Nebraska Law Review

Volume 62 | Issue 2 Article 8

1983

Res Judicata, Collateral Estoppel, and Title VII: Tool or Trap for the Unwary? *Kremer v. Chemical Construction Corp.*, 102 S. Ct. 1883 (1982)

Douglas R. Hart
University of Nebraska College of Law, dhart@sidley.com

Note

Res Judicata, Collateral Estoppel, And Title VII: Tool Or Trap For The Unwary?

Kremer v. Chemical Construction Corp., 102 S. Ct. 1883 (1982).

> Courts can only do their best to determine the truth on the basis of the evidence, and the first lesson one must learn on the subject of res judicata is that judicial findings must not be confused with absolute truth.[1]

I. INTRODUCTION

Congress passed the Civil Rights Act of 1964[2] to provide a comprehensive scheme to battle discrimination.[3] Title VII of the Act[4] was enacted to prohibit employment discrimination on the basis of race, color, religion, sex, or national origin. This same Act established the Equal Employment Opportunity Commission (EEOC)[5] to oversee the administration of title VII. While the EEOC has

1. Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 315 (1957).
2. 42 U.S.C. §§ 2000e to 2000e-17 (1976) & (Supp. IV 1980).
3. *See* Vaas, *Title VII Legislative History*, 7 B.C. INDUS. AND COM. L. REV. 431 (1966).
4. Civil Rights Act of 1964, Pub. L. No. 88-352 tit. VII, §§ 701-16, 78 Stat. 253 (1964), *as amended*, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. IV 1980) [hereinafter cited as title VII].

   Title VII was passed under unusual circumstances. The Senate bill modified the version passed by the House. The Senate bill was a compromise measure hammered out in informal bipartisan conferences and passed without an explanatory report. The House then accepted the Senate's revisions without exception so there was no Senate-House conference report. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 (1968). For a good discussion of the legislative history of title VII, see Jackson, Matheson & Piskorski, *The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits*, 79 MICH. L. REV. 1485 (1981) [hereinafter cited as Jackson].
5. Civil Rights Act of 1964, Pub. L. No. 88-352 tit. VII, §§ 705-06, 78 Stat. 258, 259 (1964) (current version at 42 U.S.C. §§ 2000e-4 to 2000e-5 (1976)).

substantial powers,[6] enforcement of the Act is generally through private civil action.

A complementary scheme developed among the states with the implementation of state discrimination laws and the creation of state agencies to administer these laws. Thus, title VII was implemented with the intent to supplement rather than supplant state employment discrimination provisions and remedies.[7] This intention is demonstrated by the deferral provisions of title VII,[8] which

6. The EEOC is empowered to negotiate with an employer prior to the commencement of civil action by an aggrieved party. 42 U.S.C. § 2000e-5(b) (1976) states:

> If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion.

The EEOC then has the authority to sue the employer if the conciliation efforts fail. 42 U.S.C. § 2000e-5(f)(1976).

7. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974), where the Court noted that in the enactment and amendment to title VII, Congress indicated a general intent to accord parallel and overlapping remedies against discrimination. *See id.* at 47 n.7; *infra* note 77 and accompanying text. This intent also applied to other federal discrimination statutes. In Johnson v. Railway Express Agency, 421 U.S. 454 (1975), the Court dealt with two federal acts, title VII and 42 U.S.C. § 1981 (1976). The Court held that these two remedies were in no sense mutually exclusive. Resort to one did not foreclose concurrent or subsequent resort to the other. *See id.* at 461.

8. 42 U.S.C. § 2000e-5(c) (1976) provides:

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

When an employment discrimination charge is filed directly with the EEOC, 42 U.S.C. § 2000e-5(d) (1976), in relevant part, provides:

> [T]he Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of

require the EEOC to defer processing a complaint and to afford the aggrieved party an opportunity to bring her action under state proceedings. Under this scheme, it is possible that each employment discrimination claim will be heard by four separate forums: a state administrative agency, a state court,[9] the EEOC, and finally a federal court. This situation leads to interesting and complex questions as to what weight should be afforded the decisions of these overlapping jurisdictions.[10]

---

such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

42 U.S.C. § 2000e-5(d)(1976).

A complete listing of title VII deferral agencies is contained at 29 C.F.R. § 1601.74 (1980). After the sixty-day deferral period has run, or the state proceeding has terminated, an individual may bring his complaint before the EEOC. The EEOC then conducts an investigation to determine whether there is reasonable cause to believe the discrimination charge is true. 42 U.S.C. § 2000e-5(b) (1976). If the EEOC finds such reasonable cause, it then begins conciliation efforts to eliminate the unlawful practice. *Id.* If unsuccessful, the EEOC may initiate its own civil action to enforce the Act. If the EEOC declines to bring an action, or if it finds no reasonable cause to believe that a violation has occurred, it must issue the aggrieved party a right to sue letter notifying that party of its right to commence a civil action. 42 U.S.C. § 2000e-5(f)(1) (1976).

9. Although there is no deferral provision relating to state courts, a claimant may appeal the state administrative agency's decision to the state appeals court. This action was taken by the claimant in *Kremer*. *See infra* notes 12-37 and accompanying text. A claimant may also bring a civil action against a defendant in state court under a state discrimination statute.

10. Congress partially addressed these problems in 1971 and 1972 when the entire enforcement scheme of title VII was subjected to reexamination. This reexamination led to an amendment to title VII. Part of that amendment provided that in making a determination of whether there is "reasonable cause" to believe that there has been unlawful discrimination, the EEOC "shall accord substantial weight to final findings and orders made by state or local authorities in proceedings commenced under state or local law . . . ." 42 U.S.C. § 2000e-5(b) (1976). While legislative history is silent as to why this provision was enacted, it was probably out of fear that the EEOC was not giving enough weight to state findings and orders. Therefore, the substantial weight criterion should be read as the minimum. While this provision is addressed to the EEOC, strong arguments are presented by both the commentary and judicial opinion that it should also apply to federal courts. *See* Jackson, *supra* note 4, at 1505; Richards, *Alexander v. Gardner-Denver: A Threat to Title VII Rights*, 29 ARK. L. REV. 129, 161 (1975). Additionally, the EEOC has interpreted the amendment in its procedural rules by providing that

> (2) "Substantial weight" shall mean that such full and careful consideration shall be accorded to final findings and orders, as defined above, as is appropriate in light of the facts supporting them, when they meet all of the prerequisites set forth below:
>
> i) The proceedings were fair and regular; and
>
> ii) The remedies and relief granted are comparable in scope to the remedies and relief required by Federal law; and
>
> iii) The final findings and order serve the interest of the effective

Many of the issues concerning the preclusive effects of these different jurisdictions remain, even though it has been nearly twenty years since title VII was first enacted. In 1982, the Supreme Court attempted to settle some of the remaining issues in *Kremer v. Chemical Construction Corp.*[11] In *Kremer*, the Court held that a charging party loses the right to sue under title VII in federal court by pursuing a state court review of an adverse deferral agency determination. This decision raises a number of new issues as well as results which seem antithetical to the purposes and intentions behind title VII. It also has far-reaching implications for lawyers who pursue employment discrimination claims and try to ensure aggrieved parties an opportunity for a de novo judicial hearing on the merits of their discrimination claims. This decision may set a trap for the unwary lawyer by foreclosing the opportunity for such a de novo judicial hearing.

This Note will address the issues raised by the Court in *Kremer* as well as outline the effect *Kremer* will have on legal strategy. It will also state a proper rule which the Court should have adopted to avoid some of the problems inherent in its decision.

II. THE *KREMER* CASE

A. Facts

In 1973, Ruben Kremer, a fifty-three year old Jewish emigrant from Poland, applied for employment and was hired by Chemical Construction Corporation (Chemico) as a piping engineer. He was the only Jewish employee in his department. On August 1, 1975, Kremer and a number of other employees were laid off. Some of these employees in the same job category were later rehired, but despite the fact that Kremer's supervisor had recognized Kremer's skills a month before the layoff,[12] and despite the fact that Kremer made repeated applications for advertised openings, Chemico refused to rehire Kremer. Kremer alleged that Chemico had signed the "anti-Jewish and anti-Israeli Arab boycott"[13] and that Chemico's failure to rehire him was the result of a conspiracy

---

enforcement of Title VII. *Provided*, that giving substantial weight to final findings and orders of a "706 Agency" does not include according weight, for purposes of applying Federal law, to that agency's conclusions of law.

29 C.F.R. § 1601.19b(e)(2) (1974).

11. 120 S. Ct. 1883 (1982).
12. Brief of Petitioner at 3 n.3, Kremer v. Chemical Constr. Corp., 102 S. Ct. 1883 (1982).
13. *Id.*

against him by his fellow employees on account of his religion.[14]

In May 1976, Kremer filed a pro se[15] discrimination charge with the EEOC asserting that Chemico had violated title VII by discharging him and subsequently refusing to rehire him because of his national origin and religion.[16] Under the deferral provisions of title VII,[17] the EEOC referred Kremer's charge to the New York State Division of Human Rights (NYHRD). Kremer then filed a complaint with NYHRD charging Chemico with unlawful discrimination in violation of article 15 of the Executive Law of New York.[18] NYHRD was required to undertake prompt investigative action to determine whether there was probable cause to believe that the alleged discrimination had occurred.[19] The NYHRD investigation consisted of three interviews. At the first interview, Kremer reviewed documents submitted by Chemico and was afforded the opportunity to respond to the documents in writing.[20] Even though Kremer met two more times with the agency, he was never afforded an adversarial hearing. There was no discovery, no formal record made, and no representation by counsel.[21] Thereafter, NYHRD informed Kremer that there was no probable cause to believe that Chemico's failure to rehire him was due to the alleged discrimination. Kremer appealed to the New York State Human Rights Appeal Board (Appeal Board).[22] The Appeal Board af-

14. Brief of Respondent at 3, Kremer v. Chemical Constr. Corp., 102 S. Ct. 1883 (1982).

15. While most complaints are filed pro se with the EEOC, it is significant that Kremer was without the aid of counsel throughout the entire state court proceedings. Kremer first had the beneifit of an attorney when he appealed to the Second Circuit. *See infra* notes 58-61 and accompanying text for a discussion of a full and fair opportunity to litigate.

16. Title VII, § 703(a), 42 U.S.C. § 2000e-2(a) (1976).

17. Title VII, § 706(c), 42 U.S.C. § 2000e-5(c) (1976). *See supra* note 8 and accompanying text.

18. N.Y. Human Rights Law § 296(1)(a), N.Y. EXEC. LAW § 296(1)(a) (McKinney 1982) provides:

> 1. It shall be an unlawful discriminatory practice: (a) for an employer or licensing agency, because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

19. N.Y. EXEC. LAW § 297(2) (McKinney 1982).

20. *See* Brief of Respondent at 5.

21. *See* Brief of Petitioner at 4.

22. The Appeal Board is an adjudicatory authority within the Executive Department and is independent of NYHRD. N.Y. EXEC. LAW § 297a(1) (McKinney 1982). The scope of the Appeal Board's review is limited to determining whether the order of the division is:

> a. in conformity with the Constitution and the laws of the state and the United States;
> b. within the division's statutory jurisdiction or authority;

firmed the decision of NYHRD. Kremer then appealed the decision of the Appeal Board to the Appellate Division of the New York Supreme Court.[23] The Appellate Division is not a section 706 deferral agency;[24] thus, by appealing the Appeal Board's decision, Kremer stepped outside the EEOC and state administrative framework of title VII. The Appellate Division unanimously upheld the determination of the Appeals Board.[25]

Kremer had renewed his EEOC complaint two days prior to filing his appeal to the Appellate Division. The EEOC did not conduct a separate investigation, but examined NYHRD's findings and concluded that there was no reasonable cause to believe the charge was true.[26] It then issued Kremer a right to sue letter[27] and informed him that he had a right to pursue the matter in federal district court. Kremer then filed suit in federal district court. Before filing an answer, Chemico moved for dismissal of the complaint or summary judgment on the grounds that Kremer's appeal of the NYHRD decision to the Appellate Division precluded a federal court action under title VII. The district court denied Chemico's motion.[28] Several months later, the Second Circuit de-

---

c. made in accordance with procedures required by law or established by appropriate rules or regulations of the division;
d. supported by substantial evidence on the whole record; or
e. not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

N.Y. EXEC. LAW § 297a(7) (McKinney 1982).

23. Under N.Y. EXEC. LAW § 298 (McKinney 1982), the Appellate Division has authority to enforce, modify, or set aside the order appealed from.
24. *See supra* notes 8-9.
25. The Appellate Division's resulting affirmance of the agency's action was a final judgment on the merits, entitled to preclusive effect under New York law. N.Y. EXEC. LAW § 298 (McKinney 1982); N.Y. CIV. PRAC. LAW § 411 (McKinney 1972). *See* Mitchell v. National Broadcasting Co., 553 F.2d 265, 273 (2d Cir. 1977); Taylor v. New York City Transit Authority, 433 F.2d 665, 668 (2d Cir. 1970); Riley v. Reed, 45 N.Y. 2d 24, 27, 379 N.E.2d 172, 174, 407 N.Y.S.3d 645, 646 (1978).
26. *See* Brief of Petitioner at 5.
27. *See supra* note 8 and accompanying text for a discussion of title VII procedures.
28. *See* Kremer v. Chemical Constr. Corp., 464 F. Supp. 468 (S.D.N.Y. 1978). The court held:

> Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. . . . Accordingly, Title VII actions should not be subject to the collateral estoppel effects of section 1738 where the result would be the possible frustration of the congressional objectives embodied in Title VII, to-wit, the availability of separate federal and state remedies and the independent adjudication of federal claims.

Id. at 473 (citations omitted).

cided *Sinicropi v. Nassau County*,[29] in which it held that res judicata should apply to actions brought under title VII in federal court after a state court had rendered a decision which would have been given preclusive effect in that state.[30] The district court then re-

29. 601 F.2d 60 (2d Cir. 1977) (per curiam), *cert. denied*, 444 U.S. 983 (1979).

30. The Second Circuit was the first circuit to make such a determination. *See supra* note 29 and accompanying text. This contrary analysis began with Mitchell v. National Broadcasting Co., 553 F.2d 265 (2d Cir. 1977). In *Mitchell*, the plaintiff filed a complaint with NYHRD charging her employer with discrimination pursuant to the New York discrimination laws. NYHRD conducted an investigation of the claim which consisted of two hearings. NYHRD then dismissed the complaint for lack of probable cause. The plaintiff appealed to the state human rights appeal board. Two weeks later, she filed a charge of discrimination with the EEOC. The appeal board then dismissed the complaint. The plaintiff then petitioned the appellate division of the New York Supreme Court pursuant to the New York rules of civil procedure and the applicable civil rights law. *See* N.Y. EXEC. LAW § 297-a(7) (McKinney 1982); N.Y. CIV. PRAC. LAW § 7801. (McKinney 1972 & Supp. 1976). The EEOC then dismissed the complaint and issued the plaintiff a right to sue letter. The plaintiff did not pursue her title VII remedy, but rather, commenced an action under 28 U.S.C. § 1981 (1976) in federal district court.

The district court dismissed the complaint on the grounds that the administrative and judicial proceedings precluded the section 1981 action. The Second Circuit affirmed. The court based its decision on a number of factors. The first factor was that under the relevant New York state civil rights law, a plaintiff was required to demonstrate that she "was discharged because of racial or color discrimination, and not for other reasons . . . ." 553 F.2d at 269 (citations omitted). Therefore, the protection afforded by state law was just as broad as that afforded by the federal statutes and constitution. The court found indecisive the fact that the determination was made on the legal merits without a formal evidentiary hearing stating that "[t]he doctrine of res judicata does not depend on whether the prior proceeding was free from error." *Id.* at 272. *See* 1B J. MOORE & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.405 [4.-1], at 634-39 (1974). The court then addressed the application of 28 U.S.C § 1738 (1976). Under section 1738, the finality accorded the state court's decision in that state became important. The court concluded that "there is no question that a determination of the Appellate Division affirming . . . [a dismissal by NYHRD] . . . operates as an absolute bar to any other action on the same facts in the courts of New York." *Id.* at 273. *See supra* note 25. Therefore, the plaintiff was on notice that the decision would foreclose any other action in the state courts. On this basis, the court concluded that the decision of the plaintiff to pursue her administrative remedy to a final determination, which was not imposed by the deferral provision of title VII or any conceivable exhaustion doctrine applicable to a section 1981 claim, carried the consequences that a federal court would be bound by that state court's decision. Several months later, the Second Circuit extended this rationale to title VII in *Sinicropi*.

The *Mitchell* decision has spawned a vast amount of comment. *See* Comment, *Developments in the Law—Section 1981*, 15 HAR. C.R.-C.L. L. REV. 33 (1980); Comment, *'Twas a Nibble Not a Bite: Res Judicata and Section 1981*, 53 N.Y.U. L. REV. 187 (1978); Comment, *Employment Discrimination—State Judicial Procedure Forcloses Federal Remedy Under 42 U.S.C. § 1981: Mitchell v. N.B.C.*, 31 RUTGERS L. REV. 973 (1979); Comment, *State Court Affirmance of*

evaluated Chemico's motion and, since it was bound by the *Sinicropi* decision, begrudgingly overruled its previous decision.[31] Kremer, represented by counsel for the first time, appealed to the Second Circuit,[32] arguing that *Sinicropi* should be overturned. The Second Circuit refused Kremer's request.[33]

As a result of these proceedings, Kremer was precluded from a de novo judicial hearing on his discrimination claim. His only judicial hearing was an appellate review, in a state court, of a state administrative agency's decision.[34] Kremer did not have an adver-

---

State Agency Determination of State Discrimination Claim Precludes Subsequent Suit in Federal Court Under 42 U.S.C. § 1981—Mitchell v. National Broadcasting Co., 12 SUFFOLK U.L. REV. 139 (1978). *See also* Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem*, 70 NW. U.L. REV. 859 (1976).

31. *See* Kremer v. Chemical Constr. Corp., 477 F. Supp. 587 (S.D.N.Y. 1979).
32. Kremer v. Chemical Constr. Corp., 623 F.2d 786 (2d Cir. 1980).
33. *Id.* The court held:

> This panel cannot properly entertain the claim that *Sinicropi* was wrongly decided. In the absence of any decisions by the Supreme Court or our own court in the brief interval since *Sinicropi* was decided that would cast doubt on its viability, and none has been called to our attention, a panel of this court will not overturn a recent decision of another panel, rendered after full consideration of the very point at issue. This is something to be done, if at all, only by the full court sitting *en banc*.

Id. at 788.

34. When the NYHRD's finding of no probable cause is reviewed, it is measured either by a "substantial evidence on the whole record" standard, N.Y. EXEC. LAW § 297-a(7)(d)(McKinney 1982), or by a "not arbitrary, capricious" standard. *Id.* § 297-a(7)(e). The substantial evidence standards which mandate deference to the NYHRD's resolution of factual issues is employed where there has been a public hearing. The "arbitrary and capricious" standard is employed where there has been no hearing and permits dismissal only where there has been no evidence to support the complaint. Mayo v. Hopeman Lumber & Manufacturing Co., *supra*, 33 A.D.2d 310, 313, 307 N.Y.S.2d 691, 695 (1970); *see also* Division of Human Rights v. Regional Transit Serv., 79 A.D.2d 1106, 435 N.Y.S.2d 856, 857 (1981); *cf.* State Div. of Human Rights v. Univ. of Rochester School of Medicine & Dentistry, 72 A.D.2d 941, 942, 422 N.Y.S.2d 224, 225-26 (1979). The dictum in *Speller* concerning the NYHRD's authority to resolve factual disputes pertained to the situation in which there has been a hearing and in which dismissal will be upheld if supported by substantial evidence. In the instant case, petitioner had no hearing, and the requirement of *Mayo* that the complaint lack merit "virtually as a matter of law" applied.

Since it is not limited to the record, the scope of judicial review under the "arbitrary and capricious" test is broader than under the "substantial evidence" test and permits the Appellate Division, where the record appears incomplete, itself to designate a referee or trial term judge to conduct a de novo hearing. *See* Gabrielli (Associate Judge of the New York Court of Appeals) & Nonna, *Judicial Review of Administrative Action in New York: An Overview and Survey*, 52 ST. JOHN'S L. REV. 361, 371 n.44 (1978); Mandle v. Brown, 5 N.Y.2d 51, 152 N.E.2d 511, 177 N.Y.S.2d 482 (1958); In re Caristro Constr. Corp., 30 Misc. 2d 185, 221 N.Y.S.2d 956 (Sup. Ct. 1961), *modified sub nom.* Caristro

sarial hearing before the NYHRD. Kremer did, however, have the opportunity for such a hearing. In conducting its investigation, NYHRD must afford a complainant a full and fair opportunity to present evidence on the record in support of his claims.[35] A claimant may offer his own testimony, the testimony of other witnesses, and may submit exhibits.[36] NYHRD is also empowered to interview the respondent's witnesses, as well as the claimant's, and to require the respondent to reply to the charge and to produce documentary evidence.[37] By not obtaining an attorney and by not taking advantage of the procedural opportunities afforded him by NYHRD, Kremer missed his opportunity for an adversarial hearing on the merits of his discrimination complaint. Kremer could have avoided this result by abandoning the state administrative remedies or by not appealing the NYHRD decision to the Appellate Division. However, given the majority opinion in *Kremer*, this last prerogative may not have guaranteed Kremer a judicial hearing on the merits of his case, and there lies the fault of the majority opinion.[38]

B. The Majority Opinion

Prior to *Kremer*, every federal court, save the Second Circuit, faced with the issue of whether to give a state court's review of a state administrative agency decision preclusive effect in federal court under title VII had answered this question in the negative.[39]

Constr. Corp. v. Rubin, 15 A.D.2d 561, 222 N.Y.S.2d 998 (1961), *aff'd*, 10 N.Y.2d 538, 180 N.E.2d 794, 225 N.Y.S.2d 502 (1962).

35. *See* State Div. of Human Rights v. New York State Drug Abuse Comm'n, 59 A.D.2d 332, 336, 399 N.Y.S.2d 541, 544 (1977).

36. *See id.* Additionally, the complainant is entitled to an opportunity to "rebut evidence submitted by or obtained from the respondent." N.Y. EXEC. APPENDIX § 465.6(c) (McKinney 1982). *See infra* note 37.

37. NYHRD's regulations provide that "subpoenas and subpoenas duces tecum may be issued by the designated division officers and employees upon the application of a party or a party's attorney." N.Y. EXEC. APPENDIX § 465.12(c) (McKinney 1982). *See also id.* § 456.6(a)-(c) (rules concerning investigations).

38. *See infra* notes 87-107 and accompanying text.

39. *See* Unger v. Consolidated Foods Corp., 657 F.2d 909, 913 (7th Cir. 1981) (soundly rejecting *Sinicropi*); Smouse v. General Elec. Co., 626 F.2d 333, 336 (3d Cir. 1980) (expressly rejecting *Sinicropi*); Gunther v. Iowa State's Mens Reformatory, 612 F.2d 1079, 1984 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980) (questioning *Sinicropi*); Kralowec v. Prince George's County Md., 503 F. Supp. 985 (D. Md. 1980); Gavin v. Peoples Natural Gas Co., 464 F. Supp. 622 (W.D. Pa. 1979), *vacated and remanded on other grounds*, 613 F.2d 482 (3d Cir. 1980); Kremer v. Chemical Constr. Corp., 464 F. Supp. 468 (S.D.N.Y. 1978) (per Pierce, J.; decided before *Sinicropi*); Nickel v. Highway Indus., Inc., 441 F. Supp. 477 (W.D. Wis. 1977); Gilinsky v. Columbia Univ., 440 F. Supp. 1120 (S.D.N.Y. 1977); Al-Hamdani v. State University of New York, 438 F. Supp. 299

However, in a five-to-four decision, the Supreme Court affirmed the Second Circuit's disposition of the issue. Justice White, writing for the majority, framed the issue addressed by the Court[40] as "[W]hether Congress intended title VII to supersede the principles of comity and repose embodied in § 1738."[41]

(W.D.N.Y. 1977); Benneci v. Department of Labor, 388 F. Supp. 1080 (S.D.N.Y. 1975); Young v. South Side Packing Co., 369 F. Supp. 59 (E.D. Wis. 1973). *See also* Aleem v. General Felt Indus., Inc. 661 F.2d 135, 137 (9th Cir. 1981) (*Sinicropi* is inconsistent with the Supreme Court's decision in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1979).).

The commentators have also disagreed with the Second Circuit's rule. Comment, *Restrictions on Access to the Federal Courts in Civil Rights Actions: The Role of Abstention and Res Judicata*, 6 FORDHAM URB. L.J. 481, 492-494 (1978) (same); Comment, *Development in the Law — Section 1981*, 15 HARV. C.R. - C.L. L. REV. 29, 266-276 (1980) (criticizing application of Second Circuit's rule to 42 U.S.C. § 1981); Comment, *Civil Rights—Civil Procedure: State Appellate Court Judgment on Employment Discrimination is Res Judicata in Subsequent Federal Action Under Section 1981 of the Civil Rights Act of 1866*, 62 MINN. L. REV. 987 (1978); Comment, 31 RUTGERS L. REV. 973 (1979) (same); Note, 53 N.Y.U. L. REV. 197 (1978); *See* Note, *Res Judicata in Successive Employment Discrimination Suits*, 1980 U. ILL. L.F. 1049. *See also* Jackson, *supra* note 4, at 20 (rejecting application of res judicata when, as in this case, the state court affirms a state agency finding of no probable cause); Richards, *Alexander v. Gardner-Denver: A Threat to Title VII Rights*, 29 ARK. L. REV. 128, 158 (1975) (interpreting title VII contrary to Second Circuit's decisions, but before the relevant Second Circuit cases were decided); Comment, *Civil Procedure—Res Judicata—Challenge of Racial Discrimination Under 42 U.S.C. § 1981 Barred by Prior Submission of Civil Rights Question to State Court*, 30 VAND. L. REV. 1260 (1977).

40. The Court addressed the specific question of "[w]hether a federal court in a Title VII case should give preclusive effect to a decision of a state court upholding a state administrative agency's rejection of an employment discrimination claim as meritless when the state court's decision would be res judicata in the state's own courts." 102 S. Ct. at 1888.

41. 28 U.S.C. § 1738 (1976) provides: "The . . . judicial proceedings of any such State . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . . ." The Supreme Court has regarded section 1738 as invoking the common law rules of preclusion, subject to the full panoply of established exceptions, rather than establishing any "more stringent" doctrine. Allen v. McCurry, 449 U.S. 90, 96 (1980). Therefore, the prior state court's decision will not be afforded preclusive weight if there has not been a full and fair opportunity to litigate the issue, *Allen*, 449 U.S. at 95; Montana v. United States, 440 U.S. 147, 153 (1979); Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 328-29 (1971), if there is reason to doubt the quality, extensiveness, or fairness of the procedures followed in the prior litigation, 440 U.S. at 164 n.11, or if there are countervailing statutory policies which may warrant an exception to the normal rules of preclusion. *Id.* at 155; Brown v. Felsen, 442 U.S. 127, 139 n.10 (1979). These points are all significant in that Kremer sought to rely on them in arguing that a prior state court review of a state administrative agency's decision should not preclude him from a trial de novo in federal court. Courts have refused to apply the traditional preclusion doctrines in cases involving issues subject to exclusive

Justice White began by stating: "Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the state from which the judgments emerged."[42] Since under New York law the judgment of the Appellate Division would preclude Kremer from bringing any other action based on his discrimination complaint in New York courts, if section 1738 applied, he would be precluded from bringing an action in federal court.[43] Kremer advanced two principal arguments against the application of section 1738 in this case. The first argument was that under title VII, Congress intended that federal courts be relieved of their usual obligation to grant finality to state court decisions.[44] Second, he asserted that the New York administrative and judicial proceedings in this case were so deficient that they should not be entitled to preclusive effect in federal court and, in any event, the rejection of a state employment discrimination claim cannot by definition bar a title VII action.[45]

In addressing the first argument, Justice White, citing *Allen v. McCurry*,[46] stated that "an exception to section 1738 will not be

---

federal jurisdiction and federal habeas corpus actions. *See* Brown v. Allen, 344 U.S. 443 (1953) (federal habeas corpus); Kalb v. Feuerstein, 308 U.S. 433 (1940) (federal bankruptcy); Lyons v. Westinghouse Electric Corp., 222 F.2d 184, 188-89 (2d Cir. 1955), *cert. denied*, 350 U.S. 825 (1955) (antitrust treble damages action).

42. 102 S. Ct. at 1889.

43. N.Y. EXEC. LAW § 300 (McKinney 1982). *See also* 102 S. Ct. at 1890.

44. 102 S. Ct. at 1890.

45. *Id.*

46. 449 U.S. 90 (1980). In *Allen*, a policeman arrested the plaintiff after a gun battle. Upon entering the house, the police seized evidence both in plain view and hidden. The trial court suppressed the evidence seized from dresser drawers and automobile tires, but denied suppression of the evidence found in plain view. Subsequently, the plaintiff, McCurry, filed an action under 42 U.S.C. § 1983 (1976) for one million dollars in damages for an alleged conspiracy to violate his fourth amendment rights. He filed the lawsuit against the arresting officers. The district court, apparently understanding the gist of the complaint to be the alleged unconstitutional search and seizure, granted summary judgment holding that collateral estoppel prevented McCurry from relitigating the search and seizure question already decided against him in the state courts. The court of appeals reversed on the grounds that under § 1983, the federal courts were McCurry's only route to a federal forum for his constitutional claim and directed the trial court to allow him to proceed to trial unencumbered by collateral estoppel.

The issue addressed by the Court was one of first impression. The Court framed the issue as whether the unavailability of federal habeas corpus prevented the police officers from raising the state court's partial rejection of McCurry's constitutional claim as a collateral estoppel defense to the § 1983 suit against them for damages.

The Court concluded that nothing in the language or legislative history of section 1983 proved any congressional intent to deny binding effect to a state

recognized unless a later statute contains an express or implied partial repeal."[47] Since there was no indication that title VII expressly repealed section 1738, any such repeal must be implied. Justice White then concluded that title VII did not fall into either of the two well-settled categories[48] of repeal by implication. In reaching this decision, Justice White reviewed the language and application of title VII as well as its legislative history. There are no provisions of title VII which require claimants to pursue in state court an unfavorable state administrative action. The Act also does not specify the weight a federal court should afford a final judgment by a state court if such a remedy is sought. While the Court had previously "interpreted the 'civil action' authorized to follow consideration by state and federal administrative agencies to be a 'trial de novo,' "[49] Justice White stated that "neither the

---

court's judgment or decision when the state court, acting within its proper jurisdiction, had given the parties a full and fair opportunity to litigate the federal claims, and thereby had shown itself willing and able to protect federal rights. Therefore, there was no congressional intent to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all. *Id.* at 420. Therefore, the Court, holding that the court of appeals had erred in concluding that McCurry's inability to obtain federal habeas corpus relief under his fourth amendment claim rendered the doctrine of collateral estoppel inapplicable to a section 1983 suit, reversed and remanded.

47. 102 S. Ct. at 1890.

48. These two categories are:

> "(1) where the provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature must be clear and manifest. . . ." *Radzanower v. Touche Ross & Co.*, 426 U.S. at 154, 96 S. Ct., at 1993, quoting *Posadas v. National City Bank*, 296 U.S. 497, 503, 56 S. Ct. 349, 352, 80 L.Ed. 351 (1936).

102 S. Ct. at 1890.

49. 102 S. Ct. at 1891. *See* Chandler v. Roudebush, 425 U.S. 840, 844-45 (1976); Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-48 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798-99 (1973). The Court distinguished *Gardner-Denver*, in which it had held that final responsibility for enforcement of title VII is vested with federal courts. 415 U.S. at 44. The Court held:

> We did not say, and our language should not be read to imply, that by vesting "final responsibility" in one forum, Congress intended to deny finality to decisions in another. The context of the statement makes this clear. In describing the operation of Title VII, we noted that the EEOC cannot adjudicate claims or impose sanctions; that responsibility, the "final responsibility for enforcement," must rest in federal court. . . . [A]rbitration decisions, of course, are not subject to the mandate of § 1738. Furthermore, unlike arbitration hearings under collective bargaining agreements, state fair employment practice laws are explicitly made part of the Title VII enforcement

statute nor our decisions indicate that the final judgment of a state court is subject to redetermination at such a trial."[50] The majority then clarified the meaning of the "substantial weight" requirement of title VII,[51] stating that it only indicates "the minimum level of deference the EEOC must afford state administrative determinations; it does not bar affording the greater preclusive effect which may be required by § 1738 if judicial action is involved."[52] In reviewing the legislative history of title VII, Justice White concluded that there was nothing to support the proposition that "Congress considered it necessary or desirable to provide an absolute right to relitigate in federal court an issue resolved by a state court."[53] The majority also concluded that the comity and federalism interests embodied in section 1738 were not compromised by applying the preclusion doctrines to title VII cases.[54]

The majority refuted the contention that their decision would result in a deterioration in the quality of state administrative procedures, reasoning that stripping state court judgments of finality would be far more destructive to the quality of adjudication by lessening the incentive for full participation by the parties and for a searching review by state officials.[55] Such a result would reduce the incentive for states to work toward effective and meaningful discrimination systems.

Justice White then divided Kremer's second argument into two parts: (1) the New York courts did not resolve the issue that the federal district court would resolve under title VII, and (2) the pro-

---

> scheme. Our decision in *Gardner-Denver* explicity recognized the "distinctly separate nature of these contractual and statutory rights." . . . Here we are dealing with a state statutory right, subject to state enforcement in a manner expressly provided for by the federal Act.

102 S. Ct. at 1891. The Court also distinguished the inadequacies of arbitration as compared to state authorities which are charged with enforcing the laws and state courts which are charged with interpreting the law.

50. 102 S. Ct. at 1891 (emphasis in original).
51. 42 U.S.C § 2000e-5(b) (1976). *See supra* note 10 and accompanying text.
52. 102 S. Ct. at 1891. The court also stated:

> Nor is it plausible to suggest that Congress intended federal courts to be bound further by state administrative decisions than by decisions of the EEOC. Since it is settled that decisions of the EEOC do not preclude a trial de novo in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a state's own courts.

Id. at 1891 n.7. *See infra* note 68 and accompanying text.
53. 102 S. Ct. at 1893. This conclusion was contrary to what most lower courts had decided when faced with the issue. *See supra* note 39 and accompanying text.
54. 102 S. Ct. at 1895.
55. This point was subject to severe criticism in Justice Blackmun's dissent. *See infra* notes 62-66 and accompanying text.

cedures accorded Kremer were inadequate.[56] The Court quickly disposed of Kremer's first contention by stating that the alleged discriminatory acts asserted by Kremer were prohibited by both New York and federal law. Thus, when the Appellate Division affirmed NYHRD's dismissal, it necessarily decided that Kremer's claim was meritless under New York law and equally meritless under title VII.[57]

The majority next addressed the second part of Kremer's argument and the "more serious"[58] issue confronted by the Court: the procedural adequacy of the previous proceedings. This contention is important in reconciling the proposition that in order for a party to be collaterally estopped from litigating an issue, there must have been a "full and fair opportunity" to litigate that issue in the prior proceeding.[59] The Court clarified the meaning of the "full and fair opportunity" proposition by stating:

> Our decisions have not specified the source or defined the content of the requirement that the first adjudication offer a full and fair opportunity to litigate. But for present purposes, where we are bound by the statutory directive of § 1738, state proceedings need do no more than satisfy the minimal procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full-faith-and-credit guaranteed by federal law.[60]

Reviewing the procedures afforded Kremer, the Court concluded that the "panoply of procedures, complimented by administrative as well as judicial review was sufficient under the Due Process Clause."[61]

---

56. *See* 102 S. Ct. at 1896.
57. The Court, in refuting the dissenters' contention that there was no finding one way or the other on the merits of Kremer's claim, stated: "When the NYHRD summarily dismisses a complaint, the appellate division must find that the petitioner's 'complaint lacks merit as a matter of law.' " 102 S. Ct. at 1896 n.21.
58. 102 S. Ct. at 1897.
59. The Court acknowledged this proposition citing to previous cases in which the proposition had been stated or relied upon. *See* 102 S. Ct. at 1897 (citing Allen v. McCurry, 449 U.S. 90, 95 (1980); Montana v. United States, 440 U.S. 147, 153 (1979); Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 328-29 (1971)). This proposition has previously been used in the application of collateral estoppel. However, neither the lower courts nor the Supreme Court discussed whether the doctrine of res judicata or collateral estoppel applied to Kremer's case. The Court clarified the application of the doctrine by stating that "it is clear from what follows that invocation of res judicata or claim preclusion is subject to the same limitation [*i.e.*, the full and fair opportunity limitation]." *Id.* at 1897 n.22. The Court continued by stating that Kremer may be precluded under res judicata from pursuing a title VII claim, but in any event, "it [was] undebatable that [Kremer was] at least estopped from relitigating the issue of employment discrimination arising from the same events." *Id.*
60. 102 S. Ct. at 1897.
61. *Id.* at 1899.

The majority concluded that the usual rule in our judicial system is that once the legal merits of a claim have been decided by a court of competent jurisdiction, they are not subject to redetermination in another forum. Since the provisions and legislative history of title VII did not override the rules of preclusion as statutorily applied to federal courts, and since Kremer had been afforded a "full and fair opportunity" to litigate the merits of his claim, he was precluded from bringing his claim in federal district court by the previous state appellate court decision.

C. The Dissent

Justice Blackmun, with whom Justice Brennan and Justice Marshall joined, delivered a rousing dissent to the majority opinion. The dissent interpreted the statutory language of title VII in opposition to that of the majority. The dissent noted that a complainant could bring a title VII suit in federal court despite the conclusion of state proceedings. The word proceedings was interpreted to refer to "both state agency proceedings and state judicial review of those agency proceedings."[62] Therefore, the dissent reasoned that since state court review was merely the last step in the administrative process, such review should not have preclusive effect in federal court.

The dissent properly focused on the major weakness in the majority opinion. This weakness, characterized as the majority's "schizophrenic reading of § 706(b),"[63] was the reading of that provision by the majority to mean that state administrative proceedings would not preclude a trial de novo in federal court, but that a limited state court review affirming those same administrative proceedings would have such an effect. The dissent reached this conclusion because in affirming the administrative agency's decision, the reviewing court finds only that the agency's conclusion "was a reasonable one and thus may not be set aside by the courts although a contrary decision 'may have been reasonable and also sustainable.' "[64] Thus, the dissenters concluded that the majority was giving preclusive effect to a state administrative agency's decision in contravention to the legislative intent behind title VII.

The dissent also concluded that the majority had abrogated the legislative intent of title VII in two other ways. First, the Court had

62. *Id.* at 1901 (Blackmun, J., dissenting). *See* New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980).

63. *Id.*

64. *Id.* at 1902-03 (Blackmun, J., dissenting) (quoting Imperial Diner, Inc. v. State Human Rights Appeal Bd., 52 N.Y.2d 72, 79, 417 N.E.2d 525, 436 N.Y.S.2d 231, 235 (1980) (quoting Mize v. State Division of Human Rights, 33 N.Y.2d 53, 56, N.E.2d 231, 233, 49 N.Y.S.2d 364, 366 (1973))).

usurped a role given to the EEOC by Congress. That role is the task of determining whether state procedures are adequate. The EEOC accomplishes this task by signing work-sharing agreements[65] with the state agencies, foreclosing any subsequent federal suits if the EEOC determines that minimal due process in agency procedures justified barring subsequent title VII suits when that state agency's decision had been affirmed by a state court. Second, the dissent noted that "[i]n Title VII, Congress wanted to assure discrimination victims more than due process; it wanted them to have the benefit of a vigorous effort to eliminate discrimination."[66] Therefore, by affording some claimants less than this vigorous effort, the majority's position contravened the congressional intent behind title VII.

In a separate dissent, Justice Stevens concluded that "Congress intended the claimant to have at least one opportunity to prove his case in a *de novo* trial in court."[67] Therefore, the Appellate Division's decision should have been considered part of the proceedings and only afforded substantial weight by the federal courts under title VII.

The dissent also raised several policy considerations which would weigh against the majority's decision. These considerations are properly considered in the following section.

III. ANALYSIS

The application of the preclusion doctrines[68] is often a complex

65. See 42 U.S.C. § 2000e-5(f)(1)(1976). The original version of this provision was designed to enable the EEOC to enter into work-sharing agreements with a state giving that state exclusive jurisdiction. Such a provision would be applicable to states which were deemed to have adequate state discrimination laws. Under this agreement, the EEOC would decline to hear the charge and the complainant could not file an action in federal court. *See* H.R. 7152, 88th Cong., 2d Sess. § 708(b) (1964). However, the Senate version of the bill, which provides that the EEOC can enter into work-sharing agreements with state agencies and those agencies have the initial opportunity to resolve the claim, does not give the state exclusive jurisdiction. Nothing in the present Act prevents a complainant from bringing a federal claim. The EEOC may decline to process a charge under a work-sharing agreement, but the complainant may still file with the EEOC after the 60-day deferral period. *See* 42 U.S.C. § 2000-5(c)(1976). Since the EEOC may be bound by the work-sharing agreement, the complainant can then bring a suit in federal court 180 days after filing with the EEOC.

66. 102 S. Ct. at 1906 (Blackmun, J., dissenting).

67. 102 S. Ct. at 1912 (Stevens, J., dissenting).

68. Preclusion is the new term encompassing the doctrines of res judicata or claim preclusion and collateral estoppel or issue preclusion. This new terminiology has been adopted by the American Law Institute, RESTATEMENT (SECOND) OF JUDGMENTS ch. 1 (1982). For a discussion on the evolution of res judicata terminology, see 18 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL

and critical issue in title VII suits. These issues can arise in a mul-

---

PRACTICE AND PROCEDURE § 4402 (1982). The policy behind preclusion generally is to promote judicial finality, "to secure the peace and repose of society by the settlement of matters capable of judicial determination so that there shall be a termination of litigation and the participants not vexed twice for the same cause." 1B J. MOORE & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.405[3], at 631 (2d ed. 1982) (citations omitted).

The doctrine of preclusion actually consists of two separate doctrines: claim preclusion and issue preclusion. Claim preclusion prevents relitigation of all grounds for, or defenses to, recovery on the same claim that was previously available to the parties, regardless of whether the claims were asserted in the initial litigation. *See* Allen v. McCurry, 449 U.S. 90, 95 (1980); Cleary, *Res Judicata Re-examined*, 57 YALE L.J. 339 (1948); Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741 (1976); Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723 (1968).

The term claim preclusion also includes the doctrines of merger and bar. Merger applies when a judgment is rendered for the plaintiff while bar applies when judgment is for the defendant. When a final judgment is rendered in favor of the plaintiff, the plaintiff cannot maintain a subsequent action on any part of the original claim since the action is said to have "merged" into the original judgment. A judgment in favor of the defendant is said to bar all subsequent actions on any part of that claim. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 18-19 (1982). *See also* Note, *Res Judicata in Successive Employment Discrimination Suits*, 1980 U. ILL. L.F. 1049, 1054 n.34 (1980); Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State Court Determinations*, 57 VA. L. REV. 1360 (1967).

The limiting factor in defining the scope of claim preclusion is the definition of claim. *See* A. VESTAL, RES JUDICATA/CLAIM PRECLUSION 43-48 (1969). Both Vestal and the American Law Institute use the term "claim" instead of the traditional and more restrictive term "cause of action." The modern term, "claim," has been given a broad meaning to effectuate the purposes behind preclusion. This definition encompasses the notion that relitigation of claims arising out of the same transaction which were not initially raised will be precluded from being litigated in a subsequent action. There have been at least three definitions of claim or cause of action. The first, and narrowest, would define claim as a single remedial right and would permit as many lawsuits as one could devise legal theories. The second would define claim as a single breach of a primary duty, and the third, and broadest, would define a claim on the basis of a unit of operative facts. *See* F. JAMES, CIVIL PROCEDURE § 11.10, at 553-54 (1st ed. 1965). The American Law Institute has endorsed the broadest definition of claim in what it terms the "transactional test." Under this test, the definition of claim embraces all the remedial rights of the plaintiff against the defendant arising out of the relevant transaction. Transaction is defined as a grouping of facts on the basis of whether the facts are related in time, space, origin, or motivation, and whether they form a convenient unit and that unit conforms to the parties' expectations or business understanding or usage. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1980). *See* Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 340-41 (1978).

Issue preclusion bars relitigation of issues which have been actually and necessarily determined in a prior proceeding, regardless of whether the same claim was involved. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 27-29 (1980). One limiting factor in the application of issue preclusion is the notion that the party against whom the doctrine is asserted must have had a "full

titude of different settings since employment discrimination claims can be brought in front of a number of different forums and under a number of different theories and statutes.[69]

Title VII cases present some unique considerations for the application of preclusion. These considerations arise because there is an inherent discrepancy within title VII. This discrepancy is illuminated by analyzing the policies behind title VII. One of the purposes behind the Act is the upgrading of state and local efforts to combat discrimination.[70] This policy is demonstrated by the deferral provisions of title VII.[71] Nevertheless, an inherent distrust of state proceedings is demonstrated by the substantial weight directive to the EEOC.[72] This distrust is in conflict with the basic premise of upgrading state proceedings, and any rule promulgated in the area of preclusion should attempt to alleviate this conflict. The more coherent rule and the one espoused by the dissent in *Kremer* would promote this objective.[73]

Before delving into the effects of *Kremer*, a brief summary of preclusion as it is generally applied under title VII is necessary. [74] This section is important in demonstrating the attitude of the courts and their reluctance to affirm any rule which would bar a plaintiff from asserting his title VII claim in federal court.

A. Preclusion and Title VII

The clearest application of preclusion in a discrimination suit is when a plaintiff simply refiles his claim in the court which had previously dismissed the claim.[75] Preclusion readily applies and the plaintiff is barred from bringing the second suit.

A less clear situation occurs when a plaintiff seeks redress for discrimination under statutes and theories other than title VII

---

and fair opportunity" to litigate that issue in the prior proceeding. Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 328 (1971). *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28(5) (1980). A second limitation occurs when the initial action was deficient in the quality and extensiveness of its procedures. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28(3) (1980).

69. *See* Note, *Res Judicata in Successive Employment Discrimination Suits*, 1980 U. ILL. L.F. 1049 (1980).
70. *See* New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980); *see also*, Jackson, *supra* note 4, at 1499.
71. *See supra* note 8 and accompanying text.
72. *See supra* note 10 and accompanying text. This proposition is also demonstrated by the work-sharing agreements. *See supra* note 65.
73. *See infra* notes 101-06 and accompanying text.
74. *See supra* note 75.
75. *See* Stebbins v. Nationwide Mut. Ins. Co., 528 F.2d 934 (4th Cir. 1975), *cert. denied*, 424 U.S. 946 (1976).

prior to initiating a title VII claim.[76] For example, a plaintiff may be under a contractual obligation to raise such a claim in a contractual setting as in *Alexander v. Gardner-Denver Co.*[77] There, the Supreme Court addressed the issue of whether an employee's statutory right to a trial de novo under title VII was foreclosed by prior submission of his claim to final arbitration under a nondiscrimination clause in a collective bargaining agreement. The Court held that an arbitrator's decision would not preclude a plaintiff from his statutory right to a trial de novo. The Court stated that ultimate authority for the enforcement of title VII rested in the federal courts and that the provisions of the Act "make plain that federal courts have been assigned plenary powers to secure compliance with title VII."[78] This language had been taken literally with courts uniformly denying the preclusive effect of any prior decision not decided in a federal court until the Second Circuit's application of preclusion to state court decisions under title VII.[79]

Courts have likewise refused to give preclusive effect to decisions rendered under other federal statutes.[80] In *Tipler v. E.I. du-Pont deNemours & Co.*,[81] the plaintiff filed a charge of discrimination with the EEOC. Two days later, he filed a charge with the National Labor Relations Board (NLRB) alleging in general terms that he had been terminated in violation of sections 8(a)(1) and 8(a)(3)[82] of the National Labor Relations Act (NLRA). After an extended evidentiary hearing, the NLRB trial examiner found that the plaintiff had been lawfully discharged. The NLRB

76. This situation is faced by virtually all title VII claimants since the deferral provisions essentially require filing a claim under a state statute. *See supra* note 8 and accompanying text.

77. 415 U.S. 36 (1974).

78. *Id.* at 45.

79. *See* Sinicropi v. Nassau County, 601 F.2d 60 (2d Cir.), *cert. denied*, 444 U.S. 983 (1979). *See supra* note 39 for cases holding contrary to *Sinicropi*.

80. *See* Norman v. Missouri Pac. R.R., 414 F.2d 73 (8th Cir. 1969) (no preclusive effect to prior action brought under the Railway Labor Act). The Court has not specifically decided on the application of preclusion to prior suits decided under 42 U.S.C. §§ 1981, 1983 (1976). However, in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), the Court held that title VII prerequisites and procedures were not applicable to section 1981 actions. In the view of at least one commentator, the Supreme Court pronouncements in *Johnson* and *Gardner-Denver* would probably lead to no preclusive effect given the prior action. *See* Note, *Res Judicata in Successive Employment Discrimination Suits*, 1980 U. ILL. L.F. 1049, 1093 (1980). The Equal Pay Amendment to the Fair Labor Standards Act, 29 U.S.C. § 206(a)(1) (1976), expressly included exceptions to the Act into title VII.

81. 443 F.2d 125 (6th Cir. 1971). *See also* Washam v. J.C. Penney Co., 519 F. Supp. 544 (D. Del. 1981); Willis v. Chicago Extruded Metals Co., 358 F. Supp. 888 (N.D. Ill. 1973).

82. 29 U.S.C. § 158(a)(1), (3) (1976).

affirmed. The employer then contended that the employee should be barred from asserting the discrimination claim under title VII because of the previous litigation under the NLRA. Although the preclusion doctrines generally apply to administrative agency adjudication,[83] the court refused to apply them in this case. The court stated that because of the variant standards between the labor laws and title VII and because different factors are often considered, the plaintiff was entitled to a trial de novo on the title VII claim.

The proposition that federal agency decisions should not be given preclusive effect in federal court for suits brought under title VII has also been applied to state administrative agency adjudications of employment discrimination claims[84] even where the administrative agency decision would have been given preclusive effect by that state.[85] This conclusion has been left undisturbed by the *Kremer* decision. The next logical question is what effect should be given a state court's review of these administrative decisions. This was the question addressed in *Kremer*. The Court's answer has very far-reaching effects, perhaps recognized by the Court but not properly considered.

B. The Effect of *Kremer*

The rule enunciated in *Kremer* is that a federal court must apply a state's preclusion rules to a state court's decision.[86] The primary effect of *Kremer* should be to reinforce the principle of comity, as well as the principles of finality and repose in the application of preclusion[87] in the state-to-federal context. A second sig-

83. In United States v. Utah Constr. and Mining Co., 384 U.S. 394 (1966), the Supreme Court held that an agency's determination can be given either res judicata or collateral estoppel effect so long as the agency acted in its judicial capacity and properly resolved the issues, and the parties involved had an adequate opportunity to litigate the claim or issue. *See* Note, *Collateral Estoppel Effect of Administrative Agency Actions in Federal Civil Litigation*, 46 GEO. WASH. L. REV. 65 (1977).

84. *See* Sinouse v. General Elec. Co., 626 F.2d 333, 336 (3d Cir. 1980), *cert. denied*, 446 U.S. 966 (1980); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1084 (8th Cir. 1980), *cert. denied*, 446 U. S. 966 (1980); Batiste v. Furnco Constr. Corp., 503 F.2d 447, 450 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975); Cooper v. Phillip-Morris, Inc., 464 F.2d 9, 11 (6th Cir. 1972); Vootsis v. Union Carbide Corp., 452 F.2d 889, 894 (2d Cir. 1971), *cert. denied*, 406 U.S. 918 (1972). These proceedings range from purely administrative investigations performed by understaffed state agencies to full scale adversarial hearings conducted before highly competent administrative tribunals and courts. *See* Jackson, *supra* note 4, at 1505.

85. *See* 102 S. Ct. at 1890-91.

86. *See supra* note 42 and accompanying text.

87. *See supra* note 54.

nificant effect of *Kremer* is the interpretation of the "full and fair opportunity to litigate" standard under section 1738.[88] Third, *Kremer* defined when the mandate of section 1738 will be overridden. The Court held that section 1738 will only be overridden when the federal statute expressly or impliedly repeals section 1738.[89] These propositions in themselves have significance to the employment discrimination attorney.

A positive effect of the *Kremer* rule is that it establishes a relatively easy standard for federal courts to apply. They need only determine the preclusion rules of the state concerning judicial review of an administrative agency's decision and apply those rules if they satisfy minimum standards of due process.[90] Therefore, the procedures available to a litigant in state court must be reviewed; the fact that the litigant chose not to take advantage of them will be of no consequence.[91] One effect of this decision, however, will be to force litigation at the pleadings stage in federal court over how full and fair the opportunity to litigate the discrimination claim was at the state court level. In *Kremer*, the majority referred to the "substantive" or "merits" review that the New York courts gave to challenges of no probable cause. However, if the court review is limited to an "abuse of discretion" standard alone, the question is raised as to whether there was actually a "full and fair opportunity to litigate" the substantive issue.

The majority opinion may also lead to other adverse results. One such result would be an undermining of state procedures. This would occur when plaintiffs, for fear of being precluded from federal court, abandon state court review of state administrative agency decisions and pursue their claims de novo in federal court.[92] This strategy would be especially prevalent for plaintiffs who lost before the state administrative agency. However, winning plaintiffs would also arguably opt for a federal de novo hearing if they felt that the state court would not treat them as well as a federal court. Such plaintiffs would probably prefer appointed federal judges who are arguably more detached than elected state judges. In addition, the choice of federal court review is aided by the broad discovery rules and the ability to subpoena witnesses available in a federal court hearing. Thus, the policy of comity, embodied in

88. *See supra* notes 59 and accompanying text.
89. *Id.*
90. 102 S. Ct. at 1897-98.
91. The Court stated that "[t]he fact that Mr. Kremer failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy." 102 S. Ct. at 1899.
92. The dissent stated: "The lesson of the Court's ruling is: *An unsuccessful state discrimination claimant should not seek state judicial review.*" 102 S. Ct. at 1909 (Blackmun, J., dissenting) (emphasis in original; footnote omitted).

section 1738, may be contravened since, in the words of the dissenters, "the Court effectively has eliminated state reviewing courts from the fight against discrimination in an entire class of cases."[93] Therefore, absent review by state courts to correct agency mistakes, the quality of state agency decisionmaking may deteriorate. This conclusion is in direct conflict with the goal of title VII to enhance and complement state discrimination laws.[94] Thus, *Kremer* will have the effect of forcing plaintiffs to proceed only as far as the state administrative agency. It will also diminish the availability of multiple and independent remedies[95] and would put discriminatees to a forced choice of forums not contemplated by Congress.

A second adverse effect of *Kremer* may be to set a trap for the unwary. This concern is especially prevalent for the "unwary *pro se* or poorly represented claimant."[96] Since state agencies are often underbudgeted and understaffed, such an agency may give a discrimination charge "less than the close examination it would receive in federal court."[97] On review in the state court, the "nature of the agency's deliberations combined with deferential judicial review may lead to discrimination charges receiving less careful consideration than Congress intended when it passed Title VII."[98] Therefore, an unwary plaintiff may be effectively precluded from any effective hearing on the merits of his claim, as was Kremer. In addition, as is demonstrated in the following discussion, a plaintiff may be forced to take drastic measures to assure that he is not precluded from a federal court hearing.

An unwary plaintiff may be precluded from federal court review depending on whether a state court review of an administrative agency's decision will have preclusive effect when that decision is appealed to state court by the defendant. The majority did not specifically address this issue. However, the dissent recognized the issue and stated that its effect would be to force a plaintiff into making every effort to prevent the state agency from reaching a final decision.[99] Failure to do so would result in his adversary seeking judicial review and effectively preventing a de novo hearing in federal court on the merits of the discrimination claim. While there has been language in circuit court decisions which

93. 102 S. Ct. at 1909.
94. *See supra* note 10 and accompanying text. *See also* New York Gaslight Club Inc. v. Carey, 447 U.S. 54 (1980) (state and federal cooperation is a goal of title VII).
95. *See supra* notes 74-87 and accompanying text.
96. 102 S. Ct. at 1910 (Blackmun, J., dissenting).
97. *Id.*
98. *Id.*
99. *See id.* at 1909 n.18.

would circumvent such a result,[100] the Supreme Court did not focus on such a distinction. The dissent prophesied that in such a case, given the *Kremer* decision, no complainant could safely predict that the court would not apply section 1738. Such a result is likely given the majority's adherence to preclusion doctrines and its mandate to federal courts to apply the rules of preclusion chosen by the rendering state.

The *Kremer* decision has thus afforded a broad bar to federal court involvement in title VII cases, a result not likely to have been approved by Congress. In addition, it adds another layer of complexity to an already complex and confusing area of law.

C. The Proper Rule

The dissent states the more coherent rule of preclusion for title VII cases in the state-to-federal context.[101] Under the dissent's rule, no preclusive effect would be given to a state court's review of a state administrative agency's decision. Rather, the state court's review could be admitted as evidence and accorded such weight as the court deemed appropriate.[102] Such a rule would not surprise an unknowing plaintiff who seeks to vindicate his rights in federal court as they appear to be granted by title VII. However, preclusive effect would be given to a state court's trial on the merits of the discrimination claim.[103] Therefore, the policies underlying section 1738 would not be frustrated; comity would be promoted by not forcing a plaintiff to abandon his state administrative remedy and by not precluding state court review of the administrative agency's ruling.[104] The principle of repose would not be violated

100. The Second Circuit emphasizes that "[t]he crucial factor is that appellant chose to submit her cause to the state courts for review." Sinicropi v. Nassau County, 601 F.2d 60, 62 (2d Cir. 1977), *cert. denied*, 444 U.S. 983 (1979).

101. *See* 102 S. Ct. at 1910-11.

102. This result was reached by all of the courts considering the issue except the Second Circuit. *See supra* note 39 and accompanying text. The rationale behind such a rule is that when Congress used the word "proceeding" in its "substantial weight" directive to the EEOC, it meant state court decisions as well as state administrative agency decisions. The dissent asserts that this directive should also apply to the federal courts. Under such a rule, the anomalous result of not giving preclusive effect to a full blown adversarial hearing at the administrative agency level and giving preclusive effect to a state court review of that agency's decision would be avoided. *See* 102 S. Ct. at 1900-01.

103. 102 S. Ct. at 1911. This result was reached in Moosavi v. Fairfax County Bd. of Educ., 666 F.2d 58 (4th Cir. 1981), where the court had no difficulty distinguishing a state court's trial on the merits of a discrimination claim from a state court's affirmance of a state administrative agency's decision.

104. *See supra* notes 85-87 and accompanying text.

since a plaintiff would be precluded from having two de novo judicial hearings on the merits of his discrimination claim.

In addition, this rule would not contravene the mandate of section 1738 since that section has been held subject to well-defined federal policies which may compete with the policies underlying the statute.[105] The dissent renders a well-reasoned and compelling argument as to why such a federal policy exists behind title VII.[106]

The one drawback of this rule would be that a well-advised plaintiff could get two bites of the apple, that is, he could receive a full blown adversarial hearing at the state administrative agency level as well as in federal court. But, it is important to note that under the majority rule such a result could also occur. A plaintiff could receive a full blown hearing at the agency level and by not appealing to the state court, receive another hearing in federal court. Therefore, the dissent's rule would not hinder the overall efficiency of the system any more than the majority's rule promises to do.

IV. CONCLUSION

The issue faced by the Court in *Kremer* is a very difficult issue to solve properly. There are good policy arguments for and against both the majority's and the dissent's rules. However, an understanding of *Kremer* and its implications are of vital importance to civil rights and labor attorneys. The rule of *Kremer* could set a trap for the unwary and preclude a plaintiff from ever having a hearing on the merits of his or her discrimination claim. A full blown adversarial hearing is important to a plaintiff alleging employment discrimination. Employment discrimination is often subtle and indirect, and the evidence needed to prove a discrimination claim is often complex and in the hands of the defendant.[107] Therefore, to properly vindicate the rights of a discriminatee, he should have the benefits of a de novo judicial hearing on the merits of his discrimination claim. Since the *Kremer* decision works to effectively preclude such a hearing in a number of circumstances, the issue should be reconsidered giving weight to the arguments propounded by the dissent.

Douglas R. Hart '84

105. *See* Hanna v. Plumer, 380 U.S. 460 (1965).
106. *See also* Jackson, *supra* note 4.
107. *See* Comment, *Employment Discrimination—State Judicial Procedure Forecloses Federal Remedy Under 42 U.S.C. § 1981: Mitchell v. N.B.C.*, 31 RUTGERS L. REV. 973, 992-93 (1979).