OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JOHN S. LYTLE, Petitioner V. HOUSEHOLD MANUFACTURING, INC., dba SCHWITZER TURBOCHARGERS

CASE NO: 88-334

PLACE: Washington, D.C.

DATE: January 8, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

JOHN S. LYTLE,
Petitioner
v. : No. 88-334
HOUSEHOLD MANUFACTURING, INC.,
dba SCHWITZER TURBOCHARGERS

Washington, D.C.
Monday, January 8, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

JUDITH REED, ESQ., New York, New York; on behalf of the Petitioner.

H. LANE DENNARD, JR., ESQ., Atlanta, Georgia; on behalf of the Respondent.

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PROCEEDINGS

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 88-334, John S. Lytle v. Household Manufacturing, Inc.

Ms. Reed.

ORAL ARGUMENT OF JUDITH REED

ON BEHALF OF THE PETITIONER

MS. REED: Mr. Chief Justice, and may it please the Court:

Petitioner John Lytle filed a complaint in Federal district court alleging that he had been fired for racially discriminatory reasons and that the Respondent employer had subsequently retaliated against him for racially discriminatory reasons. Petitioner sued under both 1981 and Title VII. His complaint therefore alleged both legal and equitable claims. He made a timely demand for a jury trial. Notwithstanding the presence of those legal claims, the district court dismissed the Section 1981 claims on reasons that everyone concedes were erroneous and proceeded to trial on the equitable claims, ruling against Petitioner and in favor of Respondent.

Respond -- Petitioner subsequently attempted to correct that error in the court of appeals. While the court of appeals held that it was error to dismiss the

1981 claims, it found that it was powerless to reverse and remand, for it held that the judge's findings, if not clearly erroneous, could collaterally estop Petitioner from litigating his claims before a jury.

Thus, the import of the holding of the court of appeals is that because the district court proceeded to make findings, his original error in denying a jury trial was unreviewable, meaning therefore that orders denying the jury trial are not reviewable after trial.

QUESTION: Ms. Reed, these were findings in connection, of the sort that are ordinarily made in connection with a bench trial, findings of fact?

MS. REED: The findings on Title VII. There were findings of fact on whether Title VII had been violated.

The issue in this case, then, is at what point a party is entitled to appeal an improper denial of a jury trial. Under the view of the respondent, and apparently in the view of the Fourth Circuit, Petitioner lost his right to appeal that order denying a jury trial on the first day of trial when that demand was extinguished and the bench trial begun. Such a holding has serious consequences for both litigants and the Federal courts, for if a party is in danger of losing his right to a jury trial, he must proceed by mandamus or take an

interlocutory appeal.

Such an order would now fall within the confines of the Cohen doctrine, addressed by this Court in Lauro Lines v. Chasser and Midland Asphalt. The practice of this Court for well over 100 years, as we discuss in our brief, and that of all other circuits, has been to reverse and remand upon a finding that the denial of the jury trial right was erroneous. What the Fourth Circuit has done, in effect, is to create a new category of interlocutory appeals. Until now, one would have thought, one had a right to appeal that denial at the conclusion of the proceeding.

Indeed, if Petitioner had taken an interlocutory appeal, under its prevailing view, it is likely that such an appeal would have been dismissed. Certainly Petitioner could have proceeded by mandamus, but --

QUESTION: Interlocutory appeal under 1292(b) by certification?

MS. REED: Well, either that or because it now fell within the Cohen doctrine, because it would be effectively unreviewable after trial, which is what we say the import of the Fourth Circuit's holding is.

QUESTION: I just want to make sure I under -- you said it is likely that it would not have been dismissed?

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MS. REED: I -- we believe that under the prevailing view of the law, had he attempted to take an interlocutory appeal, that appeal would probably have been dismissed because it was thought the jury trial orders were not appealable until the conclusion of the trial.

QUESTION: I see.

MS. REED: Now, Petitioner certainly could have proceeded by mandamus, but he was not required to do so at peril of forfeiting his right to ever appeal the denial of the jury trial. That has simply never been the law.

Now, the court of appeals did this under an erroneous view of collateral estoppel. Now, collateral estoppel is not like law of the case, which is used to maintain consistency during the proceedings of a single case. Collateral estoppel is not applicable in the course of a single proceeding. It is certainly not applicable on direct appeal. The Fourth Circuit's use of collateral estoppel on direct appeal to preclude review of an obviously erroneous order is simply unprecedented.

Now, collateral, by its terms, would appear to mean a separate proceeding. What the court of appeals seems to have done is some sort of new kind of estoppel that one might appropriately term bootstrap estoppel. Petitioners cannot correct the denial of the jury trial, according to Respondent, because the district court made

not one error but two errors. It is a somewhat circular argument. It ends up meaning that two wrongs may make a right, that because the district court proceeded to make findings after his error, Petitioner cannot get review of that.

Now the consequence of this ruling is that a party must seek and be granted interlocutory review of all rulings that might possibly infringe on a right to the jury trial. Now that is contrary to the Federal system as we know it, and it would be highly disruptive. It raises the specter of trials being ended before they start, of counsel being required to simply walk out of the court room. And indeed such a rule would not foster the values of repose that collateral estoppel is designed to foster. It would, to the contrary, generate additional litigation, generate additional appeals, because it would force counsel to take protective appeals.

Now, Respondents secondly argue that because the court would have directed a verdict for Respondent, a remand in this case is not required. Now, our first response to that is that is not what the court of appeals held in this case. The court of appeals did not hold that no reasonable jury would ever hold for Petitioner, or could ever hold for Petitioner. The court of appeals simply viewed the findings under a sufficiency of the

evidence standard.

Second, the record shows that there was considerable evidence on the -- on both the issues that Petitioner raised to submit this case to a jury. And if the district court could have found for either party there can't be a directed verdict. Now, in our briefs we cite several examples from the record showing why in this record there was sufficient evidence to submit the case to a jury. The court could grant a directed verdict only when no reasonable fact finder could have decided for Petitioner.

In the instant case the court decided the issues under Rule 41(b). And under that rule the judge could indeed do what he did. The judge could make rulings on disputed testimony. The judge was free to make inference. The judge was free to decide whom he believed. But not so under Rule 50. In accordance with this Court's decision in Anderson v. Liberty Lobby, the judge was required to allow the jury in this case, had one been empaneled, to weigh the evidence, make inferences and come to a conclusion as to whether or not Petitioner had been discriminated against.

And we think that the trial judge indicated that by his own words in the trial transcript, as we point out in our briefs. When Petitioner's counsel recited a view

of the evidence that could support Mr. Lytle's claim, the district court responded that that was indeed a reasonable view of the evidence. That single statement, especially coupled with the earlier denial of a summary judgment motion, puts to rest any claim that a directed verdict could have been granted in this case. What was okay under Rule 41(b) for the judge to do, we contend, was -- the judge was precluded from doing under Rule 50(a). Accordingly, this Court should reverse the decision of the court of appeals and remand for a jury trial.

You -- in -- indeed, the practical case, the practical issue in this case is when a party is supposed to appeal the wrongful denial of a jury. Now, our position --

QUESTION: Well, in this -- in this case the judge didn't rule on the -- on the question of the right to jury trial. His ruling, that you claim was error, was that there was no cause of action at all. He didn't rule that there was not a jury trial if there had been a cause of action presented. So this is not really a case in which we must be concerned that the jury trial right will be stifled because judges will erroneously rule that a jury is not required. This is just -- there is, the fortuity here is an erroneous ruling of law by assumption. And I don't see how that is much different than having a

previous hearing by the SEC.

MS. REED: Well, if you are referring to Parklane, it is a very different case, Justice Kennedy. The reason -- the sole reason that Petitioner was entitled to a jury trial was because his claim -- his complaint raised legal claims, and the 1981 being that claim. The respondents don't pretend to --

QUESTION: But you see my point. The judge didn't err in ruling that the seventh -- in ruling on the scope of the Seventh Amendment.

MS. REED: The judge -- we contend the judge erred, and indeed all parties agree that the district judge erred in dismissing the 1981 claims. The 1981 claims were what brought into play the right to a jury trial. By dismissing that claim and the judge then saying we will not have a jury; we will now proceed to trial in front of the bench, that is -- is the denial of the jury trial. It seems to me that it begs the question to decide that there wasn't explicitly an order striking a demand, as opposed to dismissing a claim, because it -- you still are left with a category of cases barring direct review of an erroneous decision of the district court.

Now, we contend that in this case there is one single, very important practical issue, and that is when is a party supposed to appeal the wrongful denial of a

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jury. Now, our position is clear. Plaintiff or defendant, if aggrieved by the grant or denial of a jury trial, can appeal that order at the end of trial, no matter what the reason for the order. Now we don't understand what Respondent's position is --

QUESTION: You mean you can appeal, you can appeal from the judgment entered against you and assign that as a ground of error.

MS. REED: Absolutely.

QUESTION: Yes.

MS. REED: That would be our position, that after the conclusion, after final judgment was entered on direct appeal, you could appeal any of the errors that you contend were made, including the error denying the jury trial. Now, we have raised that issue in our briefs, and Respondent has not answered that question. And we don't understand exactly what Respondent's position is.

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

QUESTION: Thank you, Ms. Reed.

Mr. Dennard.

ORAL ARGUMENT OF H. LANE DENNARD, JR.

ON BEHALF OF THE RESPONDENT

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

We may disagree with some of what the petitioner said about the background facts in the case, but we don't believe there is any disagreement about what Mr. Lytle's claims are, and we feel that the claims themselves are important for the Court's initial consideration. Mr. Lytle claims that he was discriminated against because of his race when he was terminated for violating the company's rule on unexcused absences. He next -- in other words, he claims the discriminatory application of a company rule or policy.

Next, Mr. Lytle claims that he was retaliated against or discriminated against because he filed an EEOC charge when the company gave out references to perspective employers that included only the job title and length of employment. Again, we are talking about the discriminatory application of a company policy, and in this instance the alleged basis of discrimination is the fact that Mr. Lytle filed an EEOC charge.

From the very start of this case Schwitzer has taken the position that both claims, retaliation claim and the discharge claim under Section 1981, should be dismissed because Title VII covers this conduct. This is an -- important for the Court to consider initially because the Court can avoid the constitutional issue that is urged by the Petitioner by considering the application

of this Court's decision last term in Patterson to this case.

QUESTION: This is a ground that you think you are entitled to press as a respondent?

MR. DENNARD: We do, Your Honor, because we feel like we have raised the issue below, and that's what we intend to argue, and that --

QUESTION: But you, did you --

MR. DENNARD: -- certainly records adequately developed --

QUESTION: Have you cross-petitioned?

MR. DENNARD: No, Your Honor.

QUESTION: Well, isn't this different relief than you -- than you got below?

MR. DENNARD: Well, this is -- of course Patterson was decided after that, but it is our position that we adequately -- raised these issues, as far as the coverage of Section 1981, so that we can make this argument at this stage.

QUESTION: You argued it before the Fourth Circuit?

MR. DENNARD: We argued before the Fourth Circuit and in the district court that -- that the retaliation claim -- it's a little bit different argument with both claims. But with the retaliation argument, we

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specifically argued that Section 1981 does not cover retaliation.

QUESTION: Well, had Patterson been decided then?

MR. DENNARD: Patterson hadn't been decided then.

QUESTION: But you nevertheless were arguing that point?

MR. DENNARD: We were arguing the point, and what our position here today is is that we have developed the record on that and that we have adequately raised Pat -- the issues that are covered by Patterson --

QUESTION: And the court of appeals rejected that.

MR. DENNARD: Well, the court of appeals did not rule on that. They ruled on another grounds, but they did not specifically reject that, Your Honor. They -- I think they mention in the decision that they will not rule on the other grounds that were presented by both sides.

QUESTION: Would the relief you get under -- under your Patterson theory be precisely the same as the relief that you are seeking to defend?

MR. DENNARD: That's -- well, the relief from the standpoint of Section 1981 not covering discharge and retaliation would be the same.

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QUESTION: Well, what was -- the court of appeals ruled on collateral estoppel, didn't it?

MR. DENNARD: That is correct.

QUESTION: Well, that certainly is different than saying 1981 doesn't cover this.

MR. DENNARD: Well, we would contend, Your Honor, that as --

QUESTION: It may be in result -- it may be in result that you, that there just isn't any 1981 claim for one reason or another. But it isn't the same reason.

MR. DENNARD: Well, we would contend, Your Honor, that as an appellee we would have the right to defend on any matter that was raised in the record.

QUESTION: As long as it doesn't give you more relief than you would have had.

MR. DENNARD: Well, I think the relief would be the same. I mean, we are talking about --

QUESTION: All right. So, yeah.

MR. DENNARD: The additional -- the additional point is that -- this consideration of an appellee relying on matters that are developed in the record, or raised in the record, is even stronger when there is an intervening decision like the Patterson case.

QUESTION: Wouldn't you have to amend to get under Patterson?

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MR. DENNARD: Amend? I don't understand.

QUESTION: Your pleadings, your original pleadings. Realize that the case was before Patterson.

MR. DENNARD: Well, we feel that we would have a right to present the issue at this point in time to the Supreme Court because we've raised the issue below and because the record is adequately developed to consider it, without any amendment.

QUESTION: But you didn't raise the Patterson issue.

MR. DENNARD: Well, we didn't raise the Patterson issue --

QUESTION: (Inaudible).

MR. DENNARD: -- per se.

QUESTION: I see. But just the same.

MR. DENNARD: But we took the position that Section 1981 could not be added to Title VII claims in this case for both discharge and retaliation, and the Section 1981 claims were dismissed based on that argument.

QUESTION: The certiorari papers in this case were filed before we heard and decided Patterson on rehearing, weren't they?

MR. DENNARD: That is correct.

Given the status that we're -- of the record that we have, we feel that we stand in a better situation

than someone simply arguing the retroactive application of Patterson, although I think it's clear that Patterson should apply retroactively, because -- and that has been the majority -- that has been the result in the big majority of cases that have considered it in the lower courts. The Sixth, the Seventh, the Ninth and the Eleventh Circuits have all applied Patterson retroactively to pending claims at this point in time.

We cite the Ninth Circuit or the Seventh Circuit and the Ninth Circuit opinion in our brief, and the Eleventh Circuit decision in McGinnis v. Ingrahm Equipment Company is at 888 F.2d at 111, considered the application of Patterson to a pending case and considered the plaintiff's argument in that case that Patterson couldn't be raised because it hadn't been perfected on appeal. And the Eleventh Circuit concluded that Patterson would have to be considered because it actually restricted the subject matter of the court to consider claims under Section 1981.

QUESTION: We granted certiorari on the question of whether the violation of the Seventh Amendment was -- at what time it should be reviewed on the question presented by the petitioner's question. And if you are asking us to decide the case on a ground -- kind of an alternative basis to what the court of appeals decided it

on, you really have to show us some reason why we ought not to reach that question, don't you?

MR. DENNARD: Well, the point -- the reason not to reach that question is because it, you have to consider a constitutional question there.

QUESTION: What is the constitutional question?

MR. DENNARD: The constitutional question is the Seventh Amendment right to a jury trial. That's -- the question that was presented in the petition for certiorari, it was -- that's the way it was grounded.

QUESTION: But I -- the Seventh Amendment, obviously, is a provision of the Constitution, and it guarantees the right to jury trial in a civil case. But what we are talking about here is how a decision claimed to have wrongfully denied that right should be reviewed, and collateral estoppel, and that's -- now, those aren't necessarily constitutional questions.

MR. DENNARD: Well, that is the view that we've taken, and that's the grounds for the Court considering. And of course the other basis is because we feel like we have raised the issue and the record is adequately developed so that we can have the issue considered under -- under those principles.

QUESTION: Well, was there ever a denial of the motion for new trial, in so many words? I mean, for a

jury trial, in so many words?

MR. DENNARD: There was -- what there was --

QUESTION: All there was was a dismissal.

MR. DENNARD: -- a dismissal of the Section 1981 claim, which carried with it the right to a jury trial.

QUESTION: Even if you are right about the, this being a constitutional claim that the petitioner has raised, I don't think that the avoidance of constitutional claims is something that we pay much attention to and a question where we have granted certiorari on the question. We could grant certiorari on a very important constitutional question that we think there is a conflict in the circuits on that needs decided. The respondent could come in and say well, look, you could decide this on a statutory ground. Our answer in the past has been we don't want to. We choose to decide the case, if we can, on the basis that the petitioner has presented.

MR. DENNARD: Well, we have the additional course, Your Honor, we feel like we have developed the issue and that the -- the record is adequately developed. And as an appellee we have a right to present those grounds.

QUESTION: You certainly have a right to present them. But you do have some burden, I think, to persuade us that we ought to go that way and more or less abandon

the question which we granted certiorari*.

MR. DENNARD: Well, the additional basis would be the argument that we have with the avoidance of deciding the -- a question with constitutional dimensions to it.

QUESTION: Mr. Dennard, the petitioner argues in a brief that he was wrongfully denied a promotion, discriminatorily denied. Now, would that survive Patterson as a Section 1981 claim?

MR. DENNARD: Under -- of course, under the reasoning in Patterson, some promotion decisions would be subject to coverage. But I don't think the promotion issue has really been preserved up the line. In Patterson the Court really considered the question of the overlap coverage between Section 1981 and Title VII and concluded that there could be a rational, common sense interpretation of the language of Section 1981 to make and enforce contracts that would yield an interpretation that wouldn't frustrate the congressional objective to the preference of conciliation over litigation in Title VII cases.

And with the -- they looked at the -- the court looked at the terminology to make and enforce contracts, and to make a contract extends only to the formation of a contract, and not to subsequent conduct, like the -- even

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if it amounts to the breach of a contract or the imposition of discriminatory working conditions. The right to enforce contracts, on the other hand, would extend to the legal process and protection of the legal process.

So our position on the Patterson case would be that we would urge the Court to apply Patterson in this case to uphold the dismissal of both the retaliation and the discharge claims, because this is post-formation conduct. The discharge is obviously post-formation conduct. It actually involves the discriminatory application of rules. It's very analogous to the situation in Patterson where we were talking about alleged discriminatory working conditions, harassment, sweeping the floor and this type thing.

QUESTION: I wonder if it wouldn't be advisable to let that question, the extent to which Patterson governs these particular claims, go back to the lower courts in the first instance and just deal with the question we thought we were going to deal with on certiorari.

MR. DENNARD: Well, that -- Your Honor, we would say that we feel that we have adequately developed these issues along, that would give us a right to have that considered at this point in time.

QUESTION: I guess your point is that we have no power to reverse the lower court and to remand it, if -- if in fact the Patterson issue should be resolved your way.

MR. DENNARD: Well, the -- the question of collateral estoppel doesn't even come into play unless you assume that, the error in the case.

QUESTION: We certainly don't have to reach Patterson, you would acknowledge this, if we -- if we -- we don't have to reach Patterson if we find for you on the other point, on the jury trial point.

QUESTION: If we affirm the court of appeals, you would never get to Patterson.

MR. DENNARD: Well, in that situation you would have to consider the constitutional question and consider the --

QUESTION: Well, but aren't you defending the court of appeals' judgment or not?

MR. DENNARD: We are. We are.

QUESTION: It seems to me you have two points, and you are not -- you are not separating them. Your one point is that we ought to take the Patterson issue first. And that seems to have met some -- some resistance. Your -- you have a second point, though, don't you, and that is if we don't take the Patterson issue first, and find

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against you, then we must take the Patterson issue, because we have no basis for reversing the court of appeals.

MR. DENNARD: I believe that's correct, Your Honor.

QUESTION: Let me just test that out. You mean we don't have the power to reverse and send it back and say take a look at this issue? Is that what you're saying? That if we reverse them on the only thing we granted cert. to decide, and we decide you are wrong there, we could not send the court case back to the court of appeals and say take a good hard look at the Patterson issue? You don't think we have power to do that?

MR. DENNARD: I believe you have power to do that.

If the Court does consider the -- if the Court does consider the collateral estoppel issue, or if it is addressed, we urge the Court to uphold the Fourth Circuit's decision that Mr. Lytle was collaterally estopped from relitigating issues under his Section 1981 claim.

And reaching the result that the Fourth Circuit reached, they relied on an earlier decision, in that case in Ritter v. Saint Mary's College. And in that case there had been dismissal of age discrimination act and equal pay

claims that were combined with Title VII claims, and this is the decision. The Ritter decision really contains the rationale that the Fourth Circuit has for applying collateral estoppel. The Fourth Circuit looked at the conflict that was involved, on the one hand the denial of the plaintiff's right to have his issues relitigated before the jury, and on the other hand the policy as to underlying collateral estoppel, the economic -- economical resolution of cases, and concluded that Park -- this Court's decision in Parklane Hosiery had already tipped the scales in favor of applying collateral estoppel --

QUESTION: (Inaudible) this 1981 suit and the court, for some reason or another, denied a jury trial and then tried the 1981 suit itself.

MR. DENNARD: That would -- we would submit that would be a different situation, Your Honor.

QUESTION: Well, but then on appeal the --

MR. DENNARD: On appeal then that could be reversed, but that is not our situation.

QUESTION: Why isn't it?

MR. DENNARD: Because our situation is the situation where you have Section 1981 claims combined with Title VII claims. The Section 1981 claims were dismissed. There is a good-faith dismissal of those claims. And the courts, faced with Title VII --

QUESTION: Well, you don't claim that the -- you don't claim that the correctness of the dismissal of the 1981 suit wasn't appealable?

MR. DENNARD: We don't claim; we realize that --

QUESTION: That is reviewable in that case -- in this case. It was reviewable in the court of appeals.

MR. DENNARD: That is correct.

QUESTION: And it was all part of one suit.

MR. DENNARD: But it's still a different situation --

QUESTION: It isn't -- wasn't two different suits, though, was it?

MR. DENNARD: No, not two different suits, but it is --

QUESTION: And Parklane was two different suits, wasn't it?

MR. DENNARD: Parklane was two different suits. And the Fourth Circuit looked at that, and that was of course the argument that the plaintiff made in the Ritter case, that this was different because there is a separate suit involved. And the Fourth Circuit reasoned that the separate suit really didn't make a difference because that was just because collateral estoppel (inaudible) --

QUESTION: But you say because there were two -- because there were two counts in the -- two counts in this

complaint, collateral estoppel applies, whereas if it had just been a 1981 suit which was lost, then --

MR. DENNARD: If it was just a 1981 suit and the court proceeded to just try that case before the court, without a jury trial, then that would be a direct violation of the right to a jury trial, and it would be subject to --

QUESTION: Well, I know, but in the court of appeals the court says well, we agree, the trial judge arrived at exactly the right conclusions on the facts of the case, but we have to reverse. There is no collateral, no estoppel, because it should have been tried by a jury.

MR. DENNARD: Well, that's the only -- the distinction we have is that we have two different claims involved. And in our case it is not a situation where there is a direct denial or trying of an issue before the court that should be considered by the jury. It was a situation where the legal claims were dismissed and they were -- there were pending equitable claims remaining that, under Title VII, that required the court to proceed with a bench trial.

In the separate suit type argument, too, another point to make would be that Parklane specifically recognized that the major premise with Beacon Theatres is that -- is a rule that unless legal claims are tried

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first, prior to equitable claims, then the judge's factual findings on the equitable claims would collaterally estop the jury's redetermination of these issues. And the two quotes that we would like to point out, or two portions of the opinion in Parklane that establish that -- this premise is established by the following language that is in Parklane at page 334. Recognition that an equitable determination could have collateral estoppel effect in a subsequent legal action was the major premise of this Court's decision in Beacon Theatres.

And then quoting the Court's earlier decision in Katchen v. Landy, both Beacon Theatres and Dairy Queen recognize that there may be situations in which the court could proceed to resolve the equitable claims first, even though -- even though the results may be dispositive of the issues involved in the legal claims.

So certainly Parklane and Katchen establish that Beacon Theatres rule that normally equitable or legal claims should be tried first as a general prudential rule, and that an equitable determination can have collateral estoppel effect in subsequent legal proceeding --

QUESTION: Do you think that would be the routine result if -- suppose the trial judge here said -- said well, I think you state a good cause of action in both 1981 and 19 -- and Title VII. I am going to try the

Title VII claims first.

MR. DENNARD: Well, that wouldn't be our case.

QUESTION: Well, I know, but what if, what if he had said that? It violates Beacon, doesn't it?

MR. DENNARD: I believe it would.

QUESTION: Then it would not be collateral estoppel.

MR. DENNARD: Because it violated the Beacon principle. But that's not our situation, the distinction that we have. We are not a situation in which there is a direct violation of the right to jury trial, that -- we have a situation where the district court judge made a good-faith dismissal of legal claims and was faced with a statute that required the court's determination before the bench.

QUESTION: Well, what do you mean by a good-faith dismissal? I would assume that most -- in fact I can -- it is hard to conceive of a district court dismissing an action. Even though it's erroneous, it was not done in good faith.

MR. DENNARD: Well, the Petitioner claims, I think, that the judges, district court judges, would be inclined to dismiss legal claims based on administrative and personal convenience, which we're distinguishing it certainly from that situation.

QUESTION: You're really arguing for something of an extension of that language in Parklane. That language just says that there are some situations where you can try the equitable claim first. You are not arguing that this is such a situation. But you are saying where it has been mistakenly tried first, the same philosophy that says there are some practicalities that sometimes make it triable first also dictate that that's water over the dam, that it was mistakenly tried first and we will give it collateral estoppel effects.

MR. DENNARD: That is correct.

QUESTION: But that is an extension of Parklane, of even the dictum in Parklane.

MR. DENNARD: Well, we agree that it is not, you know, directly within Parklane, that it's -- but within the rationale of Parklane.

From the standpoint of the harm involved, though, I mean, the defendants in Parklane were denied the right to a jury trial, the same as we have in our situation.

To summarize the argument or conclude --

QUESTION: The only thing that makes that -- that argument difficult is -- and the Court keeps pressing you on this -- I don't see why it wouldn't be just as true if the lower court erroneously denied a jury trial. You -

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- surely you would be able to say the same thing. You know, well, yeah, they should have done it first, but, as Parklane shows, we do take practical considerations into account --

MR. DENNARD: Well, that would fly right in the face of several decisions that -- that (inaudible).

QUESTION: Well, so did this dismissal, which is why it was reversed.

MR. DENNARD: To conclude on Parklane, our position would be that in Parklane the court found that the defendants had a full and fair opportunity to litigate their claims in the prior lawsuit, and that they were therefore collaterally estopped from relitigating factual issues in a second lawsuit. The court found that this application of collateral estoppel did not violate the Seventh Amendment.

Likewise, Mr. Lytle had a full and fair opportunity to litigate his claims in the Title VII proceedings. From the standpoint of looking at the principles of judicial economy, the same principles that applied in Parklane apply here, the dual purpose of protecting litigants from relitigating an identical issue and of promoting judicial economy by preventing needless litigation.

To summarize our final argument, it's clear that

the Court need not address the collateral estoppel issue if a directed verdict would have been proper, since the dismissal of the 1981 claim in that situation would have constituted harmless error. We realize that the standards are different for a Rule 41(b) motion and that there is some weighing of the evidence that is allowed there, but the standard for directed verdict would include a situation where there is an absence of proof on an issue material to the cause of action. With both the discharge claim and the retaliation claim, the district court judge ruled that the defendant, or the plaintiff did not establish a prima facie case.

QUESTION: But, under Rule 41, the trier of fact is entitled to weigh the credibility of the witnesses and make those sort of determinations that the trier isn't entitled to make under Rule 50, isn't it?

MR. DENNARD: We recognize that there is a difference in those standards, and -- but our position would be that -- that we met the directed verdict standard in -- by what the judge really did. He ruled that as a matter of law the plaintiff did not establish a prima facie case in either situation.

QUESTION: Well, this was after a bench trial on the Title VII action?

MR. DENNARD: That's correct.

QUESTION: Well, why, why would a district court be saying that as a matter of law?

MR. DENNARD: Well, he didn't -- the district court didn't say that, Your Honor, we say --

QUESTION: That's the kind of --

MR. DENNARD: -- that the evidence that was presented would meet that standard.

QUESTION: Well, but you -- the district court wasn't engaged in that sort of an inquiry, was it?

MR. DENNARD: That is correct.

QUESTION: So you are asking us now to reweigh the evidence and to -- or to weigh the evidence, decide that you should have gotten a motion for a -- for dismissal or summary judgment?

MR. DENNARD: Well that, you know, even the circuits courts, like Hussein, that apply the opposite rule in this situation, would look at the evidence to determine if it would have in fact gone to the jury. And that is what we are asking --

QUESTION: But we don't ordinarily make that sort of determination here. Did the court of appeals make that determination?

MR. DENNARD: No. No, sir.

Unless there are further questions, that concludes my argument.

QUESTION: Thank you, Mr. Dennard.

Ms. Reed, you have 18 minutes remaining.

REBUTTAL ARGUMENT OF JUDITH REED

ON BEHALF OF THE PETITIONER

MS. REED: Respondent urges that this Court avoid a constitutional issue by deciding on the Patterson grounds. Now, on that matter we agree with the Chief Justice on this question. Whether an ordinary collateral estoppel rule will prevail and a determination as to when a petitioner may appeal the denial -- the wrongful denial of a jury trial, does not depend on the -- the fact that the jury trial right stems from the Constitution. The issue would be the same whether it was a statutory right to a jury trial or that it came from the Seventh Amendment. We think this Court -- this question is important, and the Court ought to decide the issue upon which it granted cert.

There is the conflict, as the Court recognized, between the Fourth Circuit and the Seventh Circuit on this issue.

QUESTION: Excuse me, you wouldn't feel free to argue if we came out the wrong way on the jury trial thing, that by denying you either interlocutory appeal or vindication here we have denied you your constitutional right to a jury trial? You don't think that that

constitutional right is involved?

MS. REED: Well, oh -- the constitutional right to a jury trial is implicated here. My point is that the -- the decision that this Court must make as to the collateral estoppel issue doesn't turn on that. We believe that --

QUESTION: Well, no -- I mean, suppose we said collateral estoppel is perfectly fine. Wouldn't we -- as a matter of statutory law and common law, wouldn't we then have to say but, in this area of the Sixth Amendment, isn't there some special restriction upon it? I mean, I am just not sure I agree with you that you can possibly avoid saying that we have to ultimately say would it violate the Sixth Amendment for us to apply collateral estoppel here.

MS. REED: Well, I think what the court did constitutes a violation of the Seventh Amendment, don't get me wrong. However, the issue of when a party gets to appeal a wrongful denial does not turn on whether the, the jury trial right stems from the Constitution. So the -- I don't think you -- the necessity for avoidance of a constitutional -- deciding on a constitutional issue is really implicated here.

Now, there are -- Respondents state that they argued below the same thing that they raise here, that is

that retaliation is not covered under 1981, for the grounds that are set forth in Patterson perhaps. The argument they made below was a very different one. Now, we don't deny that they can get to raise the Patterson questions on remand. We think that would be entirely appropriate and that that is what should occur.

This record is not in the condition for this Court to resolve the Patterson question. What Patterson means is that there are fact-specific issues that would be appropriately redressed, addressed on remand, including retroactivity and including whether discharge and retaliation are within the scope.

As Justice White pointed out, if we had by-passed Title VII and sued only under Section 1981, Respondent would concede that the denial of a jury trial would have been reversible error. We don't think the Court should adopt a collateral estoppel rule that encourages or perhaps even requires a by-passing of Title VII remedies.

Finally, Respondents urge that no remand is necessary because of the directed verdict possibility. Now, certainly on remand, whether a directed verdict is appropriate can also be considered.

In closing, I would like to state that indeed the Patterson issues are relevant now and they may be

raised by both parties on remand, and we would urge that this Court reverse the Fourth Circuit's ruling and remand this case.

QUESTION: Thank you, Ms. Reed.

MS. REED: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Thereupon, at 1:42 p.m., the case in the above-entitled matter was submitted.)

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BY Leona M. May
(SIGNATURE OF REPORTER)

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