City of St. Louis v. Praprotnik

No. 86-772

Argument: October 7, 1987

Cert. to CA8

G: All but the D's

D: HAB, JPS, AS

BACKGROUND

I. The Issues

A concise statement of the issues presented in this case is somewhat difficult, as the parties and amici differ over the operative theory of liability. At the risk of oversimplifying, the questions raised are: 1) whether the directors of certain city departments are policymakers with respect to employment decisions within their departments such that their decision to transfer petitioner to a dead-end job in retaliation for his exercise of First Amendment rights constituted an official "policy" sufficient to subject the city to liability under §1983; and 2) whether a jury verdict exonerating the principal (or at least apparent) architects of such a transfer is fatally inconsistent with that same jury's decision holding the city itself liable for the constitutional deprivation.

II. The Facts

A. Respondent James Praprotnik is an architect who began working for respondent in 1968. He served in the city's Community Development Agency (CDA) and during his first 12 years of employment, enjoyed good to excellent job evaluations. Beginning in 1978, CDA Director Donald Spaid announced a change in city policy under which professionals, such as architects, were required to obtain prior approval for any outside work they undertook. Resp., along with other CDA professionals, objected to the policy as an improper intrusion on their personal privacy. The dispute, which festered for nearly two years, finally came to a head in 1980, when CDA directed resp. alone to submit a list of all the outside work he had performed since 1978. Without suggesting that any of the projects resp. listed were improper, the agency suspended him for 15 days in April 1980 for his failure to have obtained advance approval. He appealed to the city's Civil Service Commission (CSC), which concluded that while he was legitimately subject to sanctions for his actions, the penalty imposed was excessive; the Commission ordered him reinstated with backpay, and directed his supervisors to issue a letter of reprimand.

B. At trial, resp. offered testimony indicating that his superiors, Director Spaid in particular, were displeased with his testimony before the CSC. The day before the board rendered its decision, resp.'s immediate supervisor, Kindelberger, rated him "good" for 1980, but recommended that he be reduced two grades on

the salary schedule. Kindelberger, who had six months earlier (just prior to resp.'s suspension) recommended resp. for a two grade increase, justified the grade reduction as part of a city-wide restructuring of the pay scale; in light of a city charter amendment that removed a $25,000 salary cap, the mayor had ordered a reevaluation of all employee salaries to prevent windfall raises to workers who had advanced up the steps of their pay grades without demonstrating the special or exceptional merit that would justify their salaries under the new pay scale. Resp., however, viewed the reduction as retaliation for his recent appeal to the CSC, and therefore sought reveiw before the service ratings appeal board. The board upgraded some of resp.'s ratings, and ordered that he be reduced only one grade.

C. The following year, which witnessed a change in city administrations and the departure of Director Spaid, resp. was rated "adequate" in several areas and, for the first time, "inadequate" in "relationships." A confidential memo from one of the raters to Kindelberger explained that resp. did not get along well with others, in particular Spaid, who believed that resp. should have been fired for sabotaging CDA. Resp. again appeal his evaluation and the board directed that his "inadequate" rating be raised to "adequate."

D. Six months later, in the spring of 1982, CDA underwent major budget and staff reductions. The new director, Frank Hamsher, proposed transferring resp.'s duties to the city's Heritage and Urban Design Division (HUDD) and consolidating those duties with the functions of one of HUDD's vacant positions, which had far lesser responsibilities, and a lower salary, than resp.'s position. Hamsher proposed classifying the new consolidated position at a grade equivalent to resp.'s; HUDD's director, Henry Jackson, and his superior, Thomas Nash, agreed to the consolidation, and Hamsher authorized the transfer. Resp. objected and again appealed to the CSC, but it ruled that because the transfer was lateral, resp. had suffered no "adverse" employment action.

E. Although resp.'s former duties were ostensibly transferred to HUDD, Jackson took those tasks over himself and assigned resp. mainly clerical duties, a state of affairs resp. found highly unsatisfactory. In November 1982, Jackson rated resp. "inadequate" overall, suggesting that resp.'s position was no longer managerial, that resp. was "grossly overqualified" for it, and that the position should be reclassified; he also recommended resp. for a one step salary decrease. Resp. again appealed, and the board raised his rating to "adequate" and overruled the salary decrease. In the meantime, however, resp.'s position was downgraded and by July 1983, HUDD was making plans to lay him off. According to Nash, HUDD's workload exceeded the capabilities of its small staff, and the agency could pay two staffers

out of resp.'s salary. Nash, who was director of public safety, characterized resp.'s layoff as a "minor reorganization" that he could initiate himself without directly discussing it with, or obtaining approval from, the mayor's office. Resp. received notice of his layoff two days before Christmas and just one day after he had been released from the hospital following surgery; in addition to marring his holiday celebrations, the layoff cost resp. 500 hours of accumulated sick leave, all pension and vacation benefits, and all medical insurance benefits. Resp. appealed his layoff but CSC stayed its proceedings because of the pendency of this lawsuit, which resp. had initiated in February 1983, after the commission denied his transfer appeal; the commission has never ruled on his appeal from the layoff.

III. District Court Proceedings

A. Resp. brought his §1983 action against the city itself, Hamsher, Kindelberger and Deborah Patterson, CDA director at the time of his layoff; he deleted Jackson from the amended complaint after the latter left city government and moved out of the jurisdiction. He contended that the individual defendants had transferred and eventually laid him off in retaliation for his use of the city's grievance machinery, in violation of his First Amendment and due process rights. The jury exonerated the three individual defendants, but awarded resp. $15,000 on each of his constitutional claims against the city. (CA8 eventually overturned

the award premised on the due process violation and, because resp. did not challenge that decision, only the First Amendment claim is before the Court.)

B. Because of the alleged inconsistency between the jury's verdicts in favor of the individual defendants and against the city, there is considerable dispute about, and confusion over, what theory of the case the jury acted upon.

1. Resp. notes that city counsel defended the individual defendants on the grounds that they were not personally responsible for the alleged ills that had befallen him. Defense counsel pointed out that Kindelberger was not resp.'s ultimate evaluator, an Al Karetski was, yet resp. had not named Karetski. Likewise, resp. had not named Donald Spaid, whose displeasure with resp. was allegedly the motivating force behind resp.'s first grade reduction recommendation, and his subsequent adverse rating in "relationships." Similarly, defense counsel made much of the fact that resp. had failed to name Nash, the person who presumably initiated the layoff, or Robert Killen, the person who signed the layoff authorization, and that resp. had dropped Jackson from the suit.

2. Ptr. points out, however, that resp.'s counsel defended the choice of defendants as those "primarily responsible." Resp.'s

counsel specifically said during closing argument: "I'm talking about Mr. Hamsher and Mr. Kindelberger....If [they] did it, the City is responsible, if they did it, the City is responsible, if they did it pursuant to a policy, custom or usage." (Redundancy and grammatical inaccuracies in original.)

3. The jury was instructed that cities are generally not liable under §1983 for the acts of their employees, but can be if the alleged wrong was committed by an official "high enough in the government that his or her actions can be said to represent a government decision." The jury was also told that an individual cannot be liable under the statute unless he or she was personally involved in the deprivation or knew of his or her subordinate's involvement. Finally, in a lengthy and internally inconsistent instruction, the jury was told that it must find in favor of resp. if it found six facts to be true, one of which was that "Hamsher and Kindelberger were personally involved in causing [resp.'s] transfer and/of layoff." Ptr. did not object to any of these instructions.

IV. CA8's Decision

A. CA8 vacated the verdict as to the due process claim (a ruling not at issue here) but affirmed the verdict against the city on resp.'s First Amendment claim. As an initial matter, the court

rejected the city's contention that the jury's verdicts in favor of the individual defendants precluded recovery against it. The court observed that other officials, notably Nash and Killen, had effectuated resp.'s layoff. The jury was instructed, however, that it could find against the individuals only if it found that they were personally involved in "the transfer and/or layoff." As there was no evidence that Hamsher or Kindelberger were involved in the layoff, the court concluded that under this erroneous instruction the jury could have easily exonerated the two men while finding the city liable based on the acts of other unnamed official.

B. In determining whether resp.'s transfer and layoff were attributable to city policy, the court applied the following test:

(1) if, according to a policy or custom established by a governing body, an official is delegated the authority, either directly or indirectly, to act on behalf of a governing body; and (2) if a decision made within the scope of the official's authority ends the matter, then the acts of the official may fairly be said to be those of the local governing body.

1. Applying this test, the court noted that under the city charter, "appointing authorities," i.e., heads of departments, may initiate such actions subject only to the approval of the direc-

tor of personnel. In passsing on such actions, the personnel director, in turn, does not review the substance of the transfers or layoffs; his approval is conditioned only on formal compliance with the city's rules. Layoffs may be appealed to the CSC, but the court found that because the commission defers in substantial part to the judgment of the appointing authority, the original decision is not rendered nonfinal merely because of the availability of appellate review. In the case of transfers, the court questioned whether such decisions were subject to appellate review at all, noting that CSC declined to review resp.'s. The court therefore found that "the jury had sufficient evidence from which to conclude that the City may be subject to liability for the supervisor's acts."

2. The court next concluded that the jury had ample evidence from which it could find that the transfer was motivated by the exercise of resp.'s First Amendment rights, pointing to the sequence of events recited above. It further found a causal link between this unlawful motivation and resp.'s eventual layoff, concluding that resp.'s transfer to a dead-end job amounted to a constructive discharge. With respect to this determination, the court again emphasized that the jury's verdicts were not necessarily inconsistent: the jury could have viewed the unlawful motivation as the proximate cause of resp.'s dismissal but, because Nash and Killen had administered the final blows, the jury might have con-

cluded that the defendants were not personally "involved" in the layoff as required by the instructions.

ANALYSIS

I. The Policy Issue

A. In Monell v. Dept. of Social Services, 436 U.S. 658 (1978), the Court, per WJB, overruled Monroe v. Pape's prior holding that municipalities were immune to §1983 liability. In so ruling, however, the Monell Court was careful to reject the notion that cities could be subject to liability on a respondeat superior basis. Rather, municipal liability attached only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." 436 U.S. at 694. This test has proved easier to state than to apply. In Monell itself, it was undisputed that New York had a citywide policy requiring pregnant women to take leaves of absence, thus there was no need to inquire who had initiated the policy.

1. In City of New Port v. Facts Concerts, Inc., 453 U.S. 247 (1981), and Owen v. City of Independence, 445 U.S. 622 (1980), the Court deemed one-time, ad hoc decisions by the respective

cities' legislative bodies sufficient to constitute official policy. In Facts Concert, the city council voted to cancel respondent's concert license because they disapproved of one of the acts booked; in Owen, the city council voted to release a stigmatizing investigative report highly critical of petitioner, who was then dismissed from his city post the following day.

2. In City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985), however, a majority of the Court concluded that a single incident involving excessive use of force by a low-ranking police officer was not an official policy or custom, nor was it, standing alone, evidence from which a jury could infer the existence of a policy of negligent training.

a. WHR, writing for the Chief, BRW & SOC, noted that the term policy "usually implies a course of conduct consciously chosen from among various alternatives," and therefore found it difficult to accept that a city could ever pursue a policy of inadequate training. He went to add that proof of a single incident of unconstitutional activity is insufficient under Monell unless there is also proof of an existing, unconstitutional policy attributable to a municipal policymaker.

b. WJB concurred in the result, but objected to WHR's reasoning. He concluded that egregious police misbehavior could be the result of municipal policies, either "those that authorized the police officer so to act or those that did not authorize but nonetheless were the 'moving force' ... or cause of the violation." The difficulty here was that the instructions permitted the jury to find such policies based on the single incident involved.

B. Which brings us to Pembaur v. City of Cincinnati, 106 S.Ct. 1292 (1986), and WJB's purality decision. In Pembaur, police attempted to serve capiases, which are writs of attachment directing officials to seize unwilling witnesses and force them to appear before the court, on two of petitioner's employees. When petitioner would not allow the officers onto his premises, they called their supervisor who instructed them to call the Assistant Prosecutor for instructions. The Assistant DA conferred with the County Prosecutor who directed the officers to "go in and get them." The police thereafter chopped down petitioner's door with an axe and searched his offices. Such forced entries were later held by this Court to be unconstitutional. CA6 held that the plaintiff had failed to establish a policy, and therefore upheld dismissal of his complaint against the city. This Court reversed.

1. WJB wrote: "Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official -- even a policymaking official -- has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable." Id. at 1299-1300. By way of example, he added the following footnote:

> [T]he County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff is the official policymaker, would give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board. However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions would

represent county policy and could give rise to municipal liability.

Id. at 1300 n.12.

2. Applying this test, WJB found that the County Prosecutor's decision constituted official policy; in so ruling, he relied on CA6's determination that under Ohio law, the prosecutor possessed final policymaking authority with respect to the matter at issue.

3. LFP dissented, arguing that the Court's focus on the decisionmaker led to circular reasoning, i.e., that policy is what policymakers make, and policymakers are those who have authority to make policy. He proposed a test that focused on 1) the nature of the decision reached or the action taken, and 2) the process by which the decision was reached or the action taken.

C. Under either of the Pembaur formulations, the test applied below is incorrect. CA8 looked only to see whether the officials had the authority "to act on behalf of the" city, and whether the decision made in the scope of this authority was final. As WJB's footnote 12 makes clear, however, the mere ability to act on be-

half of the city is insufficient; in his example, where the county board delegated such authority to the sheriff and the sheriff exercised this discretion unlawfully, the county was not liable. Rather, the official in question must have the authority to establish policy. As petitioner and several municipal amici note, CA8's test is simply respondeat superior liability under a different name. Cities delegate a host decisions to their employees without subjecting each and every one of those decisions to de novo review; to deem all such actions official "policies" is to subject cities to liability for the acts of their employees. Not surprisingly, then, neither respondent nor amicus AFL-CIO attempts to justify the result below on the basis of CA8's municipal liability theory.

1. Resp. argues that the jury was not charged in accordance with the appellate court's theory and thus the propriety of that theory does not affect the validity of the jury's verdict. According to resp., it was a question of fact whether St. Louis employment policy was made solely by the CSC, the Department of Personnel and the Board of Service Ratings Appeals, as ptr. contended, or whether it could also be made by the persons involved in resp.'s dismissal, as resp. contended. The jury resolved that factual issue in his favor, resp. argues, and neither CA8 nor this Court should disturb its conclusion.

a. Resp. points out that city itself drafted jury Instruction No. 15, which provided that, while cities are generally not liable under §1983 for the acts of their employees, they may be if the "allegedly unconstitutional act was commited by an official high enough in the government so that his or her actions can be said to represent a government decision." (Emphasis added). Ptr. is not at liberty now, resp. argues, to claim that the jury should have been instructed that the city would only be liable if the officials involved had "ultimate authority" over the subject matter in question. On the contrary, under rule 51, ptr's failure to object to the instructions precludes it from challenging them now. See City of Springfield v. Kibbe, ___ U.S. ___ (1987).

b. Ptr argues that the error was preserved by virtue of its motions for summary judgment, directed verdict, and judgment n.o.v. In its various trial motions, ptr argued that it was entitled to judgment because there was a complete absence in the pleadings and proof that resp.'s injury resulted from any city policy. Thus the legal issue ptr seeks to raise here -- that Hamsher et al. were not acting pursuant to a policy of retaliation nor were they the creators of such a policy -- was preserved by these motions independent of the jury instructions. Last Term, in Kibbe, the Court refused to reach the question whether gross negligence in the training of police was sufficient to establish municipal liability because, although the city had argued for a heightened standard in its summary judgment, directed verdict and j.n.o.v.

motions, it had acquiesced in a gross negligence instruction. Ptr here, however, is not necessarily arguing for a different legal standard, but simply contends that under the theory presented to the jury, the facts were insufficient to demonstrate liability. In short, acquiescence to a "high enough official" instruction does not preclude a challenge that the officials here were not "high enough." This Court, therefore, would owe deference to the jury's judgment, but that judgment does not bar review altogether.

c. Ptr also points to its instruction A, which provided that a single act or incident is insufficient to establish a custom or policy and that, in order to prove such a custom or policy, "it must be shown that the alleged illegal conduct is both systematic and municipally sponsored." This instruction, it seems to me, was properly rejected because the requirement of showing "systematic" illegal conduct is inconsistent with Owen and Facts Concerts. Regardless of its propriety, it's not clear to me how this instruction would have modified the "high enough official" instruction so as to preserve the issue of whether Hamsher & Co. were policymakers; instead, the instruction goes to the sufficiency of evidence to prove a polcy. If the former issue is preserved, it is by virtue of the trial motions, not this proffered instruction.

2. Turning to the merits, the question is whether the jury had sufficient evidence from which to find that the individuals involved in resp.'s transfer and layoff were "responsible for establishing government policy respecting such activity." Pembaur, 106 S.Ct. at 1300. Under the city's charter and civil service rules, an appointing authority, i.e., one who can make appointments to any position, can make lateral transfers subject to the approval of the Director of Personnel and the appointing authority of the transferee department; appointing authorities can also layoff workers whenever there is no further need for the position because of a work stoppage or lack of funding. CA8 found that the Director of Personnel's approval was conditioned on compliance with applicable regulations, and that the Director undertook no substantive review of such decisions. Lateral transfers were apparently not subject to CSC review, while layoffs are; in the latter cases, however, the commission defers in substantial part to the appointing authority's judgment. The overriding employment policy embodied in the city charter is that all personnel decisions are to be made solely on the basis of merit and fitness.

a. Resp. and the AFL-CIO contend that this showing satisfies Pembaur: as in WJB's fn.12, the city has "delegated its power to establish final employment policy to the [appointing authorities], [thus] the [appointing authorities's] decisions do represent [city] policy." I am not so confident. Under resp.'s view,

every single employment decision made by a department head is an official policy. A fairer characterization, it seems to me, of the city's employment policymaking apparatus is that the appointing authorities have been delegated the power to act with respect to personnel decisions, but not to formulate final policy. The agency heads are like the sheriff in WJB's footnote, who has been delegated authority to hire and fire in accordance with the policies set out by the county board; like the sheriff, they may abuse this authority, but any such abuse does not amount to a policy of the governing body. Indeed, the charter provisions resp. cites say nothing whatever about policymaking; they simply allow agency heads to initiate transfers and layoffs. In essence, resp. is arguing that because these individuals have the final authority to act in such matters, and because the city charter is largely silent (aside from its platitudes about merit and fitness) as to the policies that should govern these actions, the charter implicitly delegates to these individuals the authority to make final policy. This strikes me as a very attenuated basis upon which to attribute to the city the evil motives of Hamsher & Co. I agree with resp. that the appellate authority of the CSC does not render it a policymaking body, but that fact does not establish that the appointing authorities have been delegated such power.

b. There is also a conceptual problem with characterizing the transfer decision here as a policy. Transfers made pursuant to a

formal policy of fiscal restraint or an unwritten policy or custom of racial discrimination are clearly pursuant to official policies. But to call a single, ad hoc decision -- made by one or more agency heads and designed to punish one employee -- a policy, seems to me to distort the meaning of that term.

1) Owens and Facts Concerts, which also involved one-time decisions, are distinguishable by virtue of the process by which those decisions were reached; the Court apparently views the decisions of local legislative bodies almost by definition as policy determinations. Mt. Healthy and other school board cases also reflect this view.

2) This dichotomy between decisions made pursuant to policies, and decisions made by policymakers, also highlights a key distinction between this case and Pembaur: here, the unlawfulness of the transfer turns entirely on the motivation behind it rather than the act itself; in Pembaur, the intent of the prosecutor in ordering the police to forcibly enter certain premises was irrelevant, since all the good intentions in the world could not render such an entry legal.

c. It is conceivable that the decision below could be salvaged on the theory that the jury could have reasonably concluded that,

because the city charter talks only in general terms about a policy of merit, and because the CSC is not a policymaking entity, the charter necessarily delegates to appointing authorities the power to make interstitial, so to speak, employment policies, thus Hamsher & Co. were policymakers for purposes of employee transfers and, accordingly, resp.'s transfer is attributable to an official policy. As I've already indicated, I don't consider this a particularly strong theory. I think this case falls on the wrong side of the line WJB drew in fn. 12. Not to be hard-hearted about it, but if the limitation in Monell means anything, it would seem to cover this case; to affirm on a sufficiency of the evidence theory would add little if anything to the developing law under Monell.

3. Perhaps recognizing the weakness of this theory, the AFL-CIO offers a completely new basis of municipal liability in §1983 cases. Eschewing any analysis based on an actor's authority, the union argues that whenever a case involves the denial or revocation of benefits or privileges that only a municipality can award, the act is always that of the municipality, regardless of whether the actor is a "final decisionmaker." The harms visited on plaintiffs in such cases are inflicted only because the decisions are implemented through the municipality's official processes. In this sense, the city accepts a discharge and sanctions it, by removing the employee from the payrolls, barring him from

his desk, etc. In essence, the city officially adopts the act as its own, no matter what the status of the actor.

a. This is of course a form of respondeat superior liability confined to a limited category of municipal acts. For this reason, it is unlikely to carry the day in this Court. Nevertheless, as a policy matter, this approach is not without its appeal. In the typical faculty tenure/due process cases involving state colleges, there is no dissection of the policymaking authority of the relevant actor, and there is no consequent bankrupting of state colleges; no obvious reason explains why the same result should not obtain in municipal employment cases.

b. Given Monell's limitation, the union argues, it makes sense to inquire whether an injury inflicted on a third party is properly attributed to the city; because city employment is a benefit or privilege that only the city can confer and revoke, however, the difficulty of attribution is not present. This argument breaks down somewhat, though, in a case such as this one, where the constitutional deprivation turns on the intent of the actor, rather than the act itself. Still, the city did sanction the act, if not the intent behind it, by removing resp. from the payrolls; in a third-party case, e.g., a case of police brutality, the act is over and done at the time it occurs, and no further adoption or approval from the city is necessary to complete the injury.

c. Finally, Monell's official policy or custom limitation embodies this Court's recognition that cities must govern, and that the act of governing often and unavoidably results in injuries to the governed. To subject cities to liability for all such injuries would punish them for attempting to carry out their functions. In order to govern, of course, a city must also employ people, but the act of employing is different from that of governing. Subjecting cities, like other state entities, to liability for unconstitutional acts in the course of employing people would not seem to inhibit cities from governing any more than it inhibits school systems from teaching.

4. Ptr proffers its own theory as to how the scope of municipal liability should be determined. Because acceptance of this theory is not necessary to ptr's ultimate victory, and because there is virtually no chance that WJB would ever adopt it, I won't bore you with it. Just so you can follow along at the oral argument (which no doubt will draw an SRO crowd), ptr argues that an official is not vested with final policymaking authority unless he or she is the "ultimate authority" with respect to the subject matter in question. Undder this theory, a city would liable only if the decisionmaker is subject to the control or direction of no other official. In addition, a decision or act that contravenes any policy or regulation of the city can never, in ptr's view, be an official policy. The latter position is wholly unacceptable,

as official platitudes as to appropriate employment practices are frequently ignored or violated; the ultimate authority test would also allow cities to insulate the decisions of all but a few, or perhaps just one, official from liability.

II. The Inconsistent Verdicts Issue

A. Ptr contends that the jury verdicts exonerating Hamsher & Co. are fundamentally at odds with the verdicts against the city. In advancing this claim, ptr relies principally on City of Los Angeles v. Heller, 106 S.Ct. 1571 (1986), a case in which the Court held that a verdict in favor of individual police officers necessarily dictated dismissal of the claims against the city. In Heller, the jury was not instructed as to any possible immunity defenses, thus the verdict exonerating the officers could only be viewed as a determination that the officers had not deprived the plaintiff of any rights. Since the officers were guilty of no wrong, no impropriety could be attributed to the city. As explained several hundred pages ago, in Background section of this prolix memo, CA8 found that confusing instructions could have led the jury in this case to believe that the individual defendants could not be liable unless "personally involved" in the transfer and/or layoff. Thus, exoneration of the individuals did not necessarily imply a finding of no constitutional wrong.

1. Ptr argues, however, that Hamsher at least was personally involved in the transfer. If, as CA8 concluded, the transfer amounted to a constructive discharge, then Hamsher the individual, just like Hamsher the policymaker, should have reasonably foreseen this consequence. If Hamsher the policymaker was the proximate cause of resp.'s layoff, so was Hamsher the individual, thus, ptr contends, the verdict against it based on Hamsher's official acts is absolutely inconsistent with the verdict exonerating Hamsher the individual.

2. CA8 incorrectly states that one instruction required the jury to find that the individual defendants were "personally involved in the layoff"; the instruction actually reads "personally involved in causing the deprivation of a constitutional right." Another instruction, quoted earlier, states that the defendants had to be "personally involved in the tranfer and/or layoff." The verdicts could be squared if this "and/or" language could possibly be read to mean "the transfer and layoff," or "just the layoff." This is admittedly a very strained reading. The difficulty here, of course, is that the jury was not instructed on, and no doubt never entertained any thoughts about, a theory of constructive discharge. The best that can be said is that the jury was confused by the instructions and believed 1) that resp. was really only injured by the layoff; 2) that Hamsher and Kindelberger, the people with the improper motivation, were not personally involved in that decision; and 3) that the two were

policymakers, however, with respect to the transfer decision, and Nash and Killen were policymakers with respect to the layoff, thus the city could be held liable for the combined acts and resulting injury.

3. Resp. contends that there was evidence from which the jury could find that the mayor, not Hamsher, was responsible for the transfer. When asked at trial if it was fair to say that he had initiated and pushed the transfer through the mayor's office, Hamsher stated: "I wouldn't say I pushed to get it done. I recommended it to the mayor. The mayor made a decision. And when the mayor makes a decision, all of us who work for him try to carry it out." Thus, the seemingly inconsistent verdicts could be salvaged if the jury's verdict against the city were viewed as a finding that the mayor was responsible for the transfer; this, however, would raise serious questions as to whether the mayor shared or was aware of Hamsher and Kindelberger's unlawful motivation.

CONCLUSION

As I hope is apparent by now, resp. is in serious trouble here. I don't believe the agency heads possessed final policymaking authority; rather, they were empowered to exercise discretion in hiring and firing, an authority that under Pembaur is insufficient to render the city liable. To affirm on a theory of im-

plicit delegation of policymaking authority, it seems to me, will simply further confuse an already complicated area of §1983 law. Absent such an implicit delegation theory, WJB's fn. 12 in Pembaur governs this case and dictates reversal.

Affirmance on the merits would also require reconciling the jury's verdicts, which, as just noted, is a difficult and perhaps impossible task. The strongest ground of affirmance is the rule 51, failure to object to the instructions theory. Although largely unsatisfying, this approach carries with it the least potential for further confusion. I am not convinced, however, that proffering an instruction concerning officials "high enough" in the government is in any sense a waiver of the right to argue in this Court that the officials involved in allegedly unconstitutional conduct are not policymakers for purposes of §1983.