March 4, 1986

84-1160 Pembaur v. City of Cincinnati

Dear Sandra:

This is a reply to your letter asking whether there is a relationship between Owen v. City of Independence and my discussion on retroactivity in Part I of my dissent.

It is of course true that Owen was discharged without being accorded a procedural due process hearing as required by Roth and Sindermann. The city argued that since these two cases were decided a couple of months prior to the discharge, it should not be held liable for the failure to have provided a hearing. But the Court's decision imposing liability on the City of Independence was based on its view of the plain language of §1983 and the absence of any indication in the legislative history of §1983 that municipalities were to be accorded immunity.

Immunity and retroactivity are distinct and separate doctrines that address different concerns. In some cases perhaps the underlying issues may be similar (the concept of foreseeability may apply to both), but nothing in retroactivity analysis requires consideration of immunity or vice versa.

My dissent in Pembaur is based on what can be viewed as an exception to the general rule that cases will be applied retroactively. I suppose Owen can be said to illustrate the general rule, although it did not say a word about retroactivity. Although Roth and Sindermann were mentioned, neither of those cases contained any discussion of immunity or retroactivity.

In sum, I think it is quite clear that nothing in Owen forecloses retroactivity analysis, and Steagald is the kind of case in which the Court has declined to apply retroactivity. This case illustrates the unfairness of retroactive application particularly in the Sixth Circuit where the law was settled to the contrary.

I appreciate your giving me the opportunity to address your concern, and hope that you will agree with Part I of my dissent. I also would rejoice if you also joined Part II.

Sincerely,

Justice O'Connor

lfp/ss