

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 3, 1984

MEMORANDUM TO THE CONFERENCE

Re: Holds for No. 82-738 - Migra v. Warren City
District Board of Education

One case was held for Migra. It is No. 83-208, Tompkins, et al. v. Gargiul, 704 F.2d 661 (CA2 1983). Respondent was a tenured school teacher in upper New York State. When she went on extended sick leave, she was ordered to undergo certain medical tests. She refused because she was unwilling to be examined by a male doctor. She was placed on leave of absence without pay and unsuccessfully challenged this administratively. She then brought an action against the Board in state court. This was dismissed as time-barred. The Board itself then instituted formal dismissal proceedings against respondent and prevailed. Respondent brought another state court action challenging the dismissal. That suit, too, was not successful.

Respondent brought a third law suit, this time under §1983 in federal court, raising substantive due process claims that were not addressed in the earlier proceedings. That suit had been held in abeyance pending resolution of the state litigation. The trial court granted the Board's motion to dismiss. The Second Circuit reversed. You may recall that in n. 6 on page 7 of the Migra opinion, the Second Circuit was noted as following the minority rule with respect to claim preclusion in a §1983 action. The Second Circuit rule is that an issue not actually litigated on the state side is not barred in the subsequent federal §1983 action even though it might have been litigated in state court. The CA2 applied that rule in this case, and found that state preclusion law did not apply to respondent's substantive due process claims because they had not been raised in state court. That analysis is error under the rule announced in Migra; the court should have applied state preclusion law. It is my view that we should GVR for reconsideration in light of Migra. That will be my vote.

HAB.