No. 82-738

In the Supreme Court of the United States

OCTOBER TERM, 1982

DR. ETHEL MIGRA,
Petitioner,

vs.

WARREN CITY SCHOOL DISTRICT
BOARD OF EDUCATION, et al.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does the docrine of res judicata bar a second action in federal court under 42 U.S.C. Section 1983 for redress of a First Amendment claim where a prior state court action between the same parties and based on the same operative facts as the state court claims determined all the issues raised, and the state court was a court of competent jurisdiction to determine a First Amendment claim if such claim had been raised therein?

LIST OF ALL PARTIES

Petitioner: Dr. Ethel D. Migra

Respondents: Warren City [Ohio] School District Board of Education

Catherine O. Swan
Henry J. Angelo
Willard T. Reuben
Raymond Tesner
Mary Wilheim
Barbara Miller

[Individual Board Members]

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STATEMENT OF THE CASE

The following is submitted to supplement the statement of the case offered by petitioner, Dr. Ethel D. Migra.

STATE COURT ACTION:

Petitioner's contract of employment with the respondent, Warren City School District Board of Education (hereinafter Board),was renewed on April 17, 1979 as a courtesy to petitioner and on the sole premise that petitioner would immediately thereupon submit her resignation, which she did not do. When it became apparent to the Board that petitioner would not do as represented, it took action on April 24, 1979, prior to the statutory deadline, to non-renew her contract of employment.

When petitioner had learned of the date of the meeting at which the Board intended to non-renew her contract (April 24, 1979), she consulted an attorney. After such consultation, and on the advice of counsel, petitioner sent a purported letter of acceptance of the Board's first resolution renewing her contract of employment to the Superintendent of Schools. This letter (which was back-dated to April 18, 1979) was delivered to the Superintendent prior to the April 24 meeting. Nevertheless, the Board non-renewed petitioner's contract of employment and notified her prior to the statutory deadline of April 30.

The state court complaint contained five causes of action: (1) illegal non-renewal of an employment contract; (2) anticipatory breach of contract; (3) conspiracy of the individual Board members to deprive plaintiff of contract rights; (4) violation of Ohio's "Sunshine Law";

and (5) conducting a public meeting not called pursuant to law. After trial, the state court found that petitioner had a valid contract of employment, that the meeting of April 24, 1979 wherein petitioner's contract was non-renewed was an illegal meeting due to the technical failure of the notice requirements of Ohio R.C. Section 3313.16, and that Ohio's "Sunshine Law" (Ohio R.C. Section 121.22) had not been violated by the Board. The state court did not rule on conspiracy charges alleged against the individual defendants, a claim that was later voluntarily dismissed by petitioner on July 2, 1980.

In finding for the petitioner and against the Board on the contract claim, the state court said:

> [T]he relationship between a teacher and a board of education is contractual and one that is protected against impairment by any state law by Article I Section 10 of the United States Constitution and by the Due Process Clause of the Fourteenth Amendment, subject to the qualification that pertinent state statutes in effect at the time a contract is formed are to be read into it.

No claims or findings of First Amendment violations were made in the state court proceeding.

FEDERAL ACTION:

On July 10, 1980, petitioner filed the instant suit in federal court under 42 U.S.C. Sections 1983 and 1985 against the same parties to the state court suit and arising out of the same facts and circumstances as the state claim. In this suit, petitioner alleged, in addition to the facts set forth in the state claim, that her First Amendment rights were violated by the conduct of the Board and the individual defendants.

The district court held that all petitioner's federal claims were barred by the doctrine of res judicata. (See Appendix to Petition for Certiorari at C-17 et seq.) This decision was summarily affirmed by the Sixth Circuit. (Id. at A-15).

SUMMARY OF ARGUMENT

The doctrine of res judicata is applicable to Section 1983 actions, *Allen v. McCurry*, 449 U.S. 90 (1980). Thus, where a state court has determined between the same parties Fifth and Fourteenth Amendment property and due process rights regarding an employment contract, as well as statutory rights relative to notice requirments of meetings of boards of education, res judicata will bar petitioner's same claims between the same parties set forth in a federal court Section 1983 action, including First Amendment claims that could have been raised in the state action but were not.

ARGUMENT

In *Montana v. United States,* 440 U.S. 147, 153 (1979), this Court held that under the doctrine of res judicata, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." In *Allen v. McCurry,* 449 U.S. 90 (1980) this Court again defined res judicata, stating:

> 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. *Cromwell v. County Sac.,* 94 U.S. 351, 352, 24 L. Ed. 195.

449 U.S. at 94 (emphasis added).

In the case at bar, there have been two actions, between parties and privies, one of which has gone to judgment in state court and the other which is in federal court and now before this Court. The cause of action in both, however, is singular, has been disposed of by the state court. Thus, petitioner's claims are now barred in federal court by the docrine of res judicata.

Petitioner argues that the issues in the state court action are not the equivalent of the issues she raises in her Section 1983 federal claim and that the doctrine of res judicata is, therefore, not applicable. The record in this case, however, indicates to the contrary. The record also reveals that all issues but petitioner's First Amendment claim were disposed of by the state court, and that such court could have decided the First Amendment claim had it been raised. *Deane Hill Coutry Club, Inc. v. City of Knoxville,* 379 F.2d 321, 325 (6th Cir. 1967), *cert. denied,* 389 U.S. 897.

Petitioner's reliance on *Allen v. McCurry*, 449 U.S. 90 (1980) is somewhat bewildering, for the majority opinion of the Court in that case rejected any arguments that the principle of res judicata did not apply to Section 1983 actions, and stated:

> Because the requirement of mutuality of estoppel was still alive in the federal courts until well into this century . . ., the drafters of the 1871 Civil Rights Act, of which section 1983 is a part, may have had less reason to concern themselves with rules of preclusion than a modern Congress would. Nevertheless, in 1871 res judicata and collateral estoppel could certainly have applied in federal suits following state court litigation between the same parties or their privies, *and nothing in the language of section 1983 remotely expresses any congressional intent to contravene the common law rules of preclusion .... Section 1983 creates a new federal cause of action. It says nothing about the preclusive effect of state-court judgments.*
>
> *Moreover, the legislative history of section 1983 does not in any clear way suggest that Congress intended to repeal or restrict the traditional doctrines of preclusion.* The main goal of the Act was to override the corrupting influence of the Ku Klux Klan and its sympathizers on the governments and law enforcement agencies of the Southern States ..., and of course the debates show that one strong motive behind its enactment was grave congressional concern that the state courts had been deficient in

> protecting federal rights .... But in the context of the legislative history as a whole, this congressional concern lends only most equivocal support to any argument that, in cases where the state courts have recognized the constitutional claims asserted and provided fair procedures for determining them, Congress intended to overide section 1738 [the "full faith and credit" statute] or the common-law rules of collateral estoppel and res judicata. Since repeals by implication are disfavored ..., much clearer support then this would be required to hold that section 1738 and the traditional rules of preclusion are not applicable to section 1983 suits.

449 U.S. at 97-99 (emphasis added) (citations omitted). The *Allen* court definition of res judicata cited the Supreme Court case of *Cromwell v. County Sac*, 94 U.S. 351, and defined res judicata as precluding not only issues which were raised in a prior action but also those issues which *could have been* raised in that action. 449 U.S. at 94. This is in accord with the Sixth Circuit's holdings in *Coogan v. Cincinnati Bar Assn.*, 431 F.2d 1209 (6th Cir. 1970), *cert. denied*, 401 U.S. 939, and *Mayer v. Distel Tool and Machine Co.*, 556 F.2d 798 (6th Cir. 1977).

Other circuit courts are in accord with the proposition that res judicata applies in section 1983 cases to constitutional issues which could have been raised in prior litigation between parties but were not. In the Eighth Circuit case of *Robbins v. District Court*, 592 F.2d 1015, 1017-18 (8th Cir. 1979) the court said:

In *Green v. American Broadcasting Companies, Inc.*, 572 F.2d 628, 632 (8th Cir. 1978) we held that an issue may not be relitigated in a second lawsuit where that issue had previously been litigated in a prior lawsuit which involved the same cause of action. *Furthermore, issues which might have been raised in the first lawsuit may not be raised in a second lawsuit arising out of the same cause of action.*

. . .

While *Green v. American Broadcasting Companies, Inc., supra,* did not involve constitutional issues, this circuit and several other circuits have held that the principle of *res judicata* applies to section 1983 actions and *operates as a bar to the relitigation of constitutional issues actually raised as well as to constitutional issues that could have been raised in a prior lawsuit if the second suit concerns the same operative nucleus of fact. Goodrich v. Supreme Court of South Dakota,* 511 F.2d 316, 318 (8th Cir. 1975); *Jenson v. Olson,* 353 F.2d 825, 827 (8th Cir. 1965); *Rhodes v. Meyer,* 334 F.2d 709, 716 (8th Cir. 1964); *Scoggin v. Schrunk,* 522 F.2d 436, 437 (9th Cir. 1975), *cert. denied,* 423 U.S. 1066, 96 S.Ct. 807, 46 L.Ed.2d 657 (1976); *Blankner v. Chicago,* 504 F.2d 1037, 1042 (7th Cir. 1974), *cert. denied,* 421 U.S. 948, 95 S.Ct. 1678, 44 L.Ed.2d 101 (1975); *Lovely v. Laliberte,* 498 F.2d 1261, 1263 (1st Cir.), *cert. denied,* 419 U.S. 1038, 95 S.Ct. 526, 42 L.Ed.2d 316 (1974).

(Emphasis added.)

Accord, Spence v. Latting, 512 F.2d 93, 98 (10th Cir. 1975), *cert. denied,* 423 U.S. 896.

In the state court proceeding, petitioner had every opportunity to raise and litigate the constitutional claims which she has raised in this action. The state and federal courts have concurrent jurisdiction to hear and decide constitutional issues. *Dowd Box Co. v. Courtney,* 368 U.S. 502, 507-508 (1962); *see also Jackson v. Kurtz,* 65 Ohio App. 2d 152, 156 (1979) (Ohio courts have concurrent jurisdiction of Section 1983 claims). Specifically, Ohio Revised Code Section 2305.01 and Article IV of the Constitution of the State of Ohio provided the Common Pleas Court with jurisdiction over petitioner's federal claims.

In light of the foregoing, respondents respectfully submit that petitioner, having had the opportunity to litigate her federal claims in the courts of Ohio, and having failed to do so, is now precluded from litigating these claims in a new action in federal court. The decision of the United States District Court and the Sixth Circuit Court of Appeals to apply traditional claim preclusion concepts in this Section 1983 action was sound and well-reasoned, and should be affirmed by this Court.

CONCLUSION

In light of the foregoing, it is clear that the doctrine of res judicata is applicable in the federal courts to bar claims under 42 U.S.C. Sections 1983 and 1985 which could have been litigated in a prior state court proceeding between the same parties, but were not.

Respondents Warren City School District Board of Education and individual board members Catherine O. Swan, Henry J. Angelo, Willard T. Reuben, Raymond Tesner, Mary Milheim, and Barbara Miller accordingly urge most strongly upon this Court that it deny the petition for writ of certiorari filed herein.

Respectfully submitted,

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