

January 24, 1977

1983 Actions (Who are Persons, and when
may they be sued?)

Monell v. Department of Social Services of the City of New York
___ F. 2d ___ (CA2, March 8, 1976)*

The plaintiffs (petitioners) were female employees of the New York City Department of Social Services (department) and of the New York City Board of Education (board). They brought suit under § 1983 and Title VII of the Civil Rights Acts attacking rules of these city agencies that compelled pregnant employees to take unpaid leaves of absence before medical reasons required them to do so. CA2 held that the 1972 amendment to Title VII (applicable to municipal employees) was not retroactive. I am not interested in this issue.

The remaining issue (whether these city agencies, and the members thereof), are "persons" within the meaning of § 1983, is a question of considerable importance. My guess is that the Court will grant certiorari on this issue.

I dictate this memorandum not because of the probability of a "grant", but primarily to record - for my memorandum file on § 1983 - some of the statements by CA2 (Judge Gurfein).

*As of the date of this memorandum this case is pending on petition for cert No. 75-1914, and the case may well be granted at our Conference today.

Municipal Boards and Agencies

CA2 held that "the Board of Education is no more a 'person' than the state university, the city employees' retirement system or the city transit authority (all of which have been held by the New York federal courts not to be "persons")." See petition for cert at p. A48. The Court noted that "all funds for use of the board must be appropriated by the city . . . the funds are public funds appropriated for [the board's] use as if it were a department of the city government."

Officials Sued in "Official Capacities"

This is the more interesting issue. Judge Gurfein's opinion is interesting:

"We must, however, consider appellants' claim that the officials named in their complaint may be sued in their official capacities under §1983 for damages, even though the money would have to come out of the city treasury.

"There is no doubt that municipal and state officials, sued in their official capacities, are 'persons' within the meaning of §1983 when they are sued for injunctive or declaratory relief. See Wright v. Chief of Transit Police, slip op. 1561, 1562-63 (2d Cir. Jan. 15, 1976); Gresham v. Chambers, 501 F.2d 687, 690 (2d Cir. 1974); Erdmann v. Stevens, 458 F.2d 1205, 1207-08 (2d Cir.), cert. denied, 409 U.S. 889 (1972). It is also true that individual officials who violate the civil rights of plaintiffs may be required to respond to damages for their tortious conduct out of their own pockets. Scheuer v. Rhodes, 416 U.S. 232, 238 (1974).

"In this case, unlike Scheuer, there are no allegations that the individual defendants acted outside the scope of their offices or in an arbitrary manner. The individual defendants are sued here solely in their official capacities.

"Appellants would have us merge two discrete conceptions to award relief. They would have us entertain suit against the official who committed an unconstitutional act, without malice, solely ex officio, even though from the nature of the relief sought - back pay - an award must come out of the public treasury of the Board of Education." A 53- A 55 of Pet for Cert

The court reached the foregoing conclusion by analogy to the 11th Amendment, and our decision Edelman v. Jordan. When damages which are sought in a 1983 action have to be paid by the city, it is the real party in interest and is not a "person" under § 1983.

Implication that 1983 lies only for "arbitrary" or "malicious" conduct.

Judge Gurfein recognized, in the language quoted above, that 1983 authorizes suit against officials who violate the civil rights of plaintiffs by their "tortious conduct". But the situation is different where the individual defendants are acting within the scope of their official duties. Judge Gurfein held that in the latter case, where they are sued "solely in their official capacities", 1983 does not lie because a money judgment would be paid by the city or state agency.

But Judge Gurfein noted that there was no allegation in this case of defendants having acted "in an arbitrary manner" or with "malice". Does this language suggest that something more than mere negligence must be shown in a 1983 suit even where the defendant is a "person" for jurisdictional purposes?

To be sure Judge Gurfein was not addressing this question, and his language is hardly "on point" directly. One also could construe his language as saying that if the individual defendant had acted in an arbitrary manner or with malice, a 1983 suit would lie even if the official were acting within the scope of his official duties.

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