

OCT 1 1979 CERT. GRANTED

78-1779

CERT TIMELY

SL 7 P 20

OWEN V. CITY OF INDEPENDENCE

CA 8: BRIGHT, ROSS; VAN OOSTERHOUT, c'g

Petr was canned as police chief amid a flurry of charge of corruption and misfeasance. He was not given an opportunity to have a hearing or otherwise clear his name. This occurred just before the Court's decisions in Perry and Sinderman. He sued everyone. The dt ct granted judgment to the defendants; the CA reversed and held that he could recover both a declaratory judgment and equitable compensation in the nature of back pay against the individual defendants. This Court GVR'd ILO Monell. On remand the CA determined that the City was liable in this case because this was not vicarious liability. It held, however, that good faith immunity of Woods v. Strickland applied to the City. Because of the timing of the firing, the City had no reason to know that a hearing was a constitutional requirement. Therefore, it held that the city was not liable.

Petr asserts that 1) qualified immunity should not extend to cities, and 2) even if it does, there is no reason for the CA to eliminate equitable or declaratory relief.

I'm not sure whether this case should be granted or not. The qualified immunity issue was reserved in Monell. Other circuits are beginning to deal with it. Although the CAs that considered the question before Monell seemed to be

leaning toward the plaintiffs (the CAs 5 and 7 are cited in the petition), the response says that all the CAs to consider the question since Monell have gone the other way, citing the CA 3, the CA 5, and an opinion of a CA 10 panel that has been vacated pending rehearing en banc. This certainly presents a stark case of good faith immunity. As one of the few remaining pre-Roth cases, it is one of the few cases where a city can plausibly maintain that it didn't know a hearing might be needed.

It is the second issue that bothers me. The good faith immunity question has only limited relevance, it seems to me, to equitable relief in the nature of back pay. I should note, however, that it was just such equitable relief that was claimed in Monell. Whatever relevance it has to backpay, it has no relevance at all to a declaratory judgment. Petr requested a declaratory judgment, the first CA decision granted him one, and the second decision took it away. If this case is granted, the declaratory judgment issue would probably be decided without reference to the good faith immunity, and the back pay issue might be so decided. Also, the question is still in ferment in the CAs. It might be better to wait for more CA decisions.

On balance, though, I think the case should be granted. The court is going to have to face the issue sometime of the nature of the immunity of municipalities. While the extra



issues cloud this case, I think it is pretty likely to produce  
law on the good faith immunity issue. Therefore, I would

GRANT ?

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OPN: Ptn al

There is a response