jen 02/24/84 Renewed 2/25 Fine memo.

Joe would Reverse on Gardner-Denver & Barrentine. This is my tentative view.

As a matter of public policy, it makes little sense to allow a person who loses an arbitration on a purely factual issue ("just cause for discharge") to relitigate that question. But the problem is §1983 that has been expanded to be the single most burdensome fed. statute in terms of encouraging litigation - most of it frivolous.

BENCH MEMORANDUM

No. 83-219

McDonald v. City of West Branch, Michigan

Joseph Neuhaus February 24, 1984

Question Presented

Do unappealed arbitration ~~awards~~ proceedings conducted under state law have preclusive effect in subsequent §1983 suits?

Summary of Facts & Decisions Below

McDonald was dismissed from his job with the West Branch police force. He filed a grievance under union procedures, alleging that he was dismissed without "proper cause," as required by the collective bargaining agreement. McDonald was represented by a union lawyer. After a hearing, the arbitrator held that McDonald had been dismissed for "proper cause". Resolving a conflict in testimony on the basis of credibility, the arbitrator found that the officer had engaged in unconsented sexual touching of a young married woman. See J.A. 32-38. The arbitrator rejected the other enumerated charges. McDonald then filed a §1983 action alleging that he was fired in retaliation for exercising his First Amendment rights. J.A. 4-5. The DC refused to give the arbitration preclusive effect, but allowed it to be admitted into evidence. McDonald presented evidence to show that he had been fired for investigating a charge of sexual misconduct against the chief of police. The jury found that McDonald, who was the local union steward, had been fired for "his union activity," and therefore in violation of the First Amendment. Petn. App. A15. He was awarded damages.

CA6 reversed. It held that the DC should have given res judicata and collateral estoppel effect to the arbitrator's decision. The court said that McDonald's First Amendment argument was an attempt to relitigate the issue of the reason he was dismissed. Petn. App. A3.

Discussion

1. What law to apply. The parties discuss both federal and state cases with regard to collateral estoppel and res judicata, and it is not entirely clear which law properly applies. It is reasonably certain only that the full faith and credit statute, 28 U.S.C. §1738--which requires that courts give the same effect to a state judgment as the courts of that State would--does not apply to arbitrations. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 477 (1982) (dictum). This presumably is because arbitrations are not "judicial proceedings" within the meaning of §1738. This does not mean, however, that arbitrations have no preclusive effect. As a matter of federal common law, the federal courts routinely give preclusive effect to federal arbitrations, at least as to actions based on rights arising out of the collective bargaining agreement. See Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 737 (1981); Allen v. McCurry, 449 U.S. 90, 96 (1981). When the arbitrations are conducted under state law, it probably is true that federal common law likewise would give preclusive effect.

Full Faith & Credit Clause not applicable

What is not clear is whether that law instructs federal courts to give arbitrations the same effect they would have in state courts, or whether the federal courts instead should give arbitrations such preclusive effect as they deem appropriate in light of federal principles. Allen v. McCurry's instruction to look to state law does not necessarily apply because that was with reference to §1738, which specifically refers to state law. As a policy matter, it may be that federal principles should gov-

ern. Unappealed arbitrations do not involve the comity concerns that motivate §1738. Denying them preclusive effect expresses no disrespect for state judicial proceedings, but suggests only that a private arrangement does not meet federal standards of trustworthiness. The involvement of state law in determining the fairness of the proceeding is fairly minimal. Thus, it perhaps should make no difference whether the arbitration formally is under federal or state arbitration procedures. The preclusive effect of both arguably should be governed by federal law. See, e.g., Barrentine (federal law governed preclusive effect of federal arbitration).

In any case, I do not think the question is important in the present case, because federal and state law appear to reach the same result. First, the Michigan Supreme Court appears to use a very similar approach to resolving these problems as this Court used in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), and Barrentine. That is, the court examines the legislative intent of the statute governing the second action--in this case, §1983--to determine whether such statutory rights were meant to be resolved "under a system which provides significant procedural, and appellate, review protections." Detroit Fire Fighters v. City of Detroit, 408 Mich. 663, 293 N.W.2d 278, 283 (1980). Second, in the Detroit Fire Fighters case the court reached a result similar to the one I reach in this case: courts enforcing independent statutory results were not to defer to arbitrations. In that case, moreover, which involved deference by the Michigan equivalent of the NLRB, the court rejected the analogous federal doc-

trine of deference, because Michigan did not have a public policy in favor of arbitration for public employees.

Thus, if state law applies, it is likely the state courts would go through a Gardner-Denver analysis like the one set forth below. It also is probably that they would reach the same result, i.e., no preclusio. In fact, it appears that they would be more likely to do so under state law because the legislature has not articulated a policy of ~~encouraging~~ arbitrations.

2. Analysis under Gardner-Denver and Barrentine. The approach of Gardner-Denver and Barrentine appears to be two-fold: first, the Court found a congressional intent in the federal statutes under which the second action was brought not to divest the courts of authority to decide the case because of a prior arbitration; second, the Court looked to the nature of arbitration and concluded for itself that the statutory rights are "best protected in a judicial rather than in an arbitral forum," Barrentine, supra, at 745; see Gardner-Denver, supra, at 55-59. I find under both of these tests that this case is not meaningfully distinguishable from Gardner-Denver and Barrentine, and therefore that the result here should be controlled by those cases.

Gardner-Denver involved facts very similar to those here. The plaintiff claimed that he had been fired because of race. The arbitrator found that the dismissal had been for "just cause." A unanimous Court joined your opinion holding that the arbitral determination did not have preclusive effect in a subsequent Title VII action. Barrentine involved a claim that

truckdrivers were not being paid for preparation time required by the company. The union's claim was rejected in arbitration. The truckdrivers sued under the Fair Labor Standards Act (FLSA). The Court held 7-2 per Justice Brennan that the arbitration had no preclusive effect in the FLSA action.

a. Congressional intent. Amicus EEAC, at 14, argues that §1983 is different from the statutes at issue in Gardner-Denver and Barrentine in that the latter contained extensive administrative and judicial schemes in particular and discrete areas. Amicus does not make clear what difference this makes. Arguably, it may be that the elaborate remedies of Title VII and the FLSA show a congressional intent not to have private arbitration interfere with its remedial scheme. The problem with this argument is that there was no elaborate scheme of remedies in the FLSA. The law provides merely provided for recovery in any court of double the unpaid minimum wages, along with attorney's fees. See Barrentine, supra, at 733, n. 8. Thus, while it is true that the Court in Gardner-Denver relied on the elaborate and overlapping remedies provided in Title VII, in Barrentine the Court looked to far less. The Court found sufficient congressional intent in the fact that Congress provided access to courts without an exhaustion requirement, and that it encouraged court resolution by providing back wages and attorney's fees. Section 1983 thus is not relevantly different from the FLSA in its elaborateness.

It is true that §1983 covers a lot more legal territory than either the FLSA or Title VII--although the two latter statutes together already provide a cause of action to a great number of

grievances. The only way the breadth of the subsequent statute might be relevant, however, is that a broad statute means the judicial action will very often duplicate the arbitration. I do not see how this makes a difference. In any case, the opinion in Gardner-Denver suggests that it does not matter that contractual rights are similar to or duplicative of rights conferred by the relevant statute. 415 U.S., at 54. The important point is that the statute confers individual rights, while the collective bargaining agreement confers collective rights. See Barrentine, supra, at 739; Gardner-Denver, supra, at 49-50. Section 1983 is no different in this respect.

One final distinction between §1983 and the previously considered statutes is that the former necessarily involves public rather than private employers. This may make a difference in two ways. First, the State may have an increased interest when it or its subdivisions is the "defendant" in an arbitration. But it is difficult to see why the federal courts should treat state defendants differently from private ones in this particular way; there is no reason arbitrations involving state employers are more trustworthy than those involving private employers. Second, Gardner-Denver pointed out that arbitration clauses are obtained in exchange for no-strike clauses. See 415 U.S., at 54-55. As a result, the Court did not think that declining to give preclusive effect to arbitration would "'sound the death knell for arbitration clauses in labor contracts,'" id., at 54 (quoting lower court), since employers still had an incentive to have them. It may be argued that the situation of a public employer is differ-

Difference between arbitration & 1983

ent because its employees generally are barred from striking anyway. But this fact does not subtract from the usefulness of arbitrations in keeping labor peace. See id., at 55. Moreover, public-employee arbitration statutes may be part of the political "bargain" by which no-strike provisions were obtained. Finally, the fact that public-employee arbitration clauses may decrease should not affect the decision as to preclusion, since Michigan has declined to adopt a public policy in favor of such arbitration and the federal labor statutes leave public employment to the States.

Thus, there is nothing in the nature of §1983 that distinguishes it from Title VII or the FLSA. If the federal statutory rights in the latter statutes were intended to be enforced in a judicial setting, the rights protected by §1983 are no different.

b. Nature of arbitration. Similarly, there is no difference in the nature of the arbitrations here that makes them any more suited to resolving these statutory issues. Gardner-Denver and Barrentine noted four important distinctions between arbitrations and the judicial proceedings contemplated in the statute: (1) the arbitrator's mandate is to enforce the collective bargaining agreement, and not statutory rights--if the two conflict, he presumably must enforce the former; (2) the arbitrator is skilled in the law of the shop, not the public law issues that are involved in interpreting the statutes at issue; (3) the factfinding procedures are not commensurate to those present in courts; and (4) the union controls the decision whether to arbitrate and the

course of the arbitration--its interests may not be the same as those of the individual employee whose statutory rights are at issue in the second action. All of these factors are present with equal if not greater force in this case.

The amicus EEAC points to two aspects of the present proceeding that suggest that preclusion should be afforded. First, the question here is the purely factual one of the motive for discharge--as to that the arbitrator has as great or greater competence than a court or jury. Second, in this case, the union's interests and the interests of McDonald converge, because he was dismissed for union activities. It should be noted that both of these points are not undisputed as a matter of interpreting the record. As to the second, McDonald says the record shows that he was fired for classic First Amendment activity--speaking out on matters of public interest and pursuing grievances against the government--not issues that were at the core of the union's interests. On the first point--the factual nature of the finding here--it is not clear a close look at the record will help respondents. It appears that the arbitrator in fact did not determine the motive for discharging McDonald, such that collateral estoppel would apply in a subsequent §1983 action. The arbitrator's opinion reveals only that he found that the sexual misconduct charge against McDonald constituted a proper cause for discharging him. It did not find that the actual motive was not the policeman's First Amendment activity, which is the controlling question in a §1983 action.

In any case, Gardner-Denver also was a case in which the question was the purely factual one of motive. And the Court was aware that there may be cases in which the interests of the union and the employee are congruent. See 415 U.S., at 58, n. 19. But the Court did not suggest that the outcome turned on these or any peculiar facts about the proceeding then before it. Rather it promulgated a broad rule as to all Title VII actions. This approach is supported by the nature of collateral estoppel and res judicata: they should be easy rules to apply because their aim is to avoid excessive litigation. The ambiguous state of the record here also argues against having the case turn on the facts of the present case rather than on the nature of arbitrations and §1983 actions generally.

In summary, there is nothing in this case to distinguish it from Gardner-Denver and Barrentine. The teaching of these cases appears to be that the enforcement of basic federal rights should not be left to arbitration or any nonjudicial proceeding. See also Kremer, 456 U.S., at 477 (dictum) (an unappealed state administrative determination "does not deprive an individual of a right to a federal trial de novo on a Title VII claim").

RECOMMENDATION: Reverse.