

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-219

TITLE GARY McDONALD, Petitioner v. CITY OF WEST BRANCH, MICHIGAN,
ET AL.

PLACE Washington, D. C.

DATE February 27, 1984

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GARY MC DONALD, :

4 Petitioner :

5 v. : No. 83-219

6 CITY OF WEST BRANCH, MICHIGAN, :

7 ET AL. :

8 - - - - -x

9 Washington, D.C.

10 Monday, February 27, 1984

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 1:00 p.m.

14 APPEARANCES:

15 DAVID J. ACHTENBERG, ESQ., Kansas City, Missouri; on

16 behalf of the Petitioner.

17 RICHARD G. SMITH, ESQ., Bay City, Michigan; on behalf

18 of the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments
next in McDonald against the City of West Branch.

Mr. Achtenberg, you may proceed whenever
you're ready.

CRAI ARGUMENT OF DAVID J. ACHTENBERG, ESQ.,
ON BEHALF OF THE PETITIONER

MR. ACHTENBERG: Mr. Chief Justice, and may it
please the Court:

Gary McDonald brought this Section 1983 action
to establish that his discharge violated his rights
under the Constitution. The issue before this Court is
whether he should have been forbidden to do that because
of a prior arbitration decision -- a decision which did
not deal with the constitutional issue, a decision by an
arbitrator who was not presented with and did not decide
the constitutional issue.

In Alexander v. Gardner-Denver and in
Barrentine v. Arkansas-Best Freight this Court held that
prior arbitration awards did not bar subsequent actions
under the Fair Labor Standards Act and under Title VII.
And the issue before this Court today is whether there
is some reason why a different rule should apply to
Section 1983 cases.

McDonald was discharged after receiving and

1 becoming involved in the presentation of certain citizen
2 complaints against the chief of police. These were
3 complaints by members of the public. As a police
4 officer he had received from at least six different
5 women complaints that the chief was involved in some
6 form of sexual misconduct or sexual assault. He passed
7 these on to various city officials, and an investigation
8 of the chief ensued. The chief was unhappy about this
9 and threatened McDonald and threatened one of the other
10 officers. He told McDonald on at least two occasions
11 that he would have his job for starting the
12 investigation.

13 This harassment culminated when McDonald set
14 up a meeting where one of the complaining women was to
15 present certain information to the mayor in her own
16 words. The chief walked into that meeting and
17 threatened the woman, he threatened McDonald. He again
18 said that he would have McDonald's job for starting the
19 investigation. The very next day the chief announced to
20 the city council that McDonald would be fired, and the
21 actual firing took place the day after that.

22 McDonald proceeded to file a grievance under
23 the grievance procedure provided in the collective
24 bargaining agreement, but the grievance procedure and
25 arbitration procedure which followed exemplified many of

1 the problems which are involved in using arbitration in
2 this sort of case.

3 McDonald was provided essentially no notice of
4 the only charge which the arbitrator sustained against
5 him -- the charge of having committed a sexual assault
6 on a minor female. Until the alleged victim, Mrs. Dack,
7 took the stand at arbitration, McDonald was never told
8 who it was he was supposed to have assaulted, or when or
9 where he was supposed to have assaulted her.

10 QUESTION: Did he ask for an adjournment to
11 prepare to meet those charges?

12 MR. ACHTENBERG: No. The attorney assigned to
13 him by the union did not.

14 QUESTION: Well, does that bring up the
15 subject of waiver possibly? Because you're complaining
16 about something now that he didn't object to then.

17 MR. ACHTENBERG: I don't believe it can be
18 said that he had not made the request on numerous
19 occasions. The question of whether he would have been
20 entitled to a waiver under the contract is one that we
21 have absolutely nothing in the record on. Just as --
22 and I think that that brings us to one of the other
23 problems with using arbitration to resolve individual
24 rights questions; and that is that McDonald did not
25 control his own defense. It was not his decision

1 whether to ask for an adjournment or not. It was the
2 decision --

3 QUESTION: Whose decision was it?

4 MR. ACHTENBERG: It was the decision of the
5 attorney assigned to him by the union over his
6 objection. He -- he requested -- he asked the union
7 whether he could have his own attorney present and was
8 told he could not. He did not even make the decision to
9 go to arbitration. That decision was made by the union.

10 The union, together with the city, without the
11 involvement of McDonald, picked the arbitrator. And the
12 union's attorney elected not to call the crucial witness
13 who would have corroborated McDonald's testimony; that
14 is that the so-called Dack incident simply never
15 occurred; that McDonald never touched Barbara Dack, that
16 he never said anything offensive to her. That witness
17 was called at trial and was undoubtedly persuasive
18 corroboration of McDonald's testimony to the same effect.

19 QUESTION: Well, Mr. Achtenberg, is that any
20 different than if this had, say, been a trial in a trial
21 court of general jurisdiction, and the petitioner's
22 lawyer there hadn't called a witness. I mean that's
23 kind of an ineffective assistance of counsel claim,
24 isn't it?

25 MR. ACHTENBERG: I don't believe so. The --

1 the lack of control over your own defense in a situation
2 in which the counsel represents you, not the interests
3 of the union, is somewhat different than the situation
4 where the attorney is there to represent the union's
5 interest.

6 QUESTION: Are you suggesting that the union
7 had kind of a secret interest in not calling this
8 particular witness, or just that the union lawyer wasn't
9 particularly diligent?

10 MR. ACHTENBERG: We don't know why the union's
11 lawyer did not call this witness. He may have had
12 concerns about what effects that might have on the
13 witness, on the witness himself, who was also a union
14 member.

15 QUESTION: Was any effort made after the
16 arbitration hearing to find out, to raise these
17 questions with the attorney who represented him?

18 MR. ACHTENBERG: The original complaint in
19 this case had the union joined in a state law pendant
20 claim as a defendant for failure of adequate
21 representation. The district court dismissed that, not
22 on the merits but on the basis that it did not want to
23 take pendant jurisdiction over that state law issue.

24 Now, that has not been further pursued; at
25 least to my knowledge that has not been pursued.

1 QUESTION: If you did not prevail here, would
2 you have an action over in the state courts against the
3 union or the union lawyer?

4 MR. ACHTENBERG: I believe it would be time
5 barred.

6 The issue presented to the arbitrator was not
7 even the same issue which is presented by the Section
8 1983 complaint. Under Mount Healthy v. Doyle, the issue
9 in the 1983 complaint is one of motive, one of what was
10 in Chief Longstreet's mind. Would he have decided to
11 discharge McDonald even without the First Amendment
12 activity?

13 The question the arbitrator decided was a
14 different issue, and that was simply whether there was a
15 justification assuming pure motive. It's very similar
16 to what happened in Alexander v. Gardner-Denver where
17 the arbitrator -- in Alexander the employee was charged
18 with having produced too many defective parts. He was
19 in a parts plant. The arbitrator dealt with the issue
20 of whether or not he produced too many defective parts
21 and whether that was grounds under the contract for the
22 discharge, but not with the issue of whether that was
23 the real reason for the discharge, whether in fact
24 racial discrimination was being masked by this
25 justification.

1 Similarly here the arbitrator did not deal
2 with the issue of whether anti-First Amendment animus,
3 you might call it, was being masked here by the excuse
4 of the -- of the Dack incident, which -- or the alleged
5 Dack incident.

6 I think I should deal with the argument made
7 primarily by amicus EEAC that we need to avoid -- we
8 need to grant preclusion in this case because otherwise
9 we will fill the courts with Section 1983 cases. I
10 don't think that will happen, but before we turn to
11 that, I think it's important to remember that we --
12 Congress has expressed a fundamental commitment to the
13 vindication of this sort of right.

14 In 1871 when federal causes of action were few
15 and far between, Congress thought these rights were
16 important enough to create such a cause of action. And
17 again in 1976 when it passed the Civil Rights Attorney's
18 Fee Act, Congress expressed its belief that these cases
19 were sufficiently important that special incentives in
20 the way of attorneys' fees for prevailing plaintiffs
21 should be provided to bring them. And I don't think
22 that this sort of fundamental congressional commitment
23 should be lightly ignored; but I don't think that
24 considerations of judicial economy necessarily militate
25 in favor of granting preclusion.

1 As this Court pointed out in Alexander v.
2 Gardner-Denver, and I believe in Barrentine, granting a
3 rule of preclusion will give incentives to unions and
4 employees to skip the arbitration process and instead go
5 directly into court, either state or federal.

6 QUESTION: Well, if the contract calls for
7 arbitration, they can't skip it.

8 MR. ACHTENBERG: They could skip arbitration
9 as to the Section 1983 case --

10 QUESTION: I'm speaking of the general claims
11 of discharges, all the working conditions.

12 MR. ACHTENBERG: That's correct. They could
13 not skip the Section 1983 -- I'm sorry -- they could not
14 skip arbitration as to their contractual claims.

15 QUESTION: Are you suggesting that perhaps the
16 unions wouldn't agree to arbitration in the collective
17 bargaining agreements if that were so?

18 MR. ACHTENBERG: It is possible that they
19 might not agree to arbitration, but I think more likely
20 that they would exclude specifically this sort of claim
21 rather than doing so implicitly, as I think they have in
22 most cases. They might explicitly exclude this sort of
23 claim so that although the contractual issue might be
24 resolved in arbitration, the 1983 constitutional claim
25 would be separated out and clearly could not be

1 precluded from being brought in federal court. And
2 therefore, cases which would otherwise be resolved in
3 arbitration, either because the employee won and got the
4 relief he was looking for, or because he lost and for
5 the first time realized that there were witnesses who
6 were going to testify against him, that what seemed to
7 him to be an obviously just cause might not seem so
8 obvious to an impartial decisionmaker. All of those
9 might --

10 QUESTION: What is the status of this
11 arbitration decision under state law?

12 MR. ACHTENBERG: Under state law this
13 arbitration decision would not be given preclusive
14 effect in a subsequent action to vindicate individual
15 rights. It would be given a -- I'm not sure it's
16 identical, but very similar to the same sort of effect
17 that the federal courts give it in --

18 QUESTION: What if the -- what if the
19 arbitration turned on why a person was fired, a factual
20 issue, and any suit to vindicate an individual right
21 would also turn on the same fact? How about in -- in --
22 in a state court proceeding, which you would say would
23 not be totally precluded as res judicata, but what about
24 the factual determination in the arbitration under state
25 law?

1 MR. ACHTENBERG: I think the answer to that is
2 in Michigan Civil Rights Commission ex rel. Boyd v.
3 Chrysler, in which the Michigan court said that --
4 quoted the portion of Alexander which said that the
5 federal court should try the case de novo.

6 QUESTION: Well, I'm asking what about -- how
7 about the trial on -- how about a trial in the state
8 court?

9 MR. ACHTENBERG: Yeah. That's the -- as I
10 understand Michigan ex rel. Boyd, it is saying that in
11 state court --

12 QUESTION: Suppose you're wrong about that?
13 Suppose that that factual determination would be
14 conclusive in the state suit. Let's just suppose that.

15 MR. ACHTENBERG: I don't --

16 QUESTION: Then wouldn't that have just as
17 much impact on a 1983 suit as would a state judicial
18 determination?

19 MR. ACHTENBERG: I don't believe so.

20 QUESTION: Why not?

21 MR. ACHTENBERG: As I believe you yourself
22 said in Kremer, Section 1738 does not apply to
23 arbitration awards. It does not apply to arbitration
24 awards because Section --

25 QUESTION: Well, yes, but suppose the state

1 court -- after all, I may have said that; I may be wrong.

2 (Laughter.)

3 QUESTION: I frequently am. But under state
4 law, let's just assume the arbitration proceeding had
5 just as much binding effect as a judicial determination
6 of a fact. Now, why shouldn't --

7 MR. ACHTENBERG: I think that the reasons that
8 this Court recited in Alexander and Barrentine are at
9 least as applicable in the First Amendment context, the
10 1983 context, as they were in the context of Title VII
11 or in the context of the Fair Labor Standards Act.

12 Arbitrators are not judges. Arbitrators are
13 not bound by the rules of evidence that -- that bind
14 courts. They do not have an -- they often do not have
15 an adequate record. They often are not lawyers.

16 QUESTION: Section 1738, too, speaks in terms
17 of judicial procedures, doesn't it, not arbitration
18 proceedings. It's a federal statute that requires
19 federal courts to give full faith and credit.

20 MR. ACHTENBERG: It specifically refers to
21 judicial proceedings --

22 QUESTION: Well, that wouldn't -- even if 1738
23 didn't apply, as you suggest that somebody else has
24 suggested, that still doesn't dispose of the issue.
25 1738 doesn't reach it, but why would -- well, do you

1 think the Court should be precluded from giving the same
2 finality to a factual determination in an arbitration as
3 a state court would?

4 MR. ACHTENBERG: I think -- I think it would
5 be a bad decision to do so.

6 QUESTION: And also you think inconsistent
7 with our prior cases.

8 MR. ACHTENBERG: Yeah. I think it'd certainly
9 be inconsistent with both Alexander and with
10 Barrentine. And the reasons that this Court set forth
11 in those two cases I think apply at least as strongly
12 here, because here again we have issues which involve
13 motive, we have issues which involve a statute which has
14 been subject to construction since 1871, and a
15 Constitution, or in this case constitutional amendment
16 which has been subject to construction long before that.

17 The -- the issues presented in these cases are
18 at least as foreign to an arbitrator as the issues
19 presented in Barrentine, which involved a -- a wage,
20 essentially a wage dispute. And as I believe the Chief
21 Justice said -- said in dissent in Barrentine, a civil
22 rights case is substantially different than a wage case.

23 QUESTION: In any event, you take the position
24 that Michigan law would not give preclusive effect to
25 the determinations of the arbitrator?

1 MR. ACHTENBERG: It would not in a subsequent
2 individual rights case. If this were a suit on the
3 contract, they would give it the same -- not exactly the
4 same as I read the case, but very similar to the sort of
5 deference given by the Steelworkers trilogy. In fact,
6 the Michigan courts have cited the Steelworkers trilogy
7 with some regularity, just as they have cited Alexander
8 and Barrentine.

9 QUESTION: I take it your -- your people --
10 your colleagues on the other side don't agree with you.

11 MR. ACHTENBERG: Can?

12 QUESTION: On how much --

13 QUESTION: Preclusive effect.

14 QUESTION: -- Preclusive effect this
15 arbitration provision would have.

16 MR. ACHTENBERG: Well, I -- I -- I don't --
17 you know, I don't say that I -- I made that decision. I
18 think the Michigan courts did in --

19 QUESTION: Well, I know, but -- but -- but
20 your colleagues on the other side don't agree with you,
21 do they?

22 MR. ACHTENBERG: All -- all I can say is I
23 think they're wrong.

24 (Laughter.)

25 MR. ACHTENBERG: I think my -- my thinking --

1 I think that the decision in Michigan ex rel. Boyd and
2 in Detroit Fire Fighters pretty clearly deals with that
3 issue.

4 QUESTION: You make a point that he wasn't
5 informed, your client wasn't informed about an appeal
6 from the arbitrator's award. Does the union contract
7 provide for appeal, is the arbitration final and binding?

8 MR. ACHTENBERG: I don't think there is an
9 appeal as we think of it. There are ways of
10 collaterally attacking the arbitration award. Those are
11 --

12 QUESTION: For fraud -- for fraud, for example.

13 MR. ACHTENBERG: Yeah. Those are available to
14 the union, and there's a suit for breach of fair
15 representation which would be avail -- which would be
16 available to the employee.

17 QUESTION: But when he hired -- when he joined
18 the union, he, in effect, hired the union to represent
19 him in all matters of this kind, did he not?

20 MR. ACHTENBERG: I don't believe so. I think
21 he "hired" perhaps involuntarily, although not in this
22 case. He was a member of the union. He hired the union
23 to represent him with regard to the contract, with
24 regard to his rights in collective bargaining. The --

25 QUESTION: Well, and all disputes arising

1 under the contract. Isn't that covered?

2 MR. ACHTENBERG: Disputes under the contract.

3 Not --

4 QUESTION: Well, a discharge -- a discharge is
5 a dispute under the contract, is it not?

6 MR. ACHTENBERG: It may, and it may also be a
7 dispute under the Constitution. As this Court
8 recognized, I think, in Perry v. Sindermann, your right
9 not to be discharged for exercising your First Amendment
10 rights is independent of any right you may have under a
11 contract. Even if you have no right not to be
12 discharged under the contract, you still have the right
13 as a public employee not to be discharged for exercise
14 of your First Amendment rights.

15 QUESTION: May I ask you a question? In your
16 answers to Justice White you were considering whether
17 the federal court might be required to follow the State
18 of Michigan rule on preclusion. I'd just like to ask
19 you the converse. Do you argue -- suppose this case had
20 been brought in state court under Section 1983; would
21 the state court be free to make its own decision on
22 preclusion, or would it be compelled to follow a federal
23 rule that you advocate?

24 MR. ACHTENBERG: I think the state court as an
25 issue of preclusion -- I believe that the correct answer

1 is that the state court has to follow the federal rule.

2 If --

3 QUESTION: In other words, you're in effect
4 arguing that 1983 compels the result that you're seeking.

5 MR. ACHTENBERG: I think the enactment of an
6 act such as 1983 or Title VII does. But I think that
7 even if you applied 1738 sort of analysis, under Haring
8 v. Prosise and I think also under Migra, this Court has
9 held the most preclusion you can give is the preclusion
10 that the state gives.

11 I'll point out that I don't think that the
12 court of appeals is at all clear about what rule of
13 preclusion it applied, since it cited no state cases and
14 essentially relied on the restatement.

15 I -- I want to make it clear that I don't mean
16 to --

17 QUESTION: Well, you can't rely on 1738. You
18 can't have it both ways. Under 1738 a federal court
19 can't give any more preclusion than the state would.
20 But if 1738 isn't even applicable to this case, you have
21 a whole new ball of wax.

22 MR. ACHTENBERG: That's correct. I don't
23 think that you -- that -- I don't think that 1738
24 governs here, because we do not have a state court
25 decision. I think if --

1 QUESTION: Judicial decision.

2 MR. ACHTENBERG: A state court decision or
3 judicial decision, a decision covered by Section 1738.
4 If I'm wrong about that, if this Court were to reverse
5 what it said in Kremer and say that 1738 applies, I
6 still think we're correct.

7 QUESTION: Right.

8 QUESTION: Was -- was this arbitration award
9 ever challenged in the Michigan courts?

10 MR. ACHTENBERG: No, it was not.

11 QUESTION: What -- what if it had been
12 challenged and the Michigan courts upheld it, so you
13 would have a judicial proceeding then confirming the
14 arbitration award. Would that make your analysis of
15 1738 any different?

16 MR. ACHTENBERG: Yes, I think it would. I
17 think it would be a question of what the person could
18 have brought in the act in that action and who brought
19 it. If the action in the state court permitted the
20 simultaneous bringing of the 1983 case, as it would, for
21 example, in Missouri where you could both -- well, at
22 least from an administrative decision you could in
23 Missouri; I'm not sure about arbitration -- where you
24 could both appeal the administrative decision and bring
25 your individual rights case.

1 But I think if the only thing that you were
2 permitted to join in that state court action was purely
3 an appeal of the arbitration award, I think that would
4 be a different issue.

5 I don't mean to take anything --

6 QUESTION: Well, counsel, you seem to equate
7 arbitration proceedings and arbitration awards with
8 administrative proceedings. Is that your position?

9 MR. ACHTENBERG: No. I -- I think arbitration
10 awards are entitled to less deference than
11 administrative.

12 QUESTION: Less than administrative?

13 MR. ACHTENBERG: Less than an administrative
14 decision.

15 QUESTION: What cases have held that?

16 MR. ACHTENBERG: I believe Kremer did. I
17 think in Kremer essentially the Court said that
18 administrators are entrusted by state law with the
19 interpretation of statutes, while arbitrators are not.
20 So that I think that -- you know, I don't think that
21 this is -- I -- I think it is less likely that deference
22 should be given to arbitration awards than to an
23 administrative proceeding by an administrator created by
24 --

25 QUESTION: Of course, that's argument wholly

1 beside the point, it seems to me, if what you're talking
2 about is a determination of fact, of historical fact
3 around which a case turns. It has nothing to do with
4 the -- with the construction of the statute or anything
5 else. It's a question of fact. And it may not -- and
6 it may not be a question of res judicata, but it might
7 be of collateral estoppel.

8 MR. ACHTENBERG: And I think that the reasons
9 indicated for giving de novo review for -- in Alexander
10 or in Farrentine apply equally here; and that is that
11 the factfinding process in arbitration does not approach
12 that of judicial proceedings.

13 I -- I don't mean to take anything away from
14 arbitration. I don't think it's an insult to a
15 specialized tribunal to say that it works best in its
16 area of expertise.

17 QUESTION: Well, if the state court had, as
18 Justice Rehnquist suggested, the state court had
19 confirmed the award, I take it you would -- you would
20 think there would be more to the argument that the
21 factual determinations of the arbitrator would be
22 conclusive.

23 MR. ACHTENBERG: I think there would be more
24 to the argument.

25 QUESTION: Yes. Quite a bit more, don't you

1 think?

2 MR. ACHTENEERG: Well, I think we would be
3 doing a great deal more analysis of what effect the
4 state courts gave to a confirmation of an arbitration
5 award in a subsequent individual rights case.

6 QUESTION: Yes.

7 MR. ACHTENBERG: Arbitration is the way that
8 Congress has decided -- and I think to a great extent
9 the state courts have decided -- is a good way to handle
10 disputes in the area of what we call industrial
11 self-government; but industrial self-government is just
12 that. That's the area where unions and management
13 together make the rules and can change them, define the
14 employees' rights and can change them, define the
15 employee -- the procedure for vindicating those rights
16 and can change them.

17 QUESTION: Well, are you suggesting that
18 arbitration, the arbitration mechanism is not used for
19 matters of great moment involving millions, hundreds of
20 millions of dollars?

21 MR. ACHTENBERG: No, I'm not -- I'm not
22 suggesting that at all. I'm suggesting that in the --

23 QUESTION: All arbitrations aren't just wage
24 disputes or discharge disputes. Many arbitrations
25 involve huge matters of importance, and sometimes they

1 have former judges or retired Justices of this Court as
2 arbitrators.

3 QUESTION: They must be important.

4 (Laughter.)

5 MR. ACHTENBERG: I -- I don't mean that
6 arbitration doesn't serve -- I don't mean that
7 arbitration doesn't serve in other areas as well, but
8 the common thread in all of those is that they are the
9 areas where the people have agreed that this is the
10 procedure that's going to be followed. And this case
11 arises in an area where Congress has defined the right
12 -- Congress has defined the procedure; the Constitution
13 defined the rights. Neither the union nor management
14 could change those rights. And I think that McDonald
15 should have been permitted, as he was, to use the
16 congressionally-prescribed procedure to vindicate those
17 constitutional rights.

18 I'd like to reserve the remainder of my time.

19 QUESTION: May I ask one question before you
20 sit down? If we should conclude -- and I'm not at all
21 sure we should -- but if we should conclude that you
22 have to look to state law, either because 1738 applies
23 or would apply if the arbitration award had been
24 confirmed or something like that, would you agree that
25 this case would have to go back to the court of appeals

1 to decide what the state law rule is?

2 MR. ACHTENBERG: I -- I 'don't think -- I dcn't
3 think so.

4 QUESTION: They didn't decide that, did they?

5 MR. ACHTENBERG: No, they did not decide that
6 issue.

7 QUESTION: And you're suggesting we should
8 decide it if we take that rcute?

9 MR. ACHTENBERG: Well, I -- I don't think that
10 there is -- in the past, as I recall, this Court did
11 essentially that. I don't think that there is a reason
12 not to reach that issue --

13 QUESTION: Well, we don't generally make first
14 decisicns on state law questions. At least I'm not used
15 to doing that.

16 Well, anyway, your -- your view is we shculd
17 decide it.

18 MR. ACHTENBERG: Yeah. I think it should be
19 -- it should be decided here.

20 QUESTION: Do you think we have to decide it
21 or not? I thought your argument was it was irrelevant.

22 MR. ACHTENBERG: No. I -- I don't think you
23 need to decide that issue, because I think -- I think
24 you only reach that issue if you decide that Section
25 1738 applies. I think it wculd be something of a

1 problem if we had, in fact, turned to the laws of every
2 state to determine this -- this issue. We don't do that
3 under Title VII. We don't do that under the Age Act.
4 We don't do that under the Fair Labor Standards Act.

5 QUESTION: I thought your argument was that
6 even if state law -- even if in a state individual
7 rights suit, even if the state would give conclusive --
8 conclusive effect or preclusive effect to this
9 arbitration award, that the 1983 suit could still go
10 ahead.

11 MR. ACHTENBERG: That's exactly my position.

12 QUESTION: Do you think that's consistent with
13 Kremer? You can respond to that later, if you want.

14 MR. ACHTENBERG: Okay.

15 CHIEF JUSTICE BURGER: Mr. Smith.

16 ORAL ARGUMENT OF RICHARD G. SMITH, ESQ.,

17 ON BEHALF OF THE RESPONDENT

18 MR. SMITH: Mr. Chief Justice, and may it
19 please the Court:

20 I represent the City of West Branch, Michigan
21 -- which is a community of about 1,800 people in the
22 middle of the lower peninsula of Michigan about 150
23 miles north of Detroit -- their city attorney, their
24 assistant city attorney, their city manager and their
25 chief of police.

1 This is a 1983 case which was filed in the
2 Eastern District of Michigan for the Northern Division,
3 United States District Court, under a -- after we had,
4 through an arbitration process, discharged Mr. McDonald,
5 the plaintiff, for cause.

6 The trial took about six days, five or six
7 days, and at the conclusion and before it went to the
8 jury, the court presented special questions for the
9 jury's consideration. Incidentally, over my objection.
10 But those questions were approved by the plaintiff's
11 attorney, and those questions went to whether or not Mr.
12 McDonald received due process on each of his claims.
13 And the jury answered in the case of every one of the
14 defendants that he had received due process. Only one
15 of the defendants was found to be liable. That was
16 Chief Longstreet. And this half a million dollar claim
17 which was brought in that court requesting not only that
18 money but all of the back pay and the like that this man
19 demanded, the jury found to be worth \$4,000 in actual
20 damages and \$4,000 in punitive damages.

21 QUESTION: Well, isn't that true in every
22 lawsuit? Lawyers always ask for the sky and come up
23 with something much less than that.

24 MR. SMITH: Well, it I think it goes to the
25 fact that we are told here that in an arbitration

1 proceeding that the arbitrator cannot design a relief
2 that you can get in a 1983 action; and I would say to
3 you that he'd have gotten a lot more had he won the
4 arbitration proceeding than he did in this litigation
5 that he brought in the United States District Court.

6 We're here today to ask this Court to give
7 preclusive claim effect to this arbitration opinion that
8 was entered in October of 1977 and uphold the appellate
9 court for the Sixth Circuit. We hope that in weighing
10 the evidence insofar as Mr. McDonald's rights,
11 individual rights are concerned, that you'll also give
12 consideration to the rights of the people up in West
13 Branch to be free of vexatious litigation and expense as
14 they had to put up with in this case.

15 Since this discharge, the record will show
16 that Mr. McDonald has had his arbitration hearing; he
17 has litigated his unemployment compensation benefits; he
18 has litigated his pension benefits; and he's filed a
19 worker's compensation claim alleging that he exacerbated
20 a back injury which we -- which he incurred while
21 lifting a subject out of an automobile two years before
22 we discharged him.

23 Now, we believe that the -- Mr. McDonald had a
24 fair hearing in front of that arbitrator, who
25 incidentally is a former circuit judge of Wayne County,

1 Judge Bowles --

2 QUESTION: Mr. Smith, did the arbitrator, in
3 your view, have authority to determine the
4 constitutional issue raised?

5 MR. SMITH: I believe that he did, Justice
6 O'Connor, and for this reason.

7 QUESTION: And what do you base that on?

8 MR. SMITH: I base it on this fact: I base it
9 on the fact that this man's claim in federal court was
10 that he was put upon, intimidated, and his First
11 Amendment rights were violated because he was engaging
12 in union activity.

13 Now, that was not, I will fully agree, touched
14 upon in the arbitration hearing because it was never
15 raised. It wasn't raised by McDonald in his efforts to
16 defend this case. And it was in the contract itself,
17 and therefore, I think that it was an arbitrable issue
18 and should have been raised at that point in time.

19 This -- this allusion to what Chief Longstreet
20 did or didn't do because he was charged with
21 indiscretions by Mr. McDonald is something completely
22 new. We didn't try that case in -- in the United States
23 District Court on that issue. Those weren't the
24 questions that were put to that jury to decide. Where
25 that issue appears is up in the United States Supreme

1 Court for the first time.

2 I would say to you that -- that under that
3 contract it's part of the essence of the contract to
4 raise that defense, because what we're talking about
5 here is whether or not this employee was fired for good
6 cause. And of course that issue should be raised in
7 defense if in fact that is a defense.

8 QUESTION: Well, that doesn't sound a lot like
9 the First Amendment claim to me.

10 MR. SMITH: I -- I don't understand --

11 QUESTION: All right.

12 MR. SMITH: In any event --

13 QUESTION: Well, is it your position that he
14 could have but did not raise this claim of union
15 activity in the arbitration?

16 MR. SMITH: That's absolutely correct.

17 QUESTION: So your position is he waived it by
18 not raising it.

19 MR. SMITH: I think he waived it. I think
20 that his lawyers should have brought that to the
21 attention of the arbitrator. And I'm going to suggest
22 to Your Honor that the reason that it wasn't brought to
23 the attention of the arbitrator is that the issue did he
24 do it or didn't he do it when it came to this discharge
25 for taking indecent liberties with this young woman in

1 his capacity as a police officer.

2 QUESTION: Mr. Smith, could he have gotten the
3 punitive damages against the chief of police in the
4 arbitration proceeding?

5 MR. SMITH: No, I don't think he could have
6 gotten the punitive damages, although I -- I've given
7 that some thought. There is nothing that I see in the
8 contract that doesn't -- that precludes that arbitrator
9 from fashioning any type of relief that he wanted to
10 fashion. But I would suggest to you I don't know of any
11 instance --

12 QUESTION: Could he have given relief against
13 the individual chief of police as well as against the
14 city?

15 MR. SMITH: I don't believe so.

16 QUESTION: Because that's the only party that
17 -- what?

18 MR. SMITH: No. I don't believe so, no. I
19 don't -- it would be against the city and the city only,
20 but of course the agent of the city was the chief of
21 police.

22 In -- in the arbitration hearing, they
23 developed 160 pages of transcript. There were, as I've
24 indicated, a competent arbitrator in Judge Bowles. They
25 were -- Mr. McDonald was represented by two

1 representatives of the union -- an attorney, a labor
2 attorney -- incidentally, there was another attorney in
3 the picture for a while representing Mr. -- Mr.
4 McDonald, and there's the suggestion when they talk
5 about Mr. McDonald not controlling, not having an
6 opportunity to control the proceedings, we believe he
7 controlled the proceedings, and we think that he was
8 dissatisfied with that -- with that attorney, and that's
9 why Mr. Claya came on board and took over the -- took
10 over the defense.

11 It was -- this arbitration was done under the
12 auspices of the American Arbitration Association. The
13 arbitrator at the close of the proceeding suggested that
14 each party file briefs. Briefs were filed. The
15 arbitrator took the matter under advisement for, oh, I
16 don't know, thirty days and then wrote a thirteen-page
17 opinion in which he made findings of fact and determined
18 that this man should be fired for cause, and that that
19 it would be of no avail to allow him to return to his
20 job.

21 We believe that preclusive effect should be
22 given to not only -- to all issues; that is, all issues
23 that could have been raised and should have been
24 raised. And may I just discuss that for a moment?

25 Mr. McDonald, if you read the record, was

1 streetwise. He was the man who brought the union into
2 this police department, which was comprised of a chief
3 of police and three officers. He negotiated and was a
4 signatory to the contract. From the inception he
5 administered the contract because he was the union
6 steward. And as I've said, he, I am sure, was aware of
7 that portion of the contract touching upon the inability
8 or the fact that the city could not in any way penalize
9 him for being in union activities, because Exhibit 4,
10 Plaintiff's Exhibit 4, which was offered in evidence and
11 received, was the grievance that he had filed a few
12 weeks or months before the other grievance which this
13 arbitration proceeding grew out of. And that grievance
14 was because he was complaining that the chief of police
15 was punishing him or intimidating him because of union
16 activities.

17 QUESTION: Mr. Smith?

18 MR. SMITH: Yes.

19 QUESTION: The only question presented in the
20 petition for certiorari is whether the arbitration award
21 should have been given preclusive effect by the district
22 court, I think. Speaking for me at least, this kind of
23 factual background of the characters, the people
24 involved, doesn't shed a great deal of light on that.

25 MR. SMITH: Well, in -- in response to that,

1 the best I can say is that I am well aware that there is
2 no case which specifically says that an arbitration
3 hearing can be given claim preclusion effect. What
4 we're asking this Court to do is to do that, because we
5 believe that that -- in so doing, it -- it's -- you're
6 balancing the rights of this individual against the
7 rights of this community and --

8 QUESTION: Well, Mr. Harkins, how would that
9 square with what the Court did in Alexander against
10 Gardner-Denver Company in the Title VII context?

11 MR. SMITH: Well, I think there's a
12 distinction between -- between a Title VII action and a
13 1983 action. The 1983 statute, as I understand it, was
14 a post-Civil War statute, that it was passed in order
15 that the states and the communities gave due process to
16 individuals. And in this case we believe they did give
17 due process to this individual. And that now that the
18 states have developed these procedures, now that the
19 states are giving due process, as they have, of course,
20 for many, many years, I believe that this Court should
21 adopt a claim preclusive rule which says when an
22 individual such as Mr. -- Mr. McDonald has had his day
23 in court, when Mr. -- when an individual like Mr.
24 McDonald does not take advantage of appeal, when Mr.
25 McDonald complains about his lawyers, we're going to

1 give it preclusive effect.

2 And if Mr. McDonald feels that he's got a
3 cause of action, sue the union, sue his lawyer for
4 malpractice if, in fact, that's where he believes the
5 fault lied, not subject the West Branches of this
6 country and these individuals from litigating up through
7 the federal court system until we reach, in this case,
8 the United States Supreme Court.

9 QUESTION: Mr. Smith, what you've just said
10 prompts me to ask this question. Was there a right of
11 appeal from the arbitration award?

12 MR. SMITH: Yes, sir.

13 QUESTION: Well, that -- that's the opposite
14 of what your colleague on the other side says, isn't it?

15 MR. SMITH: I don't -- I don't believe that he
16 said that. If -- if so, I didn't hear it. There is --
17 there is an appellate process, Your Honor, but it's --
18 it's very limited, and the courts are reluctant to
19 overturn an arbitration proceeding of any kind unless
20 it's shown there was fraud and the like.

21 QUESTION: So it's -- it's limited to such
22 things as fraud.

23 MR. SMITH: That's true.

24 QUESTION: There isn't anything on the merits.

25 MR. SMITH: That's true.

1 QUESTION: It isn't a review of the record; it
2 is a collateral attack, is it not?

3 MR. SMITH: That would be true.

4 QUESTION: Mr. Smith, when you used the term
5 "appeal" in answer, do you mean appeal within the
6 arbitration structure, like to a national organization,
7 or do you mean appeal from the arbitrator to the court?

8 MR. SMITH: To the state court.

9 CHIEF JUSTICE BURGER: Do you have anything
10 further, Mr. Achtenberg?

11 ORAL ARGUMENT OF DAVID J. ACHTENBERG, ESQ.,

12 ON BEHALF OF THE PETITIONER -- REBUTTAL

13 MR. ACHTENBERG: Just a little.

14 First of all, I want to make it clear that to
15 the extent that McDonald was a signatory to the
16 contract, he simply signed it on behalf of the union.
17 He was not -- there is no sense in which McDonald was
18 personally a party to this contract. It's a collective
19 bargaining agreement.

20 QUESTION: Well, isn't every member of the
21 union a party to the contract in all practical effect
22 and legal?

23 MR. ACHTENBERG: No. I believe the union --

24 QUESTION: A contract made on behalf of all
25 the members by the union as an entity.

1 MR. ACHTENBERG: The union is the party of the
2 contract, and the union as an entity has the right to
3 enforce it. The individuals do not. The individuals
4 only have -- as in this case, for example, only the
5 union has most of the rights under this contract.

6 QUESTION: Well, are you suggesting that he
7 had never agreed to the arbitration?

8 MR. ACHTENBERG: I'm suggesting that the --
9 the record indicates that he did not make that decision,
10 that the decision was made by Mr. Taft. He did not
11 object to it. I do not mean to suggest that he, you
12 know, said please don't take me to arbitration. That
13 didn't happen. The decision was made --

14 QUESTION: Then I'm not sure -- then I'm not
15 sure what your point is about it. He either consented
16 to the arbitration or he didn't. Now, in this record it
17 would appear beyond any question that he did consent to
18 the arbitration.

19 MR. ACHTENBERG: Well, I -- I -- I think the
20 record would indicate that the decision was made without
21 his assent or dissent. However, I don't believe that we
22 -- this is not a situation in which we would claim that
23 this was an involuntary arbitration. The decision was
24 made. He cooperated as best he could with the union in
25 presenting it.

1 Secondly, in response to the question about
2 whether our position is consistent with Kremer, I
3 believe at -- beginning at page 1895 of the Supreme
4 Court Reporter's report of that decision, it becomes
5 reasonably clear that this Court specifically
6 distinguished between arbitration and state
7 administrative proceedings. For example, in discussing
8 Alexander v. Gardner-Denver and the characteristics of
9 arbitration, it said, "These characteristics cannot be
10 attributed to state administrative boards and state
11 courts." The entire section -- that entire section of
12 the opinion seems to be an attempt to make it clear that
13 this is not overruling Alexander v. Gardner-Denver or
14 that arbitration is not covered by the same sort of
15 deference that is due to state court decisions under
16 Section 1738.

17 Thank you.

18 CHIEF JUSTICE BURGER: Thank you, gentlemen.

19 The case is submitted, and we'll hear
20 arguments next in Ruckelshaus against Monsanto.

21 (Whereupon, at 1:43 p.m., the case in the
22 above-entitled matter was submitted.)

23

24

25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of: #83-219-GARY McDONALD, Petitioner v. CITY OF WEST BRANCH, MICHIGAN, ET AL.

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