

TO: Justice Marshall
 FROM: Debra
 RE: City of Canton v. Harris, 86-1088 (Nov. case)

Given last week's conference vote, where you were the lone vote to affirm, I thought I should share my thoughts on this case. CA6's discussion of the standard of liability for a municipal policy of inadequate training was short and sloppy. The court held that a municipality is liable for a failure to train its police force where it acted "recklessly, intentionally, or with gross negligence" and where the municipality's inadequate training of its officers was "causally connected to the deprivation, which means proving that the lack of training was so reckless or grossly negligent that deprivations of persons' constitutional rights were substantially certain to result." Because CA6 found that the jury instructions allowed a finding of municipal liability on the alternative and impermissible ground that the City's supervisory personnel did a bad act, it reversed and remanded for a new trial.

I had recommended a vote to DIG or Affirm, assuming that one could write an opinion affirming CA6 while clarifying the standard of liability. I was not persuaded by the City's argument that section 1983 liability must be based on an unconstitutional policy and that a section 1983 plaintiff must show that the City intentionally adopted a

policy of inadequate training. At Conference, WJB and JPS also rejected the City's view and advocated a standard of liability somewhere between negligence and intent. However, they voted to vacate CA6's opinion as the necessary means for correcting the standard of liability. HAB voted to DIG and has not indicated how he would vote on the merits.

WHR has not yet assigned the majority opinion. If as expected the opinion endorses a strict view of municipal liability where the plaintiff must show an unconstitutional policy and/or an intent standard of liability, and thus forclodes the possibility of a new trial, WJB will write separately proposing a standard more generous to the section 1983 plaintiff. (It is not yet clear whether WJB will endorse gross negligence, recklessness or deliberate indifference.) As WJB, JPS and possibly HAB may endorse a standard of liability compatible with your own, I recommend waiting for both the majority opinion and a possible concurrence before dissenting separately.