BENCH MEMORANDUM

Tuesday, Oct. 11, 1983

No. 82-738

Migra v. Warren City School District Board of Education

Cert to CA6 (order: Edwards, Kennedy, Celebrezze)

Vote: Grant: WJB, BRW, HAB, JPS
Deny: WEB, TM, LP, WR, SOC

Recommendation: REVERSE

ISSUES

(1) Does the Full Faith and Credit Act, 28 U.S.C. §1738,[1] preclude litigation in federal court of a claim arising under 42 U.S.C. §1983 if the plaintiff could have been raised that claim in a prior state proceeding but failed to do so, and if the prior judgment would be given preclusive effect in state court?

(2) Is petr's §1983 claim barred under Ohio res judicata doctrine?

BACKGROUND

Petr was employed by rspt school board as "Supervisor of Elementary Education." She was employed on a yearly basis,

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[1]The pertinent portions of 28 U.S.C. §1738 (1976) provide:
The records and judicial proceedings of any court of any ... State ... shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of [the] State ... from which they are taken.

pursuant to written contracts. One of petr's duties was the development of a voluntary desegregation plan for the Warren City schools. Her efforts in that capacity -- and especially her support for controversial desegregation policies -- angered the members of the Board. In retaliation, they began to circulate malicious rumors about petr.[2] On April 17, 1979, the Board members (despite their hostility toward petr) voted unanimously to renew petr's contract for another year. One week later, the Board rescinded its decision, and voted 3-1 (one member not present) not to renew petr's contract.

Petr then brought suit against the Board and its individual members in Ohio court, asserting 2 causes of action: (a) breach of her employment contract; and (b) conspiracy to interfere tortiously with her contract. Petr did not assert any federal claims. The trial judge sua sponte ordered a continuance of the conspiracy claim, while he held trial on the contract claim. The Board did not object to this procedure. The trial judge subsequently ruled in favor of petr on the contract claim, and ordered her reinstated (for one year) and given back pay. The judge then dismissed the conspiracy claim "without prejudice."

The day after the state-court decision, petr brought this action in federal DC against the Board and its individual

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[2]The foregoing description of the motivations underlying the Board's activities is drawn from the complaint filed by petr in the §1983 action. Rspts vigorously object to petr's account of their activities. However, because the claim was dismissed as barred by the doctrine of res judicata, petr's allegations must be accepted as true for the purpose of deciding this case.

members. Petr relied upon §§1983 and 1985. She alleged a conspiracy on the part of rspts to violate her rights under the 1st, 5th, and 14th amendments. The gravamen of her suit remains somewhat unclear, but essentially petr charged that the Board members had conspired to penalize her for her exercise of her right of free speech (specifically, her advocacy of thoroughgoing desegregation) and had falsely and maliciously stigmatized her in a way that deprived her of both her liberty interest in her reputation and her property interest in her job. The DC granted rspts' motion for summary judgment, reasoning that petr could have raised her federal civil-rights claims in her state suit and therefore that the state-court judgment was res judicata.[3] In its short, unpublished opinion, the DC did not mention 28 U.S.C. §1738 and did not discuss Ohio res judicata doctrine; the court seems to have assumed that the suit must be barred under "general" res judicata principles. The CA6, in a one-page memorandum opinion, affirmed.

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[3]The DC also dismissed petr's due-process claims on the alternative ground that they were time-barred. The DC reasoned that the state cause of action that most closely resembled petr's due-process claims was defamation; the DC therefore held that Ohio's one-year statute of limitations for defamation actions controlled, and that petr's claims were untimely. Petr contests the foregoing ruling, arguing that the closest analogue in Ohio law to her federal due-process claims is the tort of conspiracy to defame, not simple defamation, and therefore that the 4-year limitations provision embodied in the Ohio statute pertaining to conspiracy to commit a tort should control.

Petr's argument is plausible, but the Court need not enter this morass. The DC did not dismiss petr's 1st-amend claims as time-barred. Accordingly, even if the DC's ruling on the due-process claims were allowed to stand, the res judicata issue on which cert was granted would still be "live."

ANALYSIS

A. Ohio Res Judicata Doctrine

Recognizing that §1738 requires federal courts to give state-court judgments the same preclusive effect they would be given in the states in which they were rendered, the parties and amici spend the bulk of their time arguing over whether, if petr had brought her §1983 suit in Ohio court, it would have been barred by res judicata. In my view, petr (and the ACLU arguing on her behalf) have the better of this dispute. Petr points out that, under generally applicable principles of res judicata, issues not raised in one lawsuit cannot be raised in a second lawsuit if and only if the second suit involves the same "cause of action" or "claim." Petr argues forcefully that a request for damages, under §1983, for violation of federal constitutional rights cannot, under any theory, be deemed the same "claim" as a request for damages for breach of state statutory or common law. Furthermore, she points out, if there is any overlap between her state and federal claims, it is between her argument under §1983 and her state tortious-conspiracy argument. But her state tort suit, she points out, was dismissed without prejudice by the state court; surely, therefore, it cannot give rise to preclusion of her federal claim.

To this compelling line of argument, rspt answers that, since the late 1950's, Ohio has been gradually liberalizing its definition of a "claim" for the purposes of res judicata. That development culminated in (what rspt characterizes as) the seminal opinion of the Ohio Supreme Court in Johnson's Island,

Inc. v. Board of Township Trustees, 431 N.E.2d 672 (1982), which held that:

> [T]he doctrine of res judicata is applicable to defenses which, although not raised, could have been raised in the prior action. Accordingly, if a defendant ... previously neglected to assert the [constitutional] defense, he is precluded from raising it subsequently by virtue of the existence of the judgment rendered in the former action.

Id., at 675. Rspts insist that Johnson's Island established as the law in Ohio that a "claim" must be defined with reference to the "transaction or occurrence" by which a plaintiff alleges he was injured -- an "aggregate of operative facts," rather than a legal theory. Under this new, "modern" doctrine, rspts insist, it is clear that petr's §1983 claims are barred.

There are three rebuttals to the foregoing argument: (1) It is not at all clear from the passage set forth above that the Ohio SCt in Johnson's Island adopted the "single-transaction-or-occurrence" theory. (2) The activities by which rspts allegedly defamed petr would seem to constitute a different "transaction or occurrence" that the activites by which they breached her employment contract. (3) Rspts' argument that Johnson's Island "dramatically broadened" the scope of res judicata doctrine in Ohio works against them. The state-court decision in this case was rendered on March 20, 1980. The DC's decision on petr's §1983 action was rendered on February 17, 1981. Johnson's Island was not decided until 1982. Surely, the preclusive effect of the state-court judgment in this case cannot turn upon a decision by the state supreme court that was not issued until after both the

state court and the federal DC had passed upon petr's claims.

In short, if this Court were to confront the question of the legitimacy of a ruling by the DC that Ohio res judicata law bars petr's §1983 action, I think petr would win. But the Court need not and probably should not reach that issue -- for the reason that neither the DC nor the CA6 fairly confronted it. The only germane comment in the DC opinion is:

> The plaintiff could have brought her First Amendment claim in state court and she is, therefore, barred from asserting it here. Coogan v. Cincinnati, 431 F.2d 1209 (6th Cir. 1970), cert. denied, 401 U.S. 939.[4]

As the ACLU argues, it is not apparent from this cryptic reference that the DC was even aware that Ohio law was relevant to the issue before it.[5]

In view of the cursory consideration the issue has received thus far, I suggest that, if the Court rules that the DC was bound by Ohio law pertaining to the preclusive effect of Ohio court decisions, the case be remanded with instructions to the DC to determine exactly what Ohio law would require.

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[4] In Coogan (cited by the DC), the CA6 had assessed and relied upon Ohio doctrine pertaining to collateral estoppel, but had not attempted to define the contours of the doctrine that lies at the heart of the instant case -- namely, Ohio res judicata law.

[5] The CA6 simply affirmed the DC's decision, "for the reasons spelled out in considerable length in the thoughtful and well reasoned order and opinion of District Judge Manos." It is thus unclear whether even the CA6 understood that the case turns upon Ohio res judicata doctrine.

B. Full Faith and Credit in §1983 Suits

In Allen v. McCurry, 449 U.S. 90 (1980), the Court held that §1738 applies to §1983 actions and accordingly that a plaintiff who brings a §1983 suit in federal court is collaterally estopped from relitigating any issues actually decided by a state court.[6] In Allen, the Court reserved the question whether similar preclusion occurs when the plaintiff could have raised an issue in a state proceeding but failed to do so.[7] Since the decision in Allen, the Courts of Appeals have continued to disagree over the foregoing issue. Cert was granted in this case in order to resolve the matter.

The outcome of the case does not appear to be in doubt. Two terms ago, five members of the Court made quite clear that they thought §1738 applies in situations of this sort. In Kremer v. Chemical Construction Corp., 456 U.S. 468 (1982), the Court held that §1738 applies to a Title VII action brought in federal court after an adverse judgment by a state court. In a footnote, the majority observed:

> [Applying the plain language of

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[6] You and Justice Brennan joined Justice Blackmun's dissent in Allen.

[7] In footnote 10, the Court noted that:

> A very few courts have suggested that the normal rules of claim preclusion should not apply in §1983 suits in one peculiar instance: Where a §1983 plaintiff seeks to litigate in federal court a federal issue which he could have raised but did not raise in an earlier state-court suit against the same adverse party. [Citations omitted] These cases present a narrow question not now before us, and we intimate no view as to whether they were correctly decided.

449 U.S. at 97 n.10.

> §1738,] the federal courts consistently have applied res judicata and collateral estoppel to causes of action and issues decided by state courts. [citations omitted] ... Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.

Id., at 467 n.6. Perhaps more importantly, the majority established as a general principle that: "an exception to §1738 will not be recognized unless a later statute contains an express or implied partial repeal." Id., at 468. Because §1983 was enacted long before §1738, there seems no escape from the conclusion that §1738 applies with undiminished force to all §1983 actions, including those in which issues are raised that could have been raised in prior state-court suits.

The foregoing result is unfortunate for three reasons (which might form the basis of a dissent):

(1) The primary purpose of §1983 was to afford adequate relief to persons deprived of their civil rights; to achieve that end, Congress thought it was essential to afford injured parties access to the federal courts. This point was made most forcefully in Monroe v. Pape, 365 U.S. 167, 180 (1961):

> It is abundantly clear that one reason [§1983] was passed was to provide a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

The social and political conditions that underlay the foregoing legislative purpose have not entirely dissipated since 1871;

civil-rights plaintiffs should still be guaranteed access to the federal courts.

It is true, as rspts insist, that application of §1738 to actions brought under §1983 will not prevent injured persons from bringing claims in federal court; it will simply force them to go first to federal court and to raise all of their claims in that forum. But in some instances, that will not be a fully satisfactory solution. On many questions of law (e.g., the breach-of-contract issue involved in the instant case), state judges are more knowledgeable and competent that their federal counterparts. To take advantage of the special expertise of the two tribunals, injured parties ought to be able to raise their state claims in state court and raise their federal claims in federal court. Affirmance of the decision of the CA6 in this case will prevent them from doing so.

(2) The pernicious effects of an affirmance will be exacerbated by the Court's decision in Pennhurst. In many civil-rights suits, the injured party has (i) a state statutory claim against a state agency, (ii) a federal constitutional claim against the agency, and (iii) a §1983 claim against the individual officials of the agency. Pennhurst, when it comes down, will deprive federal courts in such cases of power to order injunctive relief on the state claims. A plaintiff who thinks he has a strong state-law argument will thus have a powerful incentive to bring suit in state court. If he does so, however, he will be forced also to present his federal constitutional and §1983 claims to the state court; otherwise, he would subsequently

be barred, in both state and federal court, from raising those issues. The only way in which a plaintiff could avoid the foregoing bind would be to bring his federal claims in federal court, await a decision, and then (if he loses, or if he hopes to get even fuller relief under state law) bring his state claims in state court. At a minimum, such a system will cause substantial delay in the administration of justice and considerable net waste of judicial resources.

(3) As this case demonstrates, a doctrine under which federal courts are bound by state res judicata doctrine makes it possible for state courts, after they have adjudicated a particular plaintiff's claims, to alter (or clarify) the preclusive effect they would give their own prior decision in that case and thereby prevent the plaintiff from subsequently bringing suit in federal court on his federal claims, even though, at the time he litigated his state claim, the plaintiff had no reason to know that he was sacrificing his federal remedies.

CONCLUSION

The decision below should be reversed. §1738 should not be given full effect in §1983 cases. Instead, the federal courts should apply a doctrine of qualified preclusion, whereby only issues raised and resolved in state court cannot be relitigated in a subsequent federal suit.

It seems highly unlikely, however, that the Court will adopt the foregoing approach. If, as seems inevitable, a majority decides that §1738 controls §1983 actions, the case should be remanded to the DC to determine the preclusive effect to which the decision by the Ohio trial court is entitled under Ohio res judicata doctrine.

REVERSE tf October 7, 1983