In the ORIGINAL

Supreme Court of the United States

RUBIN KREMER,	)	
	)	
Petitioner,	)	
	)	
v.	)	NO. 80-6045
	)	
CHEMICAL CONSTRUCTION CORPORATION	)	

Washington, D. C.

December 7, 1981

Pages 1 thru 38

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Washington, D. C.

Monday, December 7, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:56 o'clock p.m.

APPEARANCES:

DAVID A. BARRETT, ESQ., New York, New York; on behalf of the Petitioner.

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the U. S. and E. E. O. C., as amici curaie.

ROBERT LAYTON, ESQ., New York, New York; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Kremer against the Chemical Construction Corporation.

Mr. Barrett, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF DAVID A. BARRETT, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BARRETT: Thank you.

Mr. Chief Justice, and may it please the Court, Petitioner is here today because the court of appeals for the Second Circuit held that his employment discrimination claim under Title 7 of the Civil Rights Act of 1964 had to be dismissed by the district court without any consideration of the merits of the claim. The only reason for the dismissal of the federal Title 7 action was that Petitioner had unsuccessfully sought relief for the same alleged discriminatory conduct under the New York state law that bans discrimination in employment.

The decision of the court of appeals is wrong because Congress intended to permit Title 7 plaintiffs to pursue their remedies under state law fully without losing the right to a de novo hearing of their claims in federal court.

QUESTION: Do you contend that Title 7 was an implied repeal of Section 1738, the full faith and credit

statute?

MR. BARRETT: I don't really think it is necessary for the Court to address the questions in those terms, Your Honor.

QUESTION: Well, let's address them in those terms for a moment. Do you contend it was or wasn't?

MR. BARRETT: Well, the entire statutory scheme of Title 7 presupposes a system in which there is first a state proceeding, then a proceeding before the EEOC, then a proceeidng in federal court, and I think what Congress intended was that all three of those steps should be given their full force and effect.

QUESTION: Well, certainly, but the full force and effect of the review by the appellate division in New York would not be given full effect if your contention prevails, would it?

MR. BARRETT: Your Honor, I disagree with that. The appellate division decided a question of state law, first of all. It didn't address Petitioner's Title 7 claims as such, but that is really beside the point. I think the basic point is that Congress intended in Title 7 to set up a statutory scheme that had a certain duplication, a certain overlapping of remedies, and that intent is clear, and it has been recognized by this Court in numerous cases.

Petitioner was discharged by Respondent, Chemical

Construction, from his job as a chemical engineer, and he was denied re-employment on several occasions, allegedly on the basis of his religion and national origin. Petitioner first filed his complaint with the EEOC, but the EEOC could not act immediately on the charge, because Section 706(d) of Title 7 requires it to refer the charge to the New York State Division of Human Rights for processing under the state human rights law.

The Human Rights Division eventually dismissed the charge because it said that there was not probable cause to believe it was true. That state agency decision is the only consideration that any government body, state or federal, administrative or judicial, has ever given to the merits of Petitioner's claim of employment discrimination, yet the Human Rights Division dismissed Petitioner's claim without ever holding any formal hearing.

QUESTION: Counsel, I suppose that a formal hearing could have been held had the Petitioner requested it.

MR. BARRETT: No, that is not quite right, Justice O'Connor. It is the Human Rights Division that decides whether or not there is probable cause. Only if it decides there is probable cause is a hearing then held. So it is not a question of the Petitioner requesting it.

As Petitioner was entitled to do under state law, he appealed the dismissal of his complaint both to an

administrative appeal board and to the appellate division of the Supreme Court, and I think it is important in further response to you, Justice Rehnquist, that the state legislature found it necessary to provide that step, additional step of judicial review as part of the state process that it enacted to deal with employment discrimination claims.

QUESTION: Why do you think it is helpful?

MR. BARRETT: I think it is helpful, Your Honor, because, as this Court recognized last year in Gaslight Club against Carey, the state procedure is really the whole. It is an integrated procedure. It is a whole, and the resort to state court, and of course the state court only hears the claim under an arbitrary and capricious administrative review standard, that resort to state court is properly viewed simply as an additional step in the state administrative process, a final step if you will, and I understand that it is a court, not a judicial body, but nevertheless, it is something that is part of the state system to which Congress intended, indeed, the state system as such required resort to initially.

QUESTION: Would your position be different here if the court review was de novo?

MR. BARRETT: Your Honor, that would obviously be a very different case from this case.

QUESTION: So your answer is yes, it would be?

MR. BARRETT: No, I don't think that it would be. The reason that I say that is because I think that Congress's intent in enacting Title 7 is what controls in any event. Now, as this Court has recognized in several earlier cases, the appropriate thing for a federal court to do in a Title 7 case where there have been prior proceedings, be they state, be they labor arbitration, be they some other form of administrative review, is to give those prior proceedings such weight as the district judge considering all the circumstances of the earlier determination, to give them such weight as the district court finds to be appropriate.

QUESTION: None of those cases involved a state court determination, though, did they?

MR. BARRETT: That's correct, Justice Rehnquist.

QUESTION: In that regard, Section 1738 really only refers to a state judicial proceeding, does it not?

MR. BARRETT: It is true that that is what Section 1738 refers to. However, the common law and Section 1739, which we mentioned in our reply brief, both make it clear that in general, a state administrative determination of an adjudicatory nature would be equally entitled to full faith and credit, and I think we can see clearly that Congress just didn't intend those general procedural rules to apply

to Title 7 cases, because it required resort to those state proceedings.

QUESTION: Going back to the state proceedings in this case, which you addressed a few minutes ago in response to my question, would you say that it is somewhat in the nature of a summary judgment proceeding that at least the petitioner had an opportunity to offer testimony or affidavits or such things to avoid the result that occurred, and simply didn't do it?

MR. BARRETT: No, I don't think that that is quite a fair analogy. The reason is that, in the federal court, for example, before you get summary judgment -- before you can move successfully for summary judgment, you have the opportunity for full discovery. There was nothing like that afforded to Petitioner in this case. We might have deposition evidence. He would have a chance to look through Respondent's business records.

QUESTION: Are you saying that he could not have offered such evidence to the state agency?

MR. BARRETT: I suppose if he could have stolen it, he could have gotten it, but he didn't have any way to get it and put it before the state agency. He told them his story. Respondent told them its story, or rather, I should say, it told a single investigator who looked into its claim, and Respondent presumably presented the story that

was going to benefit it most fully.

QUESTION: But the agency had the power to compel the Respondent to produce records.

MR. BARRETT: If the agency decided that that is what it wanted to do. It is perhaps worth noting that in a report just earlier this year, the New York State Bar Association, a committee of the New York State Bar Association that was composed of equal numbers of representatives of employees and employers reached the conclusion that with respect to both the Human Rights Division and the administrative appeal board, that neither agency has been funded to the degree necessary to enable it satisfactorily to perform its responsibilities under the human rights law.

I am not saying that that necessarily is what happened in this case, but that is a bit of the flavor of the kind of administrative proceeding that may exist in the states.

I would also just like to point out that once again, neither the administrative appeal board nor the appellate division had any authority to hold any sort of de novo hearing on Petitioner's claim, and moreover, with respect to his going into state court, the administrative decision that he received from the appeal board told him, and I quote, that he could "obtain judicial review" and that

"such proceedings shall be brought in the appellate division of the Supreme Court."

Now, ultimately both of those state bodies denied relief, and Petitioner finally returned to the EEOC, which, giving, as it must, substantial weight to the state proceedings, also found that there was no reasonable cause.

QUESTION: If he had been afforded the full hearing on all the claims he is now seeking to make at the state level, and that were reviewed in the state appellate court, would your position be the same as it is today, that there still is a de novo --

MR. BARRETT: It would be the same, Justice O'Connor. It would be the same as I think I told Justice White, that the district court could not dismiss the case out of hand on the basis of preclusion. It could give those proceedings appropriate weight in light of all the factors that you have described, and in such a case it might give them very heavy weight. There might be, indeed, almost nothing to do but to submit motions for summary judgment and have the district court decide the case.

QUESTION: You said, Mr. Barrett, did you, that the claimant can't force the agency into discovery proceedings?

MR. BARRETT: That is essentially correct, Your Honor.

QUESTION: That belongs -- that determination has to be made by the agency.

MR. BARRETT: Yes.

QUESTION: But had the agency engaged in extensive discovery proceedings, and they had been the basis of the decisions both administratively and in the appellate division, then I gather the district court, when the claimant came back there, would be in a position to perhaps say, well, there is nothing more to be done?

MR. BARRETT: That is exactly right, and the Respondent perhaps could move for summary judgment on that basis.

The decision of the court of appeals disrupts the very carefully thought out and very extensively debated statutory scheme that Congress enacted in Title 7. It allows one small part of the state proceedings to pre-empt the remaining steps in the federal system that Congress intended to be available to remedy job discrimination. One way that we can see this is in this Court's decision in Chandler against Roudabush.

There, the Court extensively analyzed the history of the 1972 amendments to Title 7. It recognized that Congress considered and rejected proposals to have an administrative agency -- there it was the EEOC -- exercise what the Court called primary adjudicative responsibility

for Title 7 cases, subject only to limited court review, yet the effect of the court of appeals decision is to allow the final resolution of discrimination claims to be made under a state procedural structure that is precisely of the same kind that Congress rejected for application in the federal system, or --

QUESTION: To federal employees, you mean.

MR. BARRETT: It wasn't just the federal employees, Justice Brennan. That was the issue in Chandler, but the '72 amendments as originally proposed would have given the EEOC power to hold hearings in all cases, subject to review under the Administrative Procedure Act, but the EEOC would have had primary enforcement responsibility for private cases as well.

Or, to put the argument a little bit differently, as I said earlier, the state legislature apparently believed that it was necessary to have judicial review as part of its state process for remedying discrimination claims. The decision below, however, gives the complainants an unacceptable choice. Either they may participate in the state proceedings without invoking the judicial review that the legislature thought was essential as part of that process, or they can forfeit their right to a federal court determination of their claim, a right that, as this Court has recognized a number of times, Congress clearly intended

them to have.

In short, there is nothing in the language or legislative history of Title 7 that even suggests that Congress intended to make any distinction between state administrative and state judicial proceedings. It simply intended in Title 7 to allow those states that were concerned with the problem of employment discrimination, and there are now 44, incidentally, that have enacted proceedings to deal with employment discrimination, to remedy the problem.

It made no effort to dictate the particular form of the state proceedings, and certainly it must have contemplated, for example, because it mentioned criminal proceedings right in the statute, that they would involve court judgments. Yet it nevertheless set up a system with the EEOC and then the federal courts to hear those claims after the states had acted on them. It makes no sense in the context of such a scheme to cut off the process at the very first step.

I would like to save the remainder of my time for rebuttal.

CHIEF JUSTICE BURGER: Very well.

Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,
ON BEHALF OF U. S. AND E. E. O. C. AS AMICI CURIAE

MR. WALLACE: Mr. Chief Justice, and may it please the Court, as the United States and the Equal Employment Opportunity Commission see the matter, the holding below is inconsistent with two aspects of Title 7's scheme and policies, and is contrary to the rationale of at least three of this Court's Title 7 decisions.

QUESTION: Mr. Wallace, I am just curious, the way you put it and the way it is in your brief. You say, the United States and the EEOC?

MR. WALLACE: That is correct.

QUESTION: Those are two different --

MR. WALLACE: Well, we have joined together. The Department of Justice, the Attorney General has some enforcement responsibilities under Title 7, and the EEOC has others.

QUESTION: And so you would be here even if the EEOC wasn't?

MR. WALLACE: That is correct, but they have joined in the brief.

QUESTION: Does the EEOC have a right to carry on its own litigation up through this Court?

MR. WALLACE: Up through all courts other than the Supreme Court, by statute. But we represent the EEOC in this Court.

The two aspects of the scheme and policies of

Title 7 that I am referring to are, one, that in holding that a judgment of a state court reviewing a state agency's action on a state law claim may have preclusive effect on litigation of federal claims in federal court, the holding below would discourage the full pursuit of state remedies by complainants of employment discrimination, precisely the policy that this Court expressed concern about in its decision in New York Gaslight Club against Carey. The policy of Title 7 is to encourage the full use and, Congress hoped, the resolution of many employment discrimination claims through available state procedures, and that policy would be frustrated if full pursuit of those procedures would have adverse consequences on the ability to assert the federal claim.

The other aspect of Title 7 that we find irreconcilable with the decision of the court of appeals is that Title 7 itself specifies that the EEOC in conducting its business is to give substantial weight, that it nowhere says anything about preclusive effect, it says substantial weight to the findings of state authorities that have previously been invoked with respect to the same claim.

Now, in most instances, to be sure, the EEOC is unlikely to find reasonable cause to believe that a violation has occurred when there has been an adverse resolution to the complainant in the state proceedings, but

there are instances in which, in light of everything presented during its investigation, including the evidence of the state proceedings, the Commission in giving those the substantial weight Congress prescribes, the Commission concludes that there is reasonable cause to believe that a violation of the federal statute has occurred.

QUESTION: Well, Mr. Wallace, take an entirely different area of the law. Supposing we are talking about security, and the plaintiff has a state securities case, it goes all the way up through the state court system, loses, then he brings an action under 10(b)(5) in the federal system. Now, there is nothing in any of the federal securities law that says the federal court has to give any sort of weight to the state proceedings. Would you say that 1738 didn't apply there?

MR. WALLACE: It might apply in that instance. I don't really see that 1738 plays a role in this case, with all respect, Mr. Justice Rehnquist. If one looks at 1738, all it says is that the judicial proceedings of any court of any state shall have the same full faith and credit in every court within the United States and its territories as they have by law or usage in the courts of such state.

All that the state court decided in this case was that the state administrative agency did not act arbitrarily or capriciously or abuse its discretion or make a procedural

error under state law in dismissing the complaint.

QUESTION: What if the state court had found that there simply was no discrimination?

MR. WALLACE: Well, that would be a different question, and I believe that the scheme of Title 7 would not give preclusive effect to that, although weight would be given to it, but if I may finish my thought here, there is no attempt to re-examine in the federal court whether an error was made by the state administrative agency in dismissing a complaint under state law. The other aspect of the New York scheme is that if one asserts this administrative remedy, then it cannot resort to any other remedy under state law. There is no attempt being made in federal court to resort to any other remedy under state law. It is entirely speculative to think that the New York courts would give this judgment any preclusive effect in a Title 7 suit.

Our position, as we stated in the Court last term, is that the New York courts don't have jurisdiction to entertain Title 7 suits, and the question would never even arise. In any event, neither the agency nor the reviewing court had any authority under New York law to consider a Title 7 case in this case.

So, I don't see that 1738 is in the case, myself.

QUESTION: Don't you think 1738 covers collateral

estoppel too?

MR. WALLACE: It does, but there is no attempt being made to --

QUESTION: I don't understand how you can say that -- if there had been a de novo determination in the state court that there had been no discrimination, the very fact that is at issue in the federal case, I can't believe you are suggesting that Title 7 then nevertheless mandates that that independent determination is not binding.

MR. WALLACE: That is precisely what I am suggesting, although it is not in this case, Mr. Justice --

QUESTION: I understand that. So you are --

MR. WALLACE: And I started to say, before 1738 came into the discussion, that Title 7 --

QUESTION: It has always been in the discussion.

MR. WALLACE: -- that Title 7 specifies that the EEOC, when it concludes that there is reasonable cause, has to attempt to conciliate. That is what Title 7 charges the EEOC to do, after it has given substantial weight to the state findings.

QUESTION: What does your provision that you are relying on say?

MR. WALLACE: It says that the Commission shall give substantial weight to the findings of a state authority.

QUESTION: What does authority mean?

MR. WALLACE: The statute doesn't specify it.

QUESTION: Normally, if you are talking about courts, you usually don't call them authorities, do you?

MR. WALLACE: There is no --

QUESTION: Do you have some legislative history that indicates that that includes courts?

MR. WALLACE: The legislative history indicated that Congress meant for the complainants to use whatever state procedures were available. Now, that doesn't mean that they need to bring a lawsuit of their own in courts, but as an integral part of the administrative process that New York provides --

QUESTION: That is one way of putting it, but it is nevertheless a court decision that would bind that person and the state, or and the other side. He couldn't restart that case in the state system.

MR. WALLACE: With respect to whether there had been a violation of state law. That is correct, Mr. Justice --

QUESTION: Or, he couldn't relitigate that fact of discrimination, even if he brought another cause of action.

MR. WALLACE: If there had been a state court determination of whether there had been discrimination, which is not this case. There is a --

QUESTION: Mr. Wallace, how can you say -- suppose

in this very case, after this very case, he brought another proceeding under another statute in the state, and his claim was he had been discriminated against. Are you saying in that second state court proceeding that this judgment would not be binding?

MR. WALLACE: It would be in the second state proceeding, because under state law --

QUESTION: Well, then, why wouldn't 1738 pick it up here?

MR. WALLACE: Because there is -- there is no attempt here to invoke any other state remedy, and New York state law provides that if he elects to go to the administrative remedy he can't invoke a judicial remedy. The fact that he sought review of the administrative finding against him is irrelevant under New York law to whether he could bring any other remedy. It isn't because of any deference to the New York court's decision.

QUESTION: Well, we are talking about a fact determination. We are talking about a fact determination. If that fact determination would be binding in state proceedings, why wouldn't it be binding in a federal proceeding? Surely the causes of action are different. Of course they are. But we are talking about a factual determination, and collateral estoppel.

MR. WALLACE: New York is free to decide what will

be binding in its proceedings and what won't be.

QUESTION: You are just saying that Title 7 did effect a partial repeal of 1738.

MR. WALLACE: Well, I -- I do think that 1738 permits for more specific statutes to be given their full effect, which is what is involved here. It states a general principle of law which, in our view, really isn't a part of this case, because all the New York court decided was not whether there had been discrimination or not, but whether --

QUESTION: Well, that could be put aside, too.

MR. WALLACE: -- the agency abused its discretion in dismissing a claim under New York law, and we will obviously have to stand on our brief for the remainder of our submission.

CHIEF JUSTICE BURGER: Thank you, Mr. Wallace.

Mr. Layton.

ORAL ARGUMENT OF ROBERT LAYTON, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. LAYTON: Mr. Chief Justice, and may it please the Court, this is a claim preclusion case. It centers on a judgment of the New York appellate division, first department, one of that state's second highest appellate courts. In light of what has been said here earlier, I must emphasize that this was a final judgment in the state of New York, and its finality emanates from a legislative act, New

York Executive Law Section 298, which reads as follows.

QUESTION: May I ask, because I know you will get to it in a minute, but if there were no appeal to the New York court, but really merely just an administrative finding in the New York system, would you make the same argument you are making today but base it on 1739 instead?

MR. LAYTON: No, sir, Your Honor. Absolutely not. We don't think that 1739 is in the remotest way relevant. 1739 is a statute which merely deals with the books and records such as birth certificate entries, driver's license entries in one state and another state. It does not deal and purport to deal with the preclusive effect of administrative agency determinations.

Secondarily, we believe Title 7, properly read, specifically intended not to give preclusive effect to state agency determinations. That is exactly what the statute says. What is missed here is the fact that this was a judgment of a court, and I believe that Section 1738, under traditional doctrines of claim preclusion which have been enforced by this Court for at least 200 years, is the proper guide here.

The question follows thereafter as to whether Title 7, in 1964 and 1972, repealed in any manner the pre-existing judicial and statutory circumstances, and it is our belief that without even reaching the doctrine of

repeal, that these two statutes are read together easily and there is no difficulty because the position asserted by Petitioner and the government is fundamentally incorrect.

Title 7 and its language, as Justice White correctly indicated, used the language, "state and local authorities". Beyond that, in the statute itself, "state and local agencies" are used interchangeably with "state and local authorities". Indeed, as recognized by the EEOC, its own regulations, which we have quoted in the supplemental appendix, and I call the Court's attention to Supplemental Appendix Page 59 to 60, this is the EEOC, 29 CFR, deferrals to state and local authorities. See 706 agency defined. And these regulations are replete -- Year after year EEOC has defined what they think state and local authorities are, and they are agencies.

The statutory history of the Act refers to state fair employment agencies. There is a substantial and a critical difference between an agency and a court, and I would like to call the attention of the Court to its decision in Alexander v. Gardner-Denver, which has been cited by Petitioner on its behalf, but I think incorrectly, and with respect, at 415 US 47, there is a critical statement by the Court in Alexander which reads, if I may, as follows:

"Consistent with this view, Title 7 provides for

consideration of employment discrimination claims in several forums," and the Court then cites the statute. The first is EEOC. The second is state and local agencies. The third is federal courts. It then says, "and in general, submission of a claim to one forum does not preclude a later submission to another, and its footnote clearly indicates by that it meant that Commission action is not barred by findings and orders of state or local agencies, and then it calls attention to McDonald-Douglas v. Green, which holds that proposition. The mere fact that the EEOC did not find probable cause is no bar. Congress, as recognized by this Court, was understanding that there were three forums involved, the EEOC, state and local agencies, and then the federal court, and none of the decisions of this Court read against that.

QUESTION: May I just ask you another question?

MR. LAYTON: Yes.

QUESTION: Your position, as I understand it, then, is that if a plaintiff or a claimant loses in the state agency, he then has a right under state law to appeal and he might also be able to bring a federal suit. He is faced with an election then. He has to choose --

MR. LAYTON: That is a choice.

QUESTION: He has to choose --

MR. LAYTON: That's right.

QUESTION: -- and if he goes the appeal route, he looses his federal rights, but he must make a choice right then and there. That is the way you read the statutory --

MR. LAYTON: Yes, he has that choice, and I should --

QUESTION: But he must make a choice there, because either way he goes, it is the end of the matter for him.

MR. LAYTON: Well, if he doesn't go into the state courts, he clearly has the right to preserve his right to a de novo action in the federal district court.

QUESTION: Right.

MR. LAYTON: He just can't have it both ways. He can't go the state route, come to its conclusion, be dissatisfied, and start again.

QUESTION: But he also really couldn't go into the federal court and appeal on the state court because he might lose on appeal while the federal action is pending. He really has to make a choice, one or the other.

MR. LAYTON: Well, Your Honor, I must say that he is only precluded from entering the federal courts for 60 days. On the 61st day he can bring an action in the federal court. And I must --

QUESTION: Provided he hasn't gone the state judicial route.

MR. LAYTON: If he has not gone the state judicial route.

QUESTION: Yes.

MR. LAYTON: Now, Petitioner has said that in some manner Mr. Kremer here was directed virtually or told that he had to appeal, and I think that is a substantial misstatement. I would like to call the attention of the Court to the joint appendix, Page 17, which is the notice of order, and what he is told by the state Human Rights Appeal Board is, "Any complaintant, respondent, or other person aggrieved by this order may" -- I underscore "may" -- "obtain judicial review thereof."

The following sentence says, "Such proceeding shall be brought" if he decides to do it. Then if he wants to do it he must bring it in the appellate division. But there is no order or direction to him. As Justice Stevens indicated, it is a choice that he has.

I must clear up one or two I think erroneous assumptions regarding the New York state administrative procedures. I think a question was asked by Justice O'Connor. It is quite plain that a number of procedures are available to the Petitioner, to the claimant. He must present sufficient factual material to convince the agency to take the matter further. In particular, he must, and if he does so, he is empowered to have the agency issue

subpoenas.

I call your attention to Supplemental Appendix, 64. We have quoted the agency's regulations. Application for Subpoena. "Subpoenas and subpoenas duces tecum may be issued by the designated division officers and employees upon the application of a party or party's attorney." He has to act.

QUESTION: Subpoenas to appear where?

MR. LAYTON: At any stage of the investigation, Your Honor.

QUESTION: Before whom?

MR. LAYTON: Before the division. That can be during the factual investigatory stage, or at the hearing stage, the public hearing stage. But, yes, he doesn't have an absolute right. I don't say that he has an absolute right. He simply has to ask.

QUESTION: Is there anything comparable to discovery proceedings?

MR. LAYTON: Well, the subpoena duces tecum -- the following sentence says "Issuance of a subpoena duces tecum at the instance of a party who appears without attorney shall depend upon a showing of necessity." There is discovery in terms of the subpoena duces tecum. However, I don't suggest that it is an absolute right he has. He asks for it. If he shows the necessity, the division, which is --

QUESTION: Well, it is not the kind of discovery in any event that he might have in your Supreme Court, for example.

MR. LAYTON: No. No, it is not the identical type of discovery, nor is it a duplication of the federal district court, nor do we think that it is required. We believe that Congress was dealing with employment discrimination in the same manner that New York state was dealing with employment discrimination for well over 40 years.

QUESTION: I must say, I gather your position is nevertheless that if he is unhappy with the record that is made before the administrative agency, then what he must do when he is finished with the agency proceeding is to go right into federal court. Otherwise, he will lose his right to go into the federal court if he takes an appeal.

MR. LAYTON: With the following caveat, Justice Brennan, that if he believes that somehow the agency hasn't treated him properly, hasn't acted on a subpoena request, hasn't properly investigated the matter, he can raise that issue in the Human Rights Appeal Board and before the appellate division, which is what this Petitioner did.

QUESTION: Without forfeiting his right to go into federal court?

MR. LAYTON: No, once he -- he could raise that at

the Human Rights Appeal Board.

QUESTION: Yes.

MR. LAYTON: But once he goes into the state court, he is entitled to raise that question, but then he --

QUESTION: What I am trying to get at, as I understood your position earlier, he can't go into the federal court once he goes into your appellate division.

MR. LAYTON: That is correct.

QUESTION: For whatever reason he goes there.

MR. LAYTON: For whatever reason. All I am saying is, along the way, and in the appellate division, he can raise all those procedural difficulties, and that court has ruled on those on numerous occasions, and reversed the division, and sent the matter back for reconsideration.

QUESTION: Under our decision in United States against Utah Construction Company, the Court has held that there can be preclusive effect from an administrative finding as well as a judicial one.

MR. LAYTON: Yes, sir.

QUESTION: So that isn't it possible under your construction that he could simply lose before the state human rights agency and then go directly into district court and still be precluded?

MR. LAYTON: No, Your Honor, I don't think so, because Congress has specifically said that for 60 days he

has to go -- he has to go to a state agency, administrative agency, and he still retains the right to come back. I believe Utah Mining is a case that holds that where the administrative agency procedure in toto is almost a replica of an entire court proceeding, then it may -- it may be found to have preclusive effect.

We don't argue here that Congress thought by sending a claimant to the state agencies and giving them an opportunity, primarily through conciliation, and through some effort at solving the problem -- it wasn't an adversary proceeding that Congress was sending them toward necessarily. We don't think that that is what Congress intended, and we don't think he should be precluded there at all.

QUESTION: Well, it said that he wasn't, didn't it?

MR. LAYTON: It said that he was.

QUESTION: He was not precluded?

MR. LAYTON: Not precluded.

QUESTION: Yes.

MR. LAYTON: That is exactly right, Your Honor.

QUESTION: I know there is some disagreement about the scope of the New York judicial review, not too much, but would it matter to your position what the judicial proceeding entailed? For example, supposing you had a state statute that said the only thing that the Court can review

is whether there was jurisdiction over the parties in the agency. Would that be enough to bring 1738 into play?

They argue, in effect, as I understand it here, that the appellate process really doesn't reveal the merits of the discrimination charge. It just reviews for procedural error. Suppose it was for jurisdictional error. Would your view still be the same?

MR. LAYTON: I think it would be, because we believe that that really is up to the New York state legislature and the New York state courts to determine what kind of preclusive effect would be granted --

QUESTION: Do you think Congress intended to draw that kind of distinction?

MR. LAYTON: What we are concerned about, and we have said, is that we do not believe that Congress wanted to trap Title 7 claimants, and we do not believe that Congress thought that they should be relegated to second class kind of treatment in the states. We do believe that in that unusual circumstance, and we think it is unusual --

QUESTION: Well, it is second class only in the sense that they don't have a right to appeal.

MR. LAYTON: Well, but your postulate is a very narrow right of appeal.

QUESTION: Yes.

MR. LAYTON: Yes. But to answer your question, we

still think that is preclusive. What we would say is not preclusive is that the state set up a sham or a phoney system. I think Congress was concerned about that, and we would -- we have a view that that kind of transparent judicial non-review would not or should not command preclusive effect. But we believe that Congress at the time that it enacted this statute was aware of what, if I may refer to as the ordinary rules of the game, that litigation exists, that the ordinary rules have applied for over 200 years, and there is nothing that we have uncovered that would indicate that it didn't; to the extent that we have uncovered anything, there would be an indication, and the comment we quoted of Senator Javits, that to the extent Congress considered the matter at all, they were aware that in 1972, claim preclusion, res judicata was alive and well --

QUESTION: You don't need to argue for any kind of preclusion here other than in a case where the state judicial proceeding purports to include a judgment that the discrimination determination was not arbitrary or unreasonable. That is all you need to get preclusion. You don't need to say that -- Suppose the only issue -- suppose there was an administrative finding, and the only issue that the claimant took to the courts was, he was denied the right to -- he was denied a subpoena, and he was turned down. He

was turned down. Now, you are really making a res judicata argument rather than a collateral estoppel argument, if you say there is preclusion there.

MR. LAYTON: Yes, we --

QUESTION: But you don't need to make that.

MR. LAYTON: We don't need to make it. Yes.

QUESTION: You are saying that --

MR. LAYTON: We don't need to.

QUESTION: You are saying here that the judgment of no probable cause to believe there is discrimination was not arbitrary.

MR. LAYTON: I would go a little further, Your Honor. In the opinion of this Court in New York Gaslight --

QUESTION: Do you have to -- if you think you have to, you may lose.

(General laughter.)

MR. LAYTON: I would just like to point out, Your Honor, in New York Gaslight against Carey, a decision of this Court, the state proceeding went to its conclusion through the New York courts. There wasn't a doubt in anyone's mind, the court's or the parties', that the employer there was not free to relitigate that claim, and it is our view that here the determination of the agency affirmed by the court was in the nature of a summary judgment treatment of his claim on the merit.

QUESTION: On the merits. On the merits.

MR. LAYTON: On the merits. He happened to --

QUESTION: That is as far as you need to go.

MR. LAYTON: That is as far as I need to go. All right. Thank you, Your Honor.

QUESTION: Mr. Layton, under your theory, now, I suppose that a state that basically were hostile to Title 7 claims could set up a system for these claims to grant, for instance, an automatic right to review in the state appellate proceedings for all these claims and then preclude everybody thereafter.

MR. LAYTON: You mean, compel all discrimination claimants to appeal --

QUESTION: Sure. I mean, wouldn't -- under your theory, isn't it possible that a state that basically was hostile to permitting Title 7 claims to be heard in the federal courts could set up a system that would effectively preclude everybody? I am not suggesting the state would set up a system that was unfair within the state hearing processes. That would be a different question. But isn't that a possibility?

MR. LAYTON: Slim. I think the answer is the answer I gave to Justice Stevens, which is that on the 61st day a claimant would then -- he could enter the federal district court. I do suggest that if there were some

devilish scheme that was concocted which somehow compelled him, trapped him and held him into the state system, I do think that is a matter at a later date, and not under the facts of this case, that this Court might well take, but I do think that under the present rules, on the 61st day he has easily the freedom to try his case in the federal district court.

QUESTION: Well, under your system, or your theory, a claimant might well be better advised to lose in the state proceeding rather than be trapped by an appeal at the state level. Is that right?

MR. LAYTON: No, I don't -- I don't really think so. I think that he still has a choice, Your Honor. You say trapped by an appeal. I do think that it is a voluntary act on the part of a litigant to take an appeal, as Federated Department Stores against Mortey indicated. The parties there decided not to appeal. This Petitioner decided to appeal. There was no compulsion exercised on his free choice.

I would point out that the -- as I have indicated, the line of cases that we are aware of of this Court, starting from earliest times, through Allen and McCurray, mandate an affirmance here, and I do not think that I have anything further to add to what I have said. If there are any other questions, I would be happy to deal with them.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Barrett?

ORAL ARGUMENT OF DAVID A. BARRETT, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. BARRETT: Just very briefly, Mr. Chief Justice.

First of all, with respect to Justice Stevens' question concerning Section 1739, if you look at the operative language of 1738 and 1739, it is identical for all practical purposes, and of course both of those statutes date from the very earliest days of the country. They are very general procedural statutes, like the venue statute, for example. And in a specific enactment to deal with a relatively limited and specific problem such as employment discrimination, enacted in 1964, amended in 1972, Congress simply acted under the supremacy clause to specify the weight that was to be given to state proceedings that preceded a Title 7 proceeding in the EEOC or in the federal court.

Congress never intended to force a litigant to choose to abandon his federal remedies by proceeding in a state. It wouldn't have set up this cooperative scheme if that is what it intended to do.

Petitioner has been trying for six years to get a hearing on his discrimination claim. He has been thrown out

of court not for sleeping on his rights but for pursuing them too diligently in what you might call exhausting state remedies. If he failed to anticipate that the second circuit would rule as it did in the Sinicropi case, which is the one that we are all concerned with here, he was in good company. District Judge Pierce in a decision in this very case before Sinicropi was decided held that he was not precluded, and now four other circuits, looking at the legislative history and at this Court's decisions, have reached the same result as Judge Pierce.

That is the proper reading of a remedial statute such as Title 7, and it is the only result that is consistent with the holdings and the spirit of this Court's decision in Alexander, in Chandler and, I think, most particularly, in New York Gaslight Club, where the Court looked at this very same New York procedure, clearly saw that it encompassed judicial review.

And to answer one final point, we don't say that the employer would be barred any more than the claimant would be from litigating in federal court if the claimant elects to pursue his Title 7 action there. What is fair for one is fair for the other, we think, so I don't think the Court needs to have any concern on that score.

All we are asking here is for the de novo trial before a federal judge that Congress intended, and we hope

that the Court will reverse the judgment of the Second Circuit. Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:47 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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RUBIN KREMER v CHEMICAL CONSTRUCTION CORPORATION # 80-6045

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BY Sharon Ryan Connelly