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See Supplemental
memo by my clerk.

Only "conflict" is at Circuit Ct level
intra-circuit

(There is a conflict, with a few district court cases in other circuits, but no other circuit court cases - ✓ David)

PRELIMINARY MEMORANDUM

Sept. 26, 1983 Conference
List 25, Sheet 3

No. 83-219

GARY McDONALD (fired employee)

v.

CITY OF WEST BRANCH, MICH., et al. (employers)

Cert to CA6 (Keith, Merritt, Brown) (order) (Merritt, conc)

Federal/Civil

Timely

1. SUMMARY: Whether an unappealed arbitration award has res judicata or collateral estoppel effect in a §1983 action.

2. FACTS AND DECISIONS BELOW: Petr was fired by Resp City from his position as a police officer. He filed a grievance

~~Grievance~~ Deny w/ CF Record - see attached sheet. David

under the collective bargaining agreement between the City and his union, alleging that he had been fired without "proper cause." The arbitrator held that Petr had been fired for just cause--in particular, for a certain incident of misconduct. Apparently, Petr was not given specifics on the charged misconduct until the day of the arbitration hearing. Petr did not appeal the arbitrator's decision.

Petr filed this §1983 suit in EDMich against the City and some of its officials. He alleged that he had been fired in retaliation for activities protected by the First Amendment's guarantees of free speech and of the rights to assemble and to petition government for redress of grievances. The First Amendment issue had not been raised in the arbitration proceeding. The DC refused to give any preclusive effect to the arbitration award, but it admitted into evidence both the award and extensive evidence about the arbitration process. After a six-day trial, the jury found against Resp Chief of Police but in favor of the remaining defendants.

On appeal, CA6 reversed the judgment in favor of Petr. In a brief order, the CA held that "the district court should have applied res judicata and collateral estoppel principles to dismiss the section 1983 action." The court stated that the arbitrator found that the reason for Petr's discharge was misconduct and that the First Amendment claim "seeks to relitigate this issue." Since the parties agreed to settle their dispute through arbitration and since that process was not abused, the court reasoned, the award should not be disturbed. Judge Merritt ex-

plained in a concurrence that res judicata barred Petr's suit because "[t]he issues raised at the arbitration encompassed or could have encompassed those raised in this suit" and that collateral estoppel likewise barred Petr's action because the arbitrator found that Petr was fired for misconduct and not for any First Amendment activities.

3. CONTENTIONS: Petr contends that CA6's holding is wrong and that the error is important enough to demand correction by this Court. It is important because arbitration is increasingly common in public employment. Arbitration is often the prescribed route for vindication of rights under a collective bargaining agreement, whereas noncontractual legal rights, which cannot be addressed by an arbitrator, must and often will be vindicated elsewhere--for example, in a court action. Since arbitrations are ordinarily completed quickly, the issue of what preclusive effect to give an arbitration decision will frequently arise.

CA6 is wrong for several reasons. First, its decision conflicts with Alexander v. Gardner-Denver, 415 U.S. 36 (1974), where this Court held that arbitration awards have no preclusive effect in Title VII actions. The reasoning applies equally to §1983 actions. An arbitrator is required to "effectuate the intent of the parties rather than the requirements of enacted legislation." Id. at 56-57. An arbitrator's special competence is "the law of the shop, not the law of the land." Id. at 57. And, as indicated by the late notice of the particular charges of mis-

conduct in this case, "the factfinding process in arbitration usually is not equivalent to judicial factfinding." Id.

Second, CA6's decision conflicts with the decisions of four circuits that state administrative determinations, and a fortiori arbitration awards, should not be given preclusive effect in §1983 actions. The a fortiori derives from this Court's recognition in Kremer v. Chemical Construction Corp., 456 U.S. 461, 478 (1982), that administrative proceedings are better suited than arbitration proceedings to resolve civil rights claims. Of course, neither is subject to 28 U.S.C. §1738.

The Fourth Circuit stated in Moore v. Bonner, 695 F.2d 799, 800-801 (1982), that unappealed state administrative decisions do not have preclusive effect in federal courts. The Fifth Circuit stated in Patsy v. Florida International University, 634 F.2d 900, 910 (en banc), rev'd on other grounds, 457 U.S. 496 (1982), that "[u]nlike judicial decisions, state administrative proceedings carry no res judicata or collateral estoppel baggage into federl court." The Second Circuit has held that res judicata does not attach to state administrative proceedings. See Mitchell v. National Broadcasting Co., 553 F.2d 265, 276 (1977); James v. Board of Education, 461 F.2d 566, 570-571, cert. denied, 409 U.S. 1042 (1972). The Third Circuit has adopted a similar conclusion. New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education, 654 F.2d 868, 877 (1981). All four circuits adopted these positions in §1983 actions. In addition, THE CHIEF JUSTICE noted in his dissent in Moore v. City of East Cleveland, 431 U.S. 494, 524 n.

2 (1977), that "'state administrative agency determinations do not create res judicata or collateral estoppel effects.'"

Finally, several courts--including CA6--have held that arbitration awards should not be given preclusive effect in cases under section 1981. Becton v. Detroit Terminal of Consolidated Freightways, 687 F.2d 140 (CA6 1982), cert. denied, 103 S. Ct. 1432 (1983) (holding re §1981; dicta re §1983); Kern v. Research Libraries, 27 FEP Cases 1007 (SDNY 1979) (§§1981, 1983, 1985); Liotta v. National Forge Co., 473 F. Supp. 1139 (WDPa 1979), modified on other grounds, 629 F.2d 903 (CA3 1980), cert. denied, 451 U.S. 970 (1981); Hawkins v. Babcock & Wilcox Co., 24 FEP Cases 794 (NDOhio 1980).

Resp's brief in opposition is incoherent. I think Resp argues that 28 U.S.C. §1738 requires federal courts to give the same effect to an arbitration award as the state courts would, in this case that being preclusive effect. Resp cites to Fraser v. Ford Motor Co., 364 Mich. 648, 112 N.W.2d 80 (1961). Resp suggests that the underlying purpose of preclusion doctrine requires holding Petr to his agreement to arbitrate. Resp also tries to distinguish both the language in Kremer and the holding of Alexander; I cannot tell how. Even less can I tell how Resp purports to distinguish the lower court cases cited by Petr.

4. DISCUSSION: CA6's decision is wrong. Virtually all the reasoning in Alexander applies as much to §1983 claims as to Title VII claims, and there is no justification for treating them differently. There is no more reason in §1983 actions than

there is in Title VII actions to apply waiver or election of remedies principles. Moreover, contrary to Resp, 28 U.S.C. §1738 does not require preclusion: as this Court said in Kremer, "[a]rbitration decisions, of course, are not subject to the mandate of §1738." 456 U.S., at 477. (Resp also misinterprets the Michigan Fraser case, which concerns relitigation of a contractual claim already decided by agreed-on final arbitration; it does not concern a separate noncontractual legal claim). For the reasons stated by Petr, the issue also seems important. Finally, I know of nothing in this case that would make it an inappropriate vehicle to decide the issue.

I recommend a grant. The case might even be appropriate for reversal without argument.[1]

There is a response.

September 9, 1983 Taranto opn in petn

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[1]Assuming that arbitration decisions were to be treated like state court judgments, the res judicata portion of CA6's decision would still raise an issue to be addressed in Migra v. Warren City School Dist. Bd. of Educ., No. 82-738 (to be argued October 11)--whether res judicata bars raising in a federal suit issues that could have been but were not raised in an earlier state proceeding. It would not be appropriate to hold for Migra, however, because CA6 relied in the alternative on collateral estoppel, deciding that the arbitrator effectively resolved the First Amendment claim when he resolved the just cause claim.