infra,* to establish arbitration's relationship to Title VII, so it is now necessary to establish its relationship to §1983.

The importance of resolving this issue is vividly illustrated by the decision below which misconstrues §1983 and this Court's prior decisions. The considerations which justified granting preclusive effect to *state court* decisions have no validity if applied to arbitration awards. Unlike state court decisions, arbitration awards ". . . are not subject to the mandate of [28 U.S.C.] §1738." *Kremer v. Chemical Construction Corp.,* 456 U.S. 461, 477 (1982). Unlike a state court, an arbitrator must ". . . effectuate the intent of the parties rather than the requirements of enacted legislation." *Alexander v. Gardner-Denver Co.,* 415

U.S. 36, 56-57 (1974). Unlike state courts and state administrative agencies, arbitrators' special competence is ". . . the law of the shop, not the law of the land." *Id.* at 57; *Kremer, supra,* at 478. As is evident in the present case, ". . . the factfinding process in arbitration usually is not equivalent to judicial factfinding." *Alexander, supra,* at 57; *Kremer, supra,* at 478.

As this Court pointed out in *Kremer,* the characteristics which make contractual grievance arbitration an inappropriate forum for resolving civil rights cases "cannot be attributed to state administrative boards . . . ." *Id.* at 478. Yet the decision below would give preclusive effect to an unappealed arbitration award while no such effect is given to unappealed administrative decisions. *Moore v. Bonner,* 695 F.2d 799, 800-801 (4th Cir. 1982); *Patsy v. Florida International University,* 634 F.2d 900, 910, 926 (5th Cir.) (en banc), *rev'd on other grounds,* ..... U.S. ....., 102 S. Ct. 2557 (1982); *James v. Board of Education,* 461 F.2d 566 (2nd Cir.), *cert. denied,* 409 U.S. 1042 (1972); *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education,* 654 F.2d 868, 877 (3rd Cir. 1981); *Moore v. City of East Cleveland,* 431 U.S. 494, 524 at n. 2 (1977) (Burger, C.J. dissenting); *contra, Snow v. Nevada Department of Prisons,* 543 F. Supp. 752 (D. Nev. 1982).

II

The Decision Below Conflicts With This Court's Decision in Alexander v. Gardner-Denver That Arbitration Awards Shall Not Be Given Preclusive Effect in Title VII Cases.

The decision below conflicts with this Court's holding in *Alexander v. Gardner-Denver,* 415 U.S. 36 (1974) that an arbitration award should not be given preclusive effect

in a subsequent civil rights action under Title VII. The reasoning of *Alexander* is equally applicable to the reconstruction-era Civil Rights Acts. *Becton v. Detroit Terminal of Consolidated Freightways,* 687 F.2d 140 (6th Cir. 1982) (42 U.S.C. §1981), *cert. denied,* ..... U.S. ....., 103 S. Ct. 1432 (1983); *Kern v. Research Libraries,* 27 FEP Cases 1007 (S.D. N.Y. 1979) (42 U.S.C. §§1981, 1983 and 1985); *Liotta v. National Forge Co.,* 473 F. Supp. 1139 (W.D. Pa. 1979) (42 U.S.C. §1981), *modified on other grounds,* 629 F.2d 903 (3rd Cir. 1980), *cert. denied,* 451 U.S. 970 (1981); *Hawkins v. Babcock & Wilcox Co.,* 24 FEP Cases 794 (N.D. Ohio 1980) (42 U.S.C. §1981).

The arbitrator is required to "effectuate the intent of the parties rather than the requirements of enacted legislation." *Alexander, supra,* at 56-57; *Kremer v. Chemical Construction Corp.,* 456 U.S. 461, 478 (1982). He violates that obligation if he bases his decision on the requirements of Section 1983, just as much as if he bases it on the requirements of Title VII. *Alexander, supra,* at 53. An arbitrator's special competence is "the law of the shop, not the law of the land." *Id.* at 57; *Kremer, supra,* at 478. He has no more expertise in Section 1983 issues than he does in Title VII issues. Like Title VII, Section 1983 contains "broad language [which] frequently can be given meaning only by reference to public law concepts" and needs the expertise of judicial construction. *Alexander, supra,* at 57. Arbitration's factfinding process is no more adequate for Section 1983 than it is for Title VII. *Id.* at 57; *Kremer, supra,* at 478.

III

Four Courts of Appeals Have Decided That State Administrative Determinations—and A Fortiori Arbitration Awards—Should Not Be Given Preclusive Effect. The Decision Below Conflicts With Those Decisions.

At least four Courts of Appeals have determined that unappealed state administrative determinations should not be granted preclusive effect in §1983 actions. This Court's decision in *Kremer* establishes that administrative agencies are *better* suited than arbitrators to resolve civil rights cases. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 478 (1982). Therefore, *a fortiori*, the same Courts of Appeals deny preclusive effect to unappealed arbitration awards. Thus, the decision below granting preclusive effect to an unappealed arbitration award conflicts with decisions in the Second, Third, Fourth and Fifth Circuits denying such effect even to administrative decisions.

In *Moore v. Bonner*, 695 F.2d 799, 800-801 (4th Cir. 1982), the Fourth Circuit stated:

> "It is well settled that the full-faith-and-credit clause and its statutory parallel, 28 U.S.C. §1738 (1976), require federal courts to give preclusive effect to those state court judgments which are given that same effect by the courts of the forum State. See *Allen v. McCurry, supra.* Federal decisions have not, however, generally accorded this preclusive effect to the unappealed decisions of state administrative agencies and to do so would be contrary to congressional policy and to the rationale of recent Supreme Court decisions."

Preclusive effect was denied even though the district court had found that the agency had "provided plaintiff virtually

a judicial type forum in which to present her case." *Moore v. Bonner,* 526 F. Supp. 143, 147 (D. S.C. 1981).

Similarly, in *Patsy v. Florida International University,* 634 F.2d 900 (5th Cir.) (en banc), *rev'd on other grounds,* ..... U.S. ....., 102 S. Ct. 2557 (1982), the Fifth Circuit stated:

> "Unlike judicial actions, state administrative proceedings carry no *res judicata* or collateral estoppel baggage into federal court. Resorting to appropriate and adequate state administrative remedies in no way precludes federal court protection of federal constitutional and statutory rights." *Id.* at 910.

At least five of the dissenting judges agreed, stating:

> "If the plaintiff loses on every point of the state administrative claim, since neither *res judicata* nor collateral estoppel apply, the plaintiff may then, having exhausted administrative remedies, return to the federal court to continue the suit." *Id.* at 926.[4]

In *James v. Board of Education,* 461 F.2d 566 (2nd Cir.), *cert. denied,* 409 U.S. 1042 (1972), a high school teacher who had unsuccessfully appealed his dismissal to the New York State Education Commissioner, declined to appeal to state court. *Id.* at 570. In his subsequent §1983 action, the Second Circuit rejected the argument that the decision of the Commissioner was *res judicata,* describing the argument as "wholly without merit." *Id.* at 571. The Second Circuit subsequently reaffirmed the *James* decision in *Mitchell v. National Broadcasting Co.,* 553 F.2d 265, 276 (2nd Cir. 1977), stating that "*Res judi-*

4. To Petitioner's knowledge, the Court of Appeals for the Eleventh Circuit has not yet dealt with this issue. However, all 12 present members of that court were members of the court which heard *Patsy* and 11 of them joined in one or the other of the statements quoted above.

cata attached when plaintiff chose to pursue her claim in the state courts, and not before."

The Third Circuit came to a similar conclusion in a §1983 case stating that "neither 28 U.S.C. §1738 nor federal common law principles of *res judicata* require deference to administrative as distinct from judicial proceedings." *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education,* 654 F.2d 868, 877 (3rd Cir. 1981).

Chief Justice Burger has taken an identical position stating that "state administrative agency determinations do not create *res judicata* or collateral estoppel effects." *Moore v. City of East Cleveland,* 431 U.S. 494, 524 at n. 2 (1977) (Burger, C.J. dissenting).

As discussed above, at least four Courts of Appeals have held that administrative decisions should not be given preclusive effect in §1983 actions. Other courts have specifically held that arbitration awards should not be given preclusive effect under the other reconstruction-era Civil Rights Acts. *Becton v. Detroit Terminal of Consolidated Freightways,* 687 F.2d 140 (6th Cir. 1982) (42 U.S.C. §1981), *cert. denied,* ..... U.S. ....., 103 S. Ct. 1432 (1983); *Kern v. Research Libraries,* 27 FEP Cases 1007 (S.D. N.Y. 1979) (42 U.S.C. §§1981, 1983 and 1985); *Liotta v. National Forge Co.,* 473 F. Supp. 1139 (W.D. Pa. 1979) (42 U.S.C. §1981), *modified on other grounds,* 629 F.2d 903 (3rd Cir. 1980), *cert. denied,* 451 U.S. 970 (1981); *Hawkins v. Babcock & Wilcox Co.,* 24 FEP Cases 794 (N.D. Ohio 1980) (42 U.S.C. §1981). There is no reason to believe that Congress intended that arbitration awards be given greater preclusive effect under §1983 than under the other reconstruction-era Civil Rights Acts. (As discussed in Part II, there is also no reason to give such awards greater preclusive effect under §1983 than under Title VII.)

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS

(Filed April 19, 1983)

81-1420/1442/1707/1805

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY McDONALD,
Plaintiff-Appellant (81-1420/1707)
Cross-Appellee (81-1442/1805),

v.

CITY OF WEST BRANCH, et al.,
Defendant-Appellees (81-1420/1707)
Cross-Appellants (81-1805),

PAUL LONGSTREET,
Defendant-Appellee (81-1420)
Cross-Appellant (81-1442).

BEFORE: KEITH and MERRITT, Circuit Judges and BROWN, Senior Circuit Judge.

ORDER

Plaintiff-appellant, Gary McDonald, brought this action pursuant to 42 U.S.C. §1983. He was fired from his job as a police officer after 9 1/2 years of service. At the time of his dismissal, plaintiff was the local steward for

the United Steelworkers of America, the collective bargaining unit for the City of West Branch police officers.

On July 26, 1977, an arbitration proceeding was held before Arbitrator George E. Bowles. Plaintiff was represented by a union attorney. The arbitrator held that McDonald had been discharged for "just cause." More specifically, the arbitrator ruled that the plaintiff had been discharged because of his participation in the "Dack incident." The "Dack incident" involved charges that plaintiff had taken indecent liberties with Ms. Barbara Jo Dack.

The plaintiff subsequently filed this section 1983 claim against the City of West Branch and certain of its officers in their official capacities—Chief of Police Longstreet, City Manager Olson, City Attorney Charles Jennings and City Attorney Demetre Ellias. The United Steelworkers was joined as a defendant, but the trial court refused to exercise pendant jurisdiction over the claim against the union. Plaintiff alleged in his complaint that he had been fired for exercising his first amendment rights of free speech and free association.

The case was tried to a jury for six days. The court submitted Special Interrogatory Forms to the jury. Judgment was entered in favor of plaintiff against defendant Longstreet, but in favor of the other defendants. The court awarded $4,400 to plaintiff against Longstreet, consonant with the jury's finding of damages. The court also awarded attorney's fees to the plaintiff against Longstreet in the amount of $16,835.70. However, the attorney's fee award was offset by an assessment of $8,861.40 in attorney's fees against the plaintiff in favor of defendants Ellias and Jennings, the city attorneys. The plaintiff was thus awarded a net amount of only $7,974.30 as attorney's fees. Plaintiff appeals and defendant Longstreet cross-appeals.

Upon review of the record, particularly the arbitrator's award, we conclude that the district court should have applied res judicata and collateral estoppel principles to dismiss the section 1983 action. It is clear from the arbitrator's award that he found that the reason for the plaintiff's dismissal was the Dack incident. Plaintiff's first amendment argument seeks to relitigate this issue and hence to vacate the arbitrator's award. The parties have agreed to settle this dispute through the private means of arbitration. Since we find no abuse of that process, we conclude that its result should not be disturbed.

Therefore, the judgment entered against defendant Longstreet is hereby reversed. Applying this court's principles of *Northcross v. Memphis Board of Education,* 611 F.2d 624 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980), the plaintiff is entitled to no attorney's fees against any of the defendants because he is not a prevailing party. But defendants Jennings and Ellias are entitled to attorney's fees against the plaintiff since the claims brought against them were frivolous.

Accordingly, this case is remanded to the district court for entry of judgment consistent with this opinion.

Nos. 81-1420/1442/1707/1805
McDONALD v. CITY OF WEST BRANCH, et al.

MERRITT, Circuit Judge, concurring. I concur in the disposition of this case but believe further explanation regarding the res judicata and collateral estoppel doctrines is necessary in order to inform the parties of our reasoning on this complex issue.

Under the doctrines of res judicata or "claim preclusion," when a defendant prevails in an action, the plaintiff is barred from asserting in a later proceeding

against the defendant claims that were or could have been raised at trial. The aim of claim preclusion is to avoid multiple suits on identical obligations between the same parties since the subsequent litigation would necessarily entail the redetermination of the same issues. A valid and final arbitration award has the same effect for purposes of claim preclusion as a court judgment. *See* Restatement of the Laws of Judgments, 2d § 84(1). The arbitration in this case was between the plaintiff, McDonald, and the City of West Branch. The issues raised at the arbitration encompassed or could have encompassed those raised in this suit: the plaintiff's dismissal for allegedly unlawful purposes. Therefore, under the principle of res judicata, the plaintiff is barred from bringing a second action against the City of West Branch.

The plaintiff is also barred for two reasons from bringing suit against the defendant Longstreet, sued in his official capacity. First, the defendant may assert the defense of claim preclusion because of his privity with the defendant in the arbitration, the City of West Branch. The defendant, as police commissioner, acted on behalf of the City when he fired McDonald. The arbitrator found that the City had acted with "just cause" and had not violated the rights of the plaintiff. The doctrine of res judicata has been enlarged in recent years. *See, e.g., Bruszewski v. United States,* 181 F.2d 419, 422 (3rd Cir.), *cert. denied,* 340 U.S. 865, 71 S.Ct. 87, 95 L.Ed. 632 (1950); *Miller v. United States,* 438 F.Supp. 514, 520 (E.D. Pa. 1977). Under the expanded rules of privity, the police commissioner may assert the City's defense of res judicata.

Secondly, the plaintiff is barred from suing the police commissioner because of the principles of collateral estoppel or "issue preclusion." The Restatement of the Law of Judgments, 2d § 29 states that:

> A party precluded from litigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify according him an opportunity to relitigate the issue.

Section 27 of the Restatement, referred to above, provides that:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Both Sections 28 and 29 contain exceptions to these general rules on issue preclusion but none are applicable to this case. It is clear from the arbitrator's award that he found that the reason for the plaintiff's dismissal was the Dack incident involving sexual misconduct and not any speech or union activities by the plaintiff. McDonald seeks to relitigate these issues and hence to vacate the arbitrator's award. He has had a full and fair opportunity to be heard on his charge of wrongful dismissal so he is precluded from bringing suit again on those issues.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX B

JUDGMENT OF THE UNITED STATES DISTRICT COURT

(Filed March 23, 1981)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

CIVIL ACTION NO. 79-10281

GARY McDONALD,
Plaintiff,

v.

CITY OF WEST BRANCH, PAUL LONGSTREET, BERNARD OLSON, CHARLES JENNINGS and DEMETRE ELLIAS,
Defendants.

JUDGMENT

At a session of said court held in the Federal Building, Bay City, Michigan, on the 23rd day of March, 1981

PRESENT: HONORABLE JAMES HARVEY
United States District Judge

This action having come on for trial before the Court and a jury, and the issues having been duly tried and the jury having rendered its answers to the special interrogatories,

IT IS ORDERED AND ADJUDGED that, as to defendants City of West Branch, Bernard Olson, Charles Jennings and Demetre Ellias, the plaintiff take nothing and that the action be dismissed on the merits.

IT IS FURTHER ORDERED AND ADJUDGED that, as to defendant Paul Longstreet, that the plaintiff recover the sum of Four Thousand ($4,000.00) Dollars in compensatory damages and Four Thousand ($4,000.00) Dollars in punitive damages with interest thereon as provided by law.

Each party will pay his own costs of action. FR Civ P 54(d)

Dated at Bay City, Michigan, this 23rd day of March, 1981.

John P. Mayer, Clerk
/s/ Sara E. Bigsby
Sara E. Bigsby
Resident Deputy Clerk

Approved as to form pursuant to
FR Civ P 58.

/s/ James Harvey
James Harvey
United States District Judge

APPENDIX C

ORAL ORDER OF THE UNITED STATES DISTRICT COURT DENYING DEFENDANTS' MOTION FOR DIRECTED VERDICT ISSUED MARCH 13, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

GARY McDONALD,
Plaintiff,

v.

CITY OF WEST BRANCH, et al,
Defendants.

(D Transcript p. 3) THE COURT: Gentlemen, the Court is prepared to rule on the motion for directed verdict under Rule 50 of the Federal Rules of Civil Procedure, which was made yesterday. The Court notes that all but one of the grounds for this motion involved questions of law which are of some magnitude in civil rights actions such as this one. Quite frankly, the Court has not been able to give the detailed and searching considerations of these questions in the short time that it has had since hearing the arguments of counsel. The Court has done the best as it can to research these issues, and is prepared to rule at this time. However, I point this out because the Court may reevaluate or consider in greater depth its rulings herein by way of a judgment notwithstanding the verdict under Rule 50 if the same is brought within ten days from any adverse jury verdict.

First of all, as to the sole factual basis of defendants' motion that there has been insufficient evidence to establish plaintiff's claims against Defendant Ellias, the Court, quite frankly, does believe that there is merit to this contention. However, viewing the evidence presented in the light most favorable to the plaintiff, at this time the Court is inclined to deny the motion and the defendant may wish to raise it again in a motion for judgment notwithstanding the (D Transcript p. 4) verdict.

As to the three legal bases for defendant's motion, the Court again, with qualifications that it is open for reevaluation following the trial, will say it believes at this time that they are without merit.

First of all, the argument that the arbitration decision should be considered res judicata: certainly, public policy favors arbitration of labor disputes, and while this Court believes that policy should be further expanded, the Court also believes that the great weight of judicial authority does not grant arbitration decisions any res judicata effect in subsequent civil rights actions in federal court. Res judicata bars a subsequent action on a matter already litigated, basically if three requirements are met:

First of all, that the prior judgment was rendered by a court of competent jurisdiction. Second, that the decision was a final judgment on the merits.

And third, that it involved the same parties and the same cause of action.

The primary reason for rejecting the application of this doctrine in civil rights actions occurring subsequent to arbitration hearings is the (D Transcript p. 5) belief that arbitrators are not competent to resolve claims based on the Federal Civil Rights Act. And the Court cites in that regard, Alexander versus Gardner Denver Company

found at 415 United States page 36, being a 1974 decision; Gardner versus Giarrusso found at 571 Fed Second, page 1330, being a Fifth Circuit decision decided in 1978.

Therefore, the first requirement for application of the doctrine is not satisfied.

Finally, on the question of immunity for city attorneys, the Court will say that the Court has not received any authority from counsel in support of their argument in this case that Mr. Jennings and Mr. Ellias are entitled to immunity as city attorneys. On the argument of immunity for city attorneys, let me say that the Court has received no authority in support of their argument that Mr. Jennings and Mr. Ellias are entitled to immunity as city attorneys. While as a general proposition it appears likely that they should possess a qualified immunity, they certainly, the Court believes, are not absolutely immune from suit as would be a prosecutor.

Having a qualified immunity, the good faith conduct of these defendants, however, is still a question of fact for the jury.

(D Transcript p. 6) I neglected to say anything about the other argument involving the Monnell case as to whether the City of West Branch was a person for purposes of Section 1983 under the Monnell decision. The Court believes that defendants have read too narrowly, let me say, the Supreme Court's decision in Monnell versus Department of Social Services found at 436 United States page 658, decided in 1978. That case, as you recall, overruled the court's earlier decision in Monroe versus Pate found at 365 United States page 167, a 1961 case, and held, and I quote:

"Congress did intend municipalities and other local government units to be included among those persons in whom Section 1983 apply."

Therefore, under Title 42 United States Code Section 1983, cities can be sued for monetary damages where the action alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers. And the Court would cite Antineau Federal Civil Rights Act at pages 173 and 174, the 1980 addition.

And the Court would say finally in that regard that the action by the City of West Branch in this case, it would seem to the Court, could legally be (D Transcript p. 7) interpreted as officially adopting or promulgating a decision made by certain officers of the city.

For all of these reasons, the Court is turning down the motion for a directed verdict under Rule 50, but suggesting again they may be wished to be raised at a later time on a motion for judgment notwithstanding the verdict.

APPENDIX D

ORDER OF UNITED STATES DISTRICT COURT DENYING MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT

(Filed May 28, 1981)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

GARY McDONALD,
Plaintiff,

v.

CITY OF WEST BRANCH, et al,
Defendants.

MEMORANDUM OPINION AND ORDER

At a session of said court held in the Federal Building, Bay City, Michigan on the 28 day of May, 1981

PRESENT: HONORABLE JAMES HARVEY
United States District Judge

This matter is before the Court on cross motions for judgment notwithstanding the verdict filed by both plaintiff Gary McDonald, and defendant Paul Longstreet.

Having reviewed the arguments of counsel, the Court finds the verdict of the jury, as set forth in their answers to the special interrogatories, consistent with law and

with the instructions of the Court. Accordingly, the Court is unwilling to reopen or set aside the judgment in this matter, and therefore hereby DENIES the present motions of both the plaintiff and the defendant.

IT IS SO ORDERED.

/s/ James Harvey
James Harvey
United States District Judge

APPENDIX E

ORDER OF UNITED STATES COURT OF APPEALS DENYING REHEARING

(Filed May 16, 1983)

Nos. 81-1420/42
81-1707/1805

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY MCDONALD,
Plaintiff-Appellant,
Cross-Appellee,

vs.

CITY OF WEST BRANCH, ET AL.,
Defendants-Appellees,
PAUL LONGSTREET,
Cross-Appellant.

ORDER

BEFORE: KEITH and MERRITT, Circuit Judges, and BROWN, Senior Circuit Judge

Upon receipt and consideration of the petition for rehearing filed herein by the appellant, the Court concludes that the issues raised in the petition were carefully considered upon the original submission and decision of this case, and that rehearing is not required.

Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman,
John P. Hehman, Clerk

APPENDIX F

SPECIAL INTERROGATORY FORM REGARDING DEFENDANT LONGSTREET

(Filed March 14, 1981)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

CIVIL ACTION NO: 79-10281

GARY McDONALD,
Plaintiff,

v.

CITY OF WEST BRANCH, et al.,
Defendants.

SPECIAL INTERROGATORY FORM

Members of the Jury, after your deliberations are completed, you are instructed to answer the following special interrogatories:

Plaintiff's First Amendment Claim

1. Do you find that defendant Paul Longstreet discharged the plaintiff from his position as a police officer in retaliation for, or to suppress, his union activity, and therefore in violation of his First Amendment rights to freedom of speech or association?

yes X no .....

Plaintiff's Due Process Claim

2. Do you find that the plaintiff had a right to procedural due process because he had a "liberty" interest in his continued employment as a police officer, as previously defined in these instructions?

   yes ..... no X

3. Do you find that the plaintiff had a right to procedural due process because he had a "property" interest in his continued employment as a police officer, as previously defined in these instructions?

   yes ..... no X

   (If your answer to either question 2 or question 3 was "yes," proceed to answer question 4, otherwise do not answer the next question.)

4. If you find that the plaintiff had a right to procedural due process because he had either a "liberty" or "property" interest in his employment, do you find that defendant Paul Longstreet deprived him of this right?

   yes ..... no X

   (If your answer to either question 1 or question 4 was "yes," proceed to answer question 5, otherwise do not answer the next question.)

Damages

5. What is the amount of damages which you find the plaintiff has suffered for the deprivation of his rights under 42 USC 1983?

   Amount of Damages:

   Compensatory or Nominal: $4,000.00

   Punitive: $4,000.00

Date: 3/14/81 /s/ Thomas O. Baird
(Foreperson)