View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by St. John's University School of Law

St. John's Law Review

Volume 52
Number 2 *Volume 52, Winter 1978, Number 2*

Article 13

July 2012

State Proceedings Afforded Res Judicata Effect in Subsequent Civil Rights Action Brought Under Section 1981 (Mitchell v. National Broadcasting Co.)

David Lesser

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

Recommended Citation

Lesser, David (1978) "State Proceedings Afforded Res Judicata Effect in Subsequent Civil Rights Action Brought Under Section 1981 (Mitchell v. National Broadcasting Co.)," *St. John's Law Review*: Vol. 52 : No. 2 , Article 13.
Available at: https://scholarship.law.stjohns.edu/lawreview/vol52/iss2/13

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

FEDERAL JURISDICTION AND PRACTICE

STATE PROCEEDINGS AFFORDED RES JUDICATA EFFECT IN SUBSEQUENT CIVIL RIGHTS ACTION BROUGHT UNDER SECTION 1981

Mitchell v. National Broadcasting Co.

For the victim of racially discriminatory employment practices, several forums are available in which relief may be sought.[1] At the state level, legislative schemes typically establish fair employment practice agencies which attempt to settle disputes without resort to the courts.[2] In addition, Congress has provided access to the federal courts through section 1981 of the Civil Rights Act of 1866[3] and Title

---

[1] *See generally* 2 B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS (1970); Peck, *Remedies for Racial Discrimination in Employment: A Comparative Evaluation of Forums,* 46 WASH. L. REV. 455 (1971).

[2] As of 1977, 44 states, Puerto Rico, and the District of Columbia have enacted statutes prohibiting racial discrimination in employment and creating procedures by which victims may seek redress. *See* [1977] 8A LAB. REL. REP. (BNA) 451:102-:103. Administration of these laws is effected through state agencies typically empowered to eliminate discriminatory practices by conference, conciliation, and persuasion. *See* Peck, *Remedies for Racial Discrimination in Employment: A Comparative Evaluation of Forums,* 46 WASH. L. REV. 455, 490 (1971). In New York, for example, the Human Rights Law, codified in the New York Executive Law, provides for preliminary review of a claim of discrimination by the State Division of Human Rights. N.Y. EXEC. LAW § 297 (McKinney 1972 & Supp. Pam. 1972-1977). A determination of the State Division may be appealed, first to the Human Rights Appeal Board, *id.* § 297-a(6)(c), and then to the appellate division of the supreme court, *id.* § 298.

[3] 42 U.S.C. § 1981 (1970) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1981 was originally enacted as part of § 1 of the Civil Rights Act of 1866, Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27. For over 100 years it was thought that the Act of 1866 only prohibited discrimination by persons acting under color of state law. Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment,* 7 HARV. C.R.-C.L. L. REV. 56, 57 & n.6 (1972). Indeed, in 1948 the Supreme Court indicated that § 1982, which also is derived from § 1 of the 1866 statute, is applicable only to instances of state action. Hurd v. Hodge, 334 U.S. 24, 31 (1948). In 1968, however, the Court reexamined congressional intent and concluded that § 1982 was applicable to private acts of discrimination in the sale of housing. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). Relying on the holding in *Jones,* the courts of appeals have uniformly recognized that § 1981, as part of the same legislation, is applicable to private acts of discrimination in employment. *See, e.g.,* Sethy v. Alameda County Water Dist., 545 F.2d 1157, 1160 (9th Cir. 1976); Gresham v. Chambers, 501 F.2d 687, 690 (2d Cir. 1974); Long v. Ford Motor Co., 496 F.2d 500, 503 (6th Cir. 1974); Macklin v. Spector Freight Sys., Inc., 478 F.2d 979, 993-94 (D.C. Cir. 1973); Brady v. Bristol-Meyers, Inc., 459 F.2d 621, 623 (8th Cir. 1972); Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377, 1385 (4th Cir.) (Dupree, J., concurring), *cert. denied,* 409 U.S. 982 (1972); Caldwell v. National Brewing Co., 443 F.2d 1044, 1045 (5th Cir. 1971), *cert. denied,*

VII of the Civil Rights Act of 1964.[4] Because of the availability of both federal and state avenues of relief, the question arises whether a determination at the state level should foreclose subsequent litigation of the same claim in a federal forum. Addressing this issue in the context of a Title VII suit, several federal courts have indicated that prior state proceedings will not bar a later federal action under

---

405 U.S. 916 (1972); Young v. International Tel. & Tel. Co. 438 F.2d 757, 759 (3d Cir. 1971); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097, 1099-1100 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476, 481-83 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970). Recently, the Supreme Court expressly adopted the rationale of this line of decisions. Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975). For a discussion of the legislative history of § 1981, see Note, *Civil Rights Act of 1866—New Strength for an Old Law*, 18 DE PAUL L. REV. 284, 285-90 (1968); Comment, *Racial Discrimination and the Civil Rights Act of 1866*, 23 SW. L.J. 373, 376-79 (1969); Comment, *Racial Discrimination in Employment Under the Civil Rights Act of 1866*, 36 U. CHI. L. REV. 615, 617-19 (1969).

[4] 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975). Section 2000e-2, which prohibits discriminatory employment practices, provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race . . . .

Id. § 2000e-2(a)(1) (1970). The legislative history of Title VII has been examined in numerous articles. *See, e.g.*, Vass, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966).

Several years after the enactment of the Civil Rights Act of 1964, the question arose whether Title VII had effectively repealed the provisions of § 1981. As no support for any repeal theory could be gleaned from the legislative history of Title VII, proponents of the repeal viewpoint were consistently defeated. *See, e.g.*, Brady v. Bristol-Meyers, Inc., 459 F.2d 621, 623 & n.5 (8th Cir. 1972); Young v. International Tel. & Tel. Co., 438 F.2d 757, 760-61 (3d Cir. 1971); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097, 1100-01 (5th Cir. 1970). The commentators agreed that repeal was not intended. *E.g.*, Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. C.R.-C.L. L. REV. 56, 65 (1972); Note, *Is Section 1981 Modified by Title VII of the Civil Rights Act of 1964?*, 1970 DUKE L.J. 1223, 1236; Comment, *Racial Discrimination in Employment Under the Civil Rights Act of 1866*, 36 U. CHI. L. REV. 615, 621-37 (1969).

Although it is not certain that Congress recognized the availability of § 1981 as an avenue of relief when Title VII was being debated, support for rejection of the repeal argument may be found in the Congressional Record. In 1964, an amendment was introduced in the Senate establishing the Equal Employment Opportunity Commission (EEOC), which had been created by Title VII, 42 U.S.C. § 2000e-4(a) (Supp. V 1975), as the exclusive agency for the investigation and remediation of employment discrimination. The amendment was defeated by a large margin. 110 CONG. REC. 13650-51 (1964). Thus, Congress impliedly indicated that the procedures outlined in Title VII were not meant to be a substitute for other available avenues of relief. Moreover, in 1972 Congress rejected a proposed amendment which would have effectively repealed § 1981. 110 CONG. REC. 3373 (1972). One Senator who objected to the amendment stated that its passage would repeal the first major piece of civil rights legislation in our nation's history and concluded that "[t]he law against employment discrimination did not begin with Title VII . . . nor is it intended to end with it." *Id.* at 3371 (remarks of Sen. Williams).

that statute.[5] Recently, however, in *Mitchell v. National Broadcasting Co.*,[6] the Second Circuit held that a plaintiff who has sought and obtained state court review of an adverse state administrative determination is precluded from pursuing a subsequent action in federal court under section 1981.[7]

Employed by the National Broadcasting Company (NBC) in an administrative capacity, plaintiff Mitchell, a black woman, was discharged "allegedly because of her poor work performance and uncooperative attitude."[8] Pursuant to the New York Human Rights Law,[9] Mitchell, proceeding *pro se*, filed a complaint with the State Division of Human Rights alleging that she had been discriminated against by NBC and several of its employees on the basis of her race.[10] Following an investigation, the Regional Director of the State Division dismissed the complaint, finding that there existed no probable cause to believe NBC had engaged in a discriminatory practice.[11] An evenly divided Human Rights Appeal Board affirmed.[12] With the assistance of counsel, Mitchell petitioned the

---

[5] *See* Batiste v. Furnco Constr. Corp., 503 F.2d 447 (7th Cir. 1974), *cert. denied,* 420 U.S. 928 (1975); Cooper v. Philip Morris, Inc., 464 F.2d 9 (6th Cir. 1972); Voutsis v. Union Carbide Corp., 452 F.2d 889 (2d Cir. 1971), *cert. denied,* 406 U.S. 918 (1972); Benneci v. Department of Labor, 388 F. Supp. 1080 (S.D.N.Y. 1975); Ferrell v. American Express Co., 8 Fair Empl. Prac. Cas. 521 (E.D.N.Y. 1974); Young v. South Side Packing Co., 369 F. Supp. 59 (E.D. Wis. 1973); Carrion v. New York Univ., 4 Empl. Prac. Dec. 5992 (S.D.N.Y. 1972); *cf.* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (arbitration decision will not bar Title VII claim).

[6] 553 F.2d 265 (2d Cir. 1977), *aff'g* 418 F. Supp. 462 (S.D.N.Y. 1976).

[7] *Id.* at 268.

[8] *Id.* at 266. Ms. Mitchell initially had been placed on probation by the National Broadcasting Company (NBC) for a period of 30 days. NBC claimed that she was fired at the end of that period because her attitude had failed to improve. *Id.*

[9] N.Y. EXEC. LAW §§ 290-301 (McKinney 1972 & Supp. Pam. 1972-1977).

[10] 553 F.2d at 266-67 & n.2. Within 180 days of the filing of a complaint alleging discrimination, the State Division of Human Rights is required to determine "whether there is probable cause to believe that the person named in the complaint . . . has engaged or is engaging in an unlawful discriminatory practice." N.Y. EXEC. LAW § 297(2) (McKinney Supp. Pam. 1972-1977). If the State Division finds no probable cause, the complaint is dismissed. Should probable cause be found, however, the State Division is authorized to attempt to eliminate the discriminatory practice by "conference, conciliation and persuasion." *Id.* § 297(3)(a) (McKinney 1972). The State Division will hold a public hearing if the complaint has not been dismissed or a settlement has not been reached within 270 days of filing. *Id.* § 297(4)(a) (McKinney Supp. Pam. 1972-1977).

[11] 553 F.2d at 267. The State Division's investigation consisted of two informal conferences at which oral testimony was taken and interdepartmental correspondence submitted by NBC. Brief for Appellant at 5-6.

[12] 553 F.2d at 267. The State Human Rights Appeal Board has the authority to "affirm, remand, or reverse any order of the division" it finds to be arbitrary, capricious, or not "supported by substantial evidence on the whole record." N.Y. EXEC. LAW § 297-a(7)(d)-(e) (McKinney 1972).

Appellate Division of the Supreme Court of New York to set aside the Appeal Board's order. In a unanimous decision, the appellate division upheld the administrative determination.[13] Plaintiff thereupon commenced a section 1981 action in the District Court for the Southern District of New York, relying upon judicial decisions which have interpreted that section to proscribe discrimination in private employment.[14] The district court granted NBC's motion for summary judgment on the ground that the state proceedings were entitled to res judicata effect and thus served as a bar to a new action under section 1981.[15]

On appeal to the Second Circuit, Mitchell argued that the desirability of initial resort to state conciliatory machinery in the civil rights area militated against affording state proceedings res judicata effect. In addition, she alleged that the state proceedings did not provide a " 'full and fair opportunity to litigate her claim.' "[16] Judge Mishler, writing for the majority,[17] noted that the doctrine of res judicata is a means by which duplicative litigation is prevented.[18]

[13] 553 F.2d at 267. The appeal was brought pursuant to N.Y. EXEC. LAW § 298 (McKinney 1972), and N.Y. CIV. PRAC. LAW §§ 7801-7806 (McKinney 1963 & Supp. 1977-1978). For a discussion of the appellate division's scope of review, see note 59 and accompanying text *infra.*

[14] 418 F. Supp. 462. *See* note 3 *supra.* Prior to the affirmance by the Appeal Board, Mitchell had filed a complaint with the EEOC in accordance with the requirements of Title VII, *see* 42 U.S.C. § 2000e-5(e) (Supp. V 1975). 553 F.2d at 268. Approximately 3 months after the appellate division's decision, the EEOC issued a finding of no probable cause and sent Mitchell a letter informing her of her right to commence an action under Title VII. *Id.* at 268. Title VII provides that an action thereunder must be commenced within 90 days of receipt of this letter. 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975). Since Mitchell's claim in the instant § 1981 action was filed 9 months after receipt of her right-to-sue letter, her Title VII claim was time-barred and therefore not asserted in the complaint.

[15] 418 F. Supp. at 464. The district court found Mitchell's reliance on an analogous Title VII case to be misplaced. Title VII, the court stated, provides a separate and independent remedy. Therefore, questions concerning § 1981 "must be examined largely without references to the Title VII procedures." *Id.* at 463. Finding that Mitchell had been afforded an adequate opportunity in the state forums to litigate her claim, the court concluded that those proceedings would preclude a further action. *Id.* at 464.

[16] 553 F.2d at 268.

[17] District Judge Mishler, sitting by designation, was joined by Circuit Judge Lumbard in the majority opinion. Circuit Judge Feinberg dissented.

[18] 553 F.2d at 268. The purposes and application of the judicially created doctrine of res judicata were succinctly stated by the Supreme Court in Commissioner v. Sunnen, 333 U.S. 591, 597 (1948):

> The general rule of *res judicata* applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound
> . . . .

Accord, Sea-Land Servs., Inc. v. Gaudel, 414 U.S. 573, 578-79 (1974).

Examining the *Mitchell* situation to ascertain whether res judicata could be properly applied, the court noted that the parties and issues in the federal suit were identical to those in the state action.[19] Judge Mishler observed, moreover, that since the Human Rights Law explicitly barred a new action on the same claim once a decision of the State Division has been reviewed by the appellate division,[20] the New York courts would treat the state proceedings as final and binding.[21] While these factors normally would dictate that further litigation be barred, the Second Circuit pointed out that, where state administrative proceedings are involved, it is particularly important to evaluate the type of procedures conducted to ensure that the claim has been "fully and fairly adjudicated on its legal or factual merits."[22] The majority resolved this issue by drawing an analogy between the probable cause determination made by the State Division and the disposition of a motion for summary judgment in the federal courts. In both situations, Judge Mishler observed, dismissal will result if the complaint is found to lack merit as a matter of law.[23] Although dismissal on the *legal* merits of the complaint forecloses the opportunity for a full evidentiary hearing, the *Mitchell* court declared, the claimant's "right to a day in court" does not invariably include the right to a formal hearing.[24]

As an independent ground for its holding, the Second Circuit noted that Title 28, United States Code, section 1738,[25] imposes an

---

[19] 553 F.2d at 268-70.

[20] *Id.* at 273. The Human Rights Law provides that resort to the administrative procedures contained therein, when pursued to a final determination, precludes any other action on the same grievance. N.Y. EXEC. LAW § 300 (McKinney 1972).

[21] 553 F.2d at 269.

[22] *Id.* at 270. The court added that since application of res judicata in this case would have the effect of barring a civil rights claim, an inflexible application of that doctrine would be undesirable. *Id.* at 269.

[23] *Id.* at 270-71.

[24] *Id.* at 271 (citing Olsen v. Muskegon Piston Ring Co., 117 F.2d 163, 165 (6th Cir. 1941)). The court rejected plaintiff's contention that the decision of the State Division had received an automatic affirmance by the Appeal Board and the appellate division. Judge Mishler found that the appellate division has consistently applied a standard of review which considers the legal merits of the complaint, therefore, that court's review was sufficient to remedy any errors made by the State Division. *Id.* at 272 n.9. *But see* note 59 and accompanying text *infra*.

[25] 28 U.S.C. § 1738 (1970) provides in pertinent part:

> The . . . judicial proceedings of any court of any . . . State, Territory or Possession . . . shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such . . . judicial proceedings . . . so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and

obligation upon the federal courts to give a state court judgment the same effect it would be afforded by the rendering jurisdiction.[26] Section 1738 becomes operative upon a finding of finality at the state level. Recalling its conclusion that the finality element with respect to res judicata had been satisfied, the majority reasoned that the touchstone of section 1738's applicability was fulfilled by the explicit prohibition of further legal actions contained in the New York Human Rights Law.[27]

While the court observed that satisfaction of the requirements of res judicata and section 1738 would usually lead to dismissal of the action, it recognized that the presence of a clearly defined countervailing federal policy would preclude such a result.[28] Thus, the majority addressed Mitchell's policy arguments in order to determine whether there existed a compelling reason for allowing review of the claim at the federal level. Judge Mishler acknowledged that other courts have held that compliance with the deferral policy of Title VII, under which a complainant must pursue his state administrative remedies before commencing a federal action,[29] will not foreclose a subsequent Title VII suit.[30] The court reasoned, therefore, that if state administrative proceedings were held to bar a section 1981 claim, the effect might be to force aggrieved individuals to choose between filing a complaint with the state agency, in order to preserve their Title VII action, and pursuing a claim in federal court under section 1981.[31] This, the *Mitchell* court found, would

Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

[26] 28 U.S.C. § 1738 (1970) gives a state judgment res judicata effect so as to bar a subsequent suit on the same cause of action in federal court. Davis v. Davis, 305 U.S. 32, 39-40 (1938); American Sur. Co. v. Baldwin, 287 U.S. 156, 166 (1932); American Mannex Corp. v. Rozands, 462 F.2d 688, 689-90 (5th Cir.), *cert. denied,* 409 U.S. 1040 (1972); Lynne Carol Fashions, Inc. v. Cranston Print Works Co., 453 F.2d 1177, 1184 (3d Cir. 1972); 1B MOORE'S FEDERAL PRACTICE ¶ 0.406[1] (2d ed. 1974).

[27] 553 F.2d at 274. *See* note 20 and accompanying text *supra.*

[28] 553 F.2d at 274. *See* Spilker v. Hankin, 188 F.2d 35, 39 (D.C. Cir. 1951), wherein the court stated: "[R]es judicata, as the embodiment of a public policy, must, at times, be weighed against competing interests, and must on occasion, yield to other policies." *Accord,* Pearlstein v. Scudder & German, 429 F.2d 1136, 1143 (2d Cir. 1970), *cert. denied,* 401 U.S. 1013 (1971); 1B MOORE'S FEDERAL PRACTICE ¶ 0.405[11] (2d ed. 1974).

[29] *See* note 31 *infra.*

[30] 553 F.2d at 274 & 275 n.13.

[31] *Id.* at 274-75. Under the deferral provision of Title VII, if the state in which the alleged discriminatory act occurred has enacted a law prohibiting such acts, and has created a local agency authorized to receive complaints, the complaint must be deferred to that agency and no federal charge may be filed until the expiration of 60 days or the termination of the state proceedings, whichever occurs first. 42 U.S.C. § 2000e-5(c) (Supp. V 1975). The *Mitchell* court pointed out that the State Division received the complaint on Dec. 3, 1973, and dismissed it *more than* 60 days later on Feb. 11, 1974. Nonetheless, it was observed that Mitchell

contravene the legislature's intention that civil rights claimants be permitted " 'to pursue independently [their] rights under both Title VII and other applicable state and federal statutes.' "[32] Accepting the argument that deferral would also be desirable in the context of a section 1981 claim, Judge Mishler nonetheless reasoned that such a deferral policy could be fully satisfied without requiring claimants to pursue state remedies beyond the administrative level.[33] Although federal policy therefore would militate against bar-

could have filed a charge with the EEOC and commenced her § 1981 action before the proceedings at the State Division had *terminated.* 553 F.2d at 275 n.12. Later in its opinion, the majority stated that its decision to apply res judicata is consistent with the rule it has applied to actions under 42 U.S.C. § 1983 (1970), which proscribes deprivation of constitutional rights under color of state law. That rule requires resort to state administrative proceedings under certain circumstances. 553 F.2d at 276. While the court gave no definitive answer to the question whether resort to state administrative machinery is required as a prerequisite to a § 1981 action, the foregoing dictum seems to indicate that the court assumed that such a requirement exists. A majority of the federal courts addressing the more general question whether the full panoply of Title VII remedies must be pursued prior to the filing of a § 1981 claim, however, have answered in the negative. Taylor v. Safeway Stores, Inc., 524 F.2d 263, 274 (10th Cir. 1975); Gresham v. Chambers, 501 F.2d 687, 690-91 (2d Cir. 1974); Long v. Ford Motor Co., 496 F.2d 500, 503 (6th Cir. 1974); Caldwell v. National Brewing Co., 443 F.2d 1044, 1046 (5th Cir. 1971), *cert. denied,* 405 U.S. 916 (1972); Young v. International Tel. & Tel. Co., 438 F.2d 757, 763 (3d Cir. 1971); Wageed v. Schenuit Indus., Inc., 406 F. Supp. 217, 221 (D. Md. 1975). *But cf.* Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476, 487 (7th Cir.), *cert. denied,* 400 U.S. 911 (1970) (plaintiff must plead reasonable excuse for failure to exhaust administrative remedies).

It should also be noted that the continued vitality of the deferral requirement established by the Second Circuit for § 1983 actions in Blanton v. State Univ., 489 F.2d 377 (2d Cir. 1973) and Eisen v. Eastman, 421 F.2d 570 (2d Cir. 1969), *cert. denied,* 400 U.S. 841 (1970), has been cast in doubt by subsequent decisions. *See* Cordova v. Reed, 521 F.2d 621, 624 (2d Cir. 1975); Fuentes v. Roher, 519 F.2d 379 (2d Cir. 1975); Plano v. Baker, 504 F.2d 595 (2d Cir. 1974).

[32] 553 F.2d at 274 (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974)). In *Gardner-Denver,* an arbitration determination adverse to the plaintiff had been rendered. The collective bargaining agreement between the defendant-employer and the plaintiff's union stated that the arbitrator's decision was to be final and binding on all parties. In plaintiff's later suit under Title VII, the district court granted defendant's motion for summary judgment and dismissed the action, reasoning that the plaintiff had made a voluntary election of remedies. 415 U.S. at 39-43. Rejecting this rationale, the Supreme Court dismissed at length the policies underlying civil rights legislation and the intent of Congress to ensure the availability of multiple remedies in discrimination situations. The Court also noted that "in general, submission of a claim to one forum does not preclude a later submission to another." *Id.* at 47-48. Thus, it was concluded that the arbitral decision was not binding and that *de novo* review by the district court was warranted. *Id.* at 59-60. For a further discussion of *Gardner-Denver* and its applicability to *Mitchell,* see notes 45-48 and accompanying text *infra.*

[33] 553 F.2d at 275. The district court in *Mitchell* apparently was of the opinion that pursuit of available state judicial review is required by the deferral provisions of Title VII:

> Thus, this court is presented with the narrow issue . . . of whether a state administrative and judicial proceeding, instituted pursuant to required state exhaustion under Title VII . . . , has a res judicata effect barring later action . . . .

ring a section 1981 suit solely because a prior administrative determination had been obtained, these policy considerations, the majority found, are not an obstacle to the application of res judicata when the plaintiff has chosen to seek review in a state court.[34] In the "absence of countervailing policy considerations," the Second Circuit majority concluded that the interests of finality, certainty, and conservation of judicial energies dictate that Mitchell's action be dismissed.[35]

In a dissenting opinion, Judge Feinberg argued that there existed strong federal policy reasons for overriding the mandate of section 1738 and the doctrine of res judicata.[36] In the dissent's view, Congress had intended to afford employment discrimination claimants "ultimate resort to the federal forum" because of its recognition that " 'federal rights are best adjudicated in federal forums' "[37] and that inadequacies encountered at the state administrative level diminish the ability of agencies to deal effectively[38] with discrimination claims. Judge Feinberg found unpersuasive the argument that these considerations were inapplicable to a section 1981 claim.[39] He went on to reject the majority's conclusion that the occurrence of state court review is dispositive, pointing out that since the appellate division's scope of review is strictly limited by statute, Mitchell's claim had not been reviewed *de novo* by a judicial body.[40] To give preclusive effect to the state proceedings under these circumstances, the dissent declared, would do violence to the congressional intention that administrative determinations of employment dis-

> . . . It would be anomalous to argue that the *very state proceeding* that is *required* by Title VII bars the contemplated federal remedy under Title VII.

418 F. Supp. at 463 (citations omitted) (emphasis added).

[34] 553 F.2d at 275-76. The *Mitchell* court specifically left unanswered the question whether res judicata would have been found applicable had the instant action been brought under Title VII. *Id.* at 275 n.13. Shortly after *Mitchell*, a district court within the Second Circuit, in Al-Hamdani v. State Univ., 438 F. Supp. 299 (W.D.N.Y. 1977), was presented with that precise question. Pointing to the express reservation of the question in *Mitchell* and the strong policy favoring federal court review of Title VII claims, the court ruled that the plaintiff is not bound by the state determinations. *Id.* at 302.

[35] 553 F.2d at 276-77.

[36] *Id.* at 277 (Feinberg, J., dissenting).

[37] *Id.* at 278 (Feinberg, J., dissenting) (quoting Ferrell v. American Express Co., 8 Fair Empl. Prac. Cas. 521, 523 (E.D.N.Y. 1974)).

[38] *Id.* (Feinberg, J., dissenting).

[39] *Id.* at 278 (Feinberg, J., dissenting). The dissent felt that the district court's reasoning, which would force the plaintiff to choose between the remedies provided by Title VII and § 1981, was convoluted. Judge Feinberg stated that a "coherent interpretation of the two statutes" demands that the same policy considerations be applied in actions arising under the two legislative schemes. *Id.* (Feinberg, J., dissenting).

[40] *Id.* at 278-79 (Feinberg, J., dissenting).

crimination claims be "subjected to intensive scrutiny in the federal courts."[41]

It is submitted that the *Mitchell* court's analysis of the relevant policy considerations was unnecessarily narrow. In its examination of Mitchell's arguments, the Second Circuit limited its discussion to the desirability of deferral to state agencies.[42] Gleaned from the provisions of Title VII, this policy, which the Second Circuit found applicable in the context of a section 1981 claim,[43] reflects a congressional desire to encourage utilization of existing state administrative machinery in combating employment discrimination. As a result of its focus upon administrative proceedings, this consideration would have supported a decision to allow Mitchell's 1981 action only if she had not originally appealed beyond the administrative level.[44]

---

[41] *Id.* at 279 (Feinberg, J., dissenting). In addition to the narrowness of the review obtained by Mitchell from the appellate division, Judge Feinberg pointed out that at both the State Division and Appeal Board proceedings she had not been represented by counsel, and that the State Division's investigation had been limited in scope. *Id.* at 278 (Feinberg, J., dissenting). The dissent concluded that, under these circumstances, *de novo* review of the claim in a federal forum was a necessary safeguard. *Id.* at 280 (Feinberg, J., dissenting).

[42] *See id.* at 274-76.

[43] 553 F.2d at 274-77. There are several reasons for looking to Title VII policies for guidance in § 1981 actions. Foremost among these is the fact that § 1981 was passed more than 110 years ago and its legislative history, therefore, is of little assistance in determining the relationship between the federal remedy and recent state enactments. In addition, there is a paucity of cases involving the procedural aspects of the statute, because it was not until after 1968 that § 1981 was recognized as a remedy for private acts of discrimination. *See* note 3 *supra.* Since that time there has been less utilization of the statute by civil rights claimants than had been anticipated. *See* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 80, 84 (1973).

The *Mitchell* court assumed for the sake of argument that the same policy considerations "underlying the treatment of state proceedings in Title VII claims are desirable in a § 1981 context." 553 F.2d at 275. This approach appears sound, since both statutes are designed to achieve the same goal, *i.e.*, elimination of discrimination. In Johnson v. Railway Express Agency, 421 U.S. 454 (1975), however, the Supreme Court employed language which may tend to confuse this issue. The *Johnson* Court held that a timely filing with the EEOC, as required by Title VII, does not toll the running of the statute of limitations on a § 1981 claim. *Id.* at 455. Finding that § 1981 and Title VII seek to accomplish the same goals, the extensive substantive and procedural differences between the two nonetheless led the Court to conclude that they are "separate, distinct, and independent" and must be treated as such. *Id.* at 461.

It is submitted, however, that, in the interest of ensuring full utilization of both statutes, *Johnson* should not be read as precluding the application of Title VII policy considerations in § 1981 actions. *Accord,* Miller v. Poretsky, 409 F. Supp. 837, 839 & n.3 (D.D.C. 1976). *See* Waters v. Wisconsin Steel Works, 502 F.2d 1309, 1316 (7th Cir. 1974), wherein the court stated: "[I]n fashioning a substantive body of law under section 1981 the courts should . . . look to the principles of . . . Title VII for direction." *See generally* Note, *Employment Discrimination—Statute of Limitations Under Section 1981 not Tolled by Filing of Charges with EEOC under Title VII,* 1976 WIS. L. REV. 288.

[44] Although the court did not expressly state that an unreviewed administrative determination would not bar a § 1981 action, it did point out that "[r]es judicata attached when the plaintiff chose to pursue her claim in the state courts, and not before." 553 F.2d at 276.

Since Mitchell's claim was in fact reviewed by a state court, the Second Circuit's decision to preclude her later 1981 suit would therefore be unassailable absent further apposite policy considerations.

Several federal courts have refused to bar civil rights actions commenced after the conclusion of apparently binding state proceedings, however, relying upon policies not discussed by the *Mitchell* majority.[45] For example, in *Alexander v. Gardner-Denver Co.*,[46] the Supreme Court considered the res judicata effect of an arbitral decision upon a subsequent Title VII claim.[47] Rejecting a contention that the plaintiff voluntarily had elected to pursue the arbitral remedy and thereby had waived his federal claim, the Court emphasized that Congress intended Title VII to serve as an independent remedy and placed final responsibility for its enforcement in the federal courts.[48] Added impetus for allowing the claim to be reviewed *de novo* in the district court was the realization that the arbitral mechanism, which lacks the procedural rules and safeguards available in the federal courts, is a less desirable forum for the final adjudication of Title VII claims.[49] In *Voutsis v. Union*

Less than 2 months after the *Mitchell* decision, the District Court for the Southern District of New York was presented with a § 1981 claim where the plaintiff had exhausted her state administrative remedies but had not appealed to the appellate division. The defendant's contention that res judicata should bar the later § 1981 action was rejected on the basis of the judicial-administrative distinction drawn by the *Mitchell* court. Stewart v. Wappingers Cent. School Dist., 437 F. Supp. 250 (S.D.N.Y. 1977).

Prior to *Mitchell*, three district courts had held that a prior state administrative determination does not bar a § 1981 suit. *See* Miller v. Poretsky, 409 F. Supp. 837 (D.D.C. 1976); Wageed v. Schenuit Indus., Inc., 406 F. Supp. 217 (D. Md. 1975); Hollander v. Sears, Roebuck & Co., 392 F. Supp. 90 (D. Conn. 1975).

[45] *See* cases cited in note 5 *supra*; notes 46-54, 64 and accompanying text *infra*.

[46] 415 U.S. 36 (1974).

[47] *See* note 32 *supra*.

[48] 415 U.S. at 51-52. The *Gardner-Denver* Court recognized that Title VII provides the aggrieved party with several forums in which relief may be sought: the EEOC, state and local agencies, and the federal courts. The Court went on to find that Congress had intended to allow a civil rights claimant to pursue his remedies under any other applicable statute: "The clear inference is that Title VII was designed to supplement . . . existing laws and institutions relating to employment discrimination." *Id.* at 48-49. Supporting the Court's analysis are the House and Senate reports on the Equal Employment Opportunity Enforcement Act of 1971, wherein it was clearly indicated that neither Title VII nor its amendments were intended to displace any other remedy. H.R. REP. No. 238, 92d Cong., 1st Sess. 18-19 (1971); S. REP. No. 415, 92d Cong., 1st Sess. 24 (1971).

[49] 415 U.S. at 57-58. The Court pointed out many of the undesirable aspects of the arbitral process:

> [T]he factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the . . . proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross examination, and testimony under oath, are

Carbide Corp.,[50] a case somewhat analogous to *Mitchell*, the Second Circuit was faced with the question whether a settlement effected by the State Division should bar a later suit under Title VII.[51] Upholding plaintiff's right to *de novo* review, a unanimous court[52] explained that the broad "Congressional policy here sought to be enforced is one of eliminating employment discrimination;" to that end, an independent federal remedy is available "if the state machinery has proved inadequate."[53] Underlying the congressional decision to provide an independent federal remedy, the court observed, was a recognition that state fair employment agencies are often ill-equipped to deal effectively with claims of discrimination.[54]

> often severely limited or unavailable. . . . Indeed, it is the informality of arbitral procedure that . . . makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.

Id. at 57-58 (citations omitted).

Many of these same undesirable qualities are also found in proceedings conducted by the State Division. *See* Ferrell v. American Express Co., 8 Fair Empl. Prac. Cas. 521, 523 (E.D.N.Y. 1974). Thus, it is clear that Mitchell was not afforded the safeguards that are available in a federal forum. For example, she was not entitled to subpoena witnesses. *See* State Div. of Human Rights v. University of Rochester, 53 App. Div. 2d 1020, 1020, 386 N.Y.S.2d 147, 148 (4th Dep't 1976) (mem.) (claimant's attorney may not issue subpoenas until full hearing is held). Had the case proceeded to a full administrative hearing, the hearing examiner would not have been bound by the usual rules of evidence. [1977] 9A-1 N.Y.C.R.R. § 465.10(e)(1)-(7). Moreover, as the New York courts have critically noted, the proceedings conducted by the State Division are often unduly abbreviated. *See, e.g.*, Tenenbaum v. Division of Human Rights, 50 App. Div. 2d 257, 259, 376 N.Y.S.2d 542, 544 (1st Dep't 1975) per curiam); State Div. of Human Rights v. Board of Educ., 46 App. Div. 2d 483, 486, 363 N.Y.S.2d 370, 373 (4th Dep't 1975); Mayo v. Hopeman Lumber & Mfg. Co., 33 App. Div. 2d 310, 313, 307 N.Y.S.2d 691, 694-95 (4th Dep't 1970). These factors, together with the fact that Mitchell was unassisted by counsel and that only informal conferences were held during the investigation, militate against the court's conclusion that Mitchell's claim was disposed of in a manner similar to the disposition of a motion for summary judgment by a federal court.

[50] 452 F.2d 889 (2d Cir. 1971), *cert. denied*, 406 U.S. 918 (1972).

[51] In *Voutsis*, a settlement had been negotiated by the State Division which, despite the passage of 2 years and 2 appeals to the appellate division, remained unenforced. 321 F. Supp. 830, 831-32 (S.D.N.Y. 1971). In plaintiff's Title VII suit, the district court granted the defendant's motion for summary judgment on the ground, *inter alia*, of res judicata. *Id.* at 833.

[52] Sitting on the *Voutsis* panel were Judges Feinberg and Lumbard, both of whom participated in *Mitchell*. It is interesting to note that while Judge Lumbard joined in the unanimous rejection of the res judicata defense in *Voutsis*, he opted for the application of that doctrine in *Mitchell*.

[53] 452 F.2d at 893. Although it is uncertain whether the result would have been different in *Voutsis* had the state courts handled the appeals in a more expeditious manner, the court did imply that even where relief is granted at the state level, a subsequent federal action might not be precluded: "While plaintiff may ultimately achieve some individual relief in the state proceedings . . ., the federal claim allows the district court to conduct a 'full scale inquiry into the charged unlawful motivation in employment practices.' " *Id.* at 893 (quoting Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968)).

[54] The *Voutsis* panel declared:

> [T]he purposes underlying enactment of that Title were clearly based on the

The foregoing cases illustrate the general consensus among the federal courts that Congress intended to provide effective remedies in the area of employment discrimination.[55] Consistent with this objective is the provision of an ultimate federal forum, a forum which Congress felt would best safeguard individual rights.[56] A major factor militating in favor of access to the federal courts, moreover, was the belief that the procedures employed by the typical state administrative body would not prove adequate to redress unfair practices.[57] Although these considerations were articulated in the context of Title VII actions, a number of district courts have found them applicable in section 1981 suits and therefore have rejected res judicata defenses.[58]

It is submitted that the factors which have led these courts to

---

> congressional recognition that " . . . state and local FEPC laws vary widely in effectiveness. In many areas effective enforcement is hampered by inadequate legislation, inadequate procedures, or an inadequate budget. Big interstate industry cannot effectively be handled by the States."

Id. at 894 (quoting statement of Sen. Clark, *reprinted in* 2 B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 1290 (1970)).

[55] Relying upon the broad remedial purposes of Title VII, courts have held that a finding of probable cause by the EEOC is not a jurisdictional prerequisite to the filing of a suit under Title VII, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Fekete v. United States Steel Corp., 424 F.2d 331 (3d Cir. 1970), that a prior determination by an arbitrator will not bar a Title VII action, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Hutchings v. United States Indus., Inc., 428 F.2d 303 (5th Cir. 1970), and that a prior determination by a state administrative agency will not bar a subsequent suit under Title VII, Batiste v. Furnco Constr. Corp., 503 F.2d 447 (7th Cir. 1974), *cert. denied,* 420 U.S. 928 (1975); Cooper v. Philip Morris, Inc., 464 F.2d 9 (6th Cir. 1972); Voutsis v. Union Carbide Corp., 452 F.2d 889 (2d Cir. 1971), *cert. denied,* 406 U.S. 918 (1972); Benneci v. Department of Labor, 388 F. Supp. 1080 (S.D.N.Y. 1975); Ferrell v. American Express Co., 8 Fair Empl. Prac. Cas. 521 (E.D.N.Y. 1974); Young v. South Side Packing Co., 369 F. Supp. 59 (E.D. Wis. 1973).

[56] *See* cases cited in note 5 *supra.* In Batiste v. Furnco Constr. Corp., 503 F.2d 447, 449 (7th Cir. 1974), *cert. denied,* 420 U.S. 428 (1975), the plaintiff had received a favorable determination at the state administrative level. In rejecting the defendant's attempt to invoke the doctrine of res judicata, the Seventh Circuit relied upon the overriding congressional intention that "final responsibility for the administration of Title VII rests within the federal system." *Id.* at 450.

In contrast to *Mitchell,* the plaintiff in *Batiste* had received a full hearing and had prevailed at the administrative level; yet the Seventh Circuit refused to foreclose the later federal action. Although the action in *Batiste* was premised upon § 1981 as well as Title VII, no mention was made by the court of the possibility that the § 1981 claim was barred.

Apparently, no circuit court has been confronted with the question whether res judicata bars a Title VII action where the appellant has obtained judicial review of the initial state administrative determination. Several district courts, however, have held that neither a § 1981 nor a Title VII action would be barred in such a situation. *See* note 63 *infra.*

[57] *See* note 54 *supra.*

[58] *See, e.g.,* Crouch v. United Press Int'l, No. 74-296 (S.D.N.Y. Feb. 25, 1977); Miller v. Poretsky, 409 F. Supp. 837 (D.D.C. 1976); Wageed v. Schenuit Indus., Inc., 406 F. Supp. 217 (D. Md. 1975); Hollander v. Sears, Roebuck & Co., 392 F. Supp. 90 (D. Conn. 1975); Carrion v. New York Univ., 4 Empl. Prac. Dec. 5992 (S.D.N.Y. 1972); note 63 *infra.*

conclude that an ultimate federal remedy should be afforded both Title VII and section 1981 plaintiffs are particularly relevant to the factual setting of *Mitchell.* While Mitchell's claim was investigated by the State Division, it was done so on an informal basis; a full hearing was never held. In addition, review by both the Appeal Board and the appellate division was confined by statute to the narrow question whether the finding of no probable cause by the State Division was arbitrary, capricious, or constituted an abuse of discretion.[59] While Mitchell's complaint was heard, the only factual inquiry ever undertaken was the limited one conducted by the State Division.[60] Since the state court's review of the agency decision was severly restricted and therefore can be said to have added little to the sufficiency of the state proceedings as a whole, the res judicata requirement that the claimant be found to have had a full and fair opportunity to present her claim must in this instance find fulfillment in the administrative proceedings. That application of res judicata in civil rights cases cannot rest on the weight of an administrative determination has been definitively stated by many federal courts and was conceded by the *Mitchell* court.[61] Thus, in view of the fact that the Second Circuit inquiry into the sufficiency of the state proceedings was focused upon the administrative component, it is difficult to reconcile the court's decision with such cases as *Gardner-Denver* and *Voutsis.*

Admittedly, it is questionable whether a federal court would adhere to the philosophy that "federal rights are best adjudicated in federal forums" if faced with a prior *state court* determination in which a full scale inquiry had been conducted upon the factual merits of the claim. That situation might well be found to present

[59] *See* N.Y. Civ. Prac. Law § 7803(3) (McKinney 1963); N.Y. Exec. Law § 297-a(7)(e) (McKinney 1972); Mize v. State Div. of Human Rights, 33 N.Y.2d 53, 304 N.E.2d 231, 349 N.Y.S.2d 364 (1973), wherein the New York Court of Appeals stated:

> The scope of . . . review by the board . . . would have been limited to whether the decision of the commissioner was "arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." This would seem to contemplate the limited scope of review familiar in article 78 proceedings . . . . The scope of review in the Appellate Division could scarcely be any broader than that of the appeal board.

Id. at 57, 304 N.E.2d at 233, 349 N.Y.S.2d at 367-68 (citations omitted); *accord,* State Div. of Human Rights v. Mecca Kendall Corp., 53 App. Div. 2d 201, 202-03, 385 N.Y.S.2d 665, 666-67 (4th Dep't 1976); State Div. of Human Rights v. Board of Educ., 46 App. Div. 2d 483, 486, 363 N.Y.S.2d 370, 373 (4th Dep't 1975); Long Island R.R. v. State Div. of Human Rights, 42 App. Div. 2d 857, 857, 346 N.Y.S.2d 849, 850 (2d Dep't 1973) (mem.).

[60] *See* note 59 and accompanying text *supra.*

[61] *See* note 5 and accompanying text *supra.*

an acceptable alternative to review in federal court.[62] Since Mitchell's claim, however, was never adjudicated on its factual merits by any judicial body, the Second Circuit's decision seems to conflict with congressional intent and to ignore the basic assumption underlying Congress' decision to provide for the final adjudication of civil rights claims in the federal courts.[63]

David Lesser

---

[62] In discussing whether the procedures provided by a state statutory scheme may serve as an acceptable substitute for federal review, the court in Tooles v. Kellog Co., 336 F. Supp. 14 (D. Neb. 1972), stated:

> [I]f the State machinery contained the protections for the plaintiff and possible remedies provided by the Federal statute, then a prior state decision should be entitled to a res judicata effect in the Federal action, assuming all the usual requirements for res judicata are met. If, on the other hand, the State's protections and possible remedies were narrower than the Federal relief, then the Congressional purpose is not allowed to be diminished by the action of the State and the extent of the res judicata effect of the prior State decision would have to be decided . . . according to how close the State's possible relief approximated that of the Federal statute.

Id. at 17.

[63] Prior to *Mitchell,* three district courts had found res judicata inapplicable in the context of § 1981 and Title VII suits, even though the plaintiffs in those actions had obtained state court review of the initial administrative determination. In Carrion v. New York Univ., 4 Empl. Prac. Dec. 5992 (S.D.N.Y. 1972), the plaintiff had prevailed at the administrative level. The defendant thereupon petitioned a New York trial court, which reversed and dismissed the complaint on the merits. The appellate division affirmed the reversal and the court of appeals denied leave to appeal. *Id.* at 5993. The district court denied defendant's motion to dismiss plaintiff's subsequent § 1981 and Title VII actions on the basis of the decision in *Voutsis, see* notes 50-54 and accompanying text *supra. Id.* at 5994. In Benneci v. Department of Labor, 388 F. Supp. 1080 (S.D.N.Y. 1975), the district court denied defendant's motion for summary judgment although the claim had been previously reviewed by the State Division, the Appeal Board, the appellate division, and the EEOC. Relying upon the interpretations of congressional intent expressed in *Gardner-Denver* and *Voutsis, see* note 54 *supra,* the *Benneci* court concluded that the appellate division's review was too limited in scope to bar the plaintiff's Title VII action. More recently, in Crouch v. United Press Int'l, No. 74-296 (S.D.N.Y. Feb. 25, 1977), the court rejected a claim of res judicata on two grounds: that a contrary holding would force plaintiffs to choose between a Title VII and § 1981 action, and that the state proceedings, taken as a whole, did not afford the plaintiff a "full and fair opportunity" to present his claim.