BENCH MEMORANDUM

Wednesday, October 7, 1987

City of Saint Louis v. Praprotnik, No. 86-772

Initial Votes:

Grant: WHR, WJB, BRW, TM, LFP, SOC

Deny: HAB, JPS, AS

Recommendation: REVERSE

QUESTION PRESENTED

May a municipality be held liable under 42 U.S.C. §1983 for the unconstitutional actions of its agents who are acting within the scope of their delegated authority and whose actions are subject to only very deferential and circumscribed review by a municipal agency?

INTRODUCTION

Rspt James Praprotnik was an architect for the City of St. Louis. Praprotnik's employment record was unblemished until he successfully challenged a job suspension in a hearing before the City Civil Service Commission. After the hearing, Praprotnik began to receive unfavorable work evaluations and was eventually transferred and then fired. Praprotnik brought an action under 42 U.S.C. §1983 against petr City of St. Louis as well as against some of the individual officials who had carried out the adverse

actions. The jury returned a verdict against the City, and the CA8 affirmed. This Court took cert to reconsider the question of when the actions of a municipal employee may be considered municipal policy so as to subject the municipality to liability under §1983.

BACKGROUND

From 1968-80, Praprotnik enjoyed favorable job evaluations and steady promotions, reaching the position of a city planning manager in St. Louis's Community Development Agency (CDA). In 1980, Praprotnik challenged a policy promulgated by the CDA director, Donald Spaid, requiring CDA architects to get advance approval before taking on outside projects. Praprotnik was suspended for 15 days for not cooperating with the policy. He appealed the suspension to the City's Civil Service Commission, which reversed the suspension and awarded him backpay.

As the CA8 noted, the suspension appeal was "a watershed point" in Praprotnik's employment history. Before the dispute, Praprotnik's immediate supervisor, Charles Kindelberger, had recommended Praprotnik receive a "two-grade" increase in pay; shortly after it, the same supervisor reviewed Praprotnik again and recommended a two-step decrease in salary. Explaining his recommendation to Praprotnik, Kindelberger said that Spaid was "down on" on Praprotnik and believed Praprotnik had not been fully honest during the hearing. Praprotnik appealed the salary decision to the service ratings appeals board, which overruled Kingdelberger and awarded Praprotnik a one-step pay increase.

At Praprotnik's next annual review, in 1981, Praprotnik was rated "adequate" in several categories and "inadequate" in relationships (prior to the suspension appeal, Praprotnik had never received a category rating below "good"). Praprotnik appealed the rating, and the appeals board upgraded the "inadequate" rating to an "adequate."

In the spring of 1982, the CDA implemented staff and budget reactions, in the course of which Praprotnik was involuntary transferred to a newly-created position in another city agency (the Heritage and Urban Design Division, or H&UD). Praprotnik attempted to appeal the transfer, but the Civil Service Commission declined to hear the appeal on the ground that Praprotnik had suffered no loss. Praprotnik then brought suit in DC under §1983, alleging that the transfer was in retaliation for his protected first amendment activity of appealing the suspension. Praprotnik also alleged that the transfer was a violation of his due process rights.

Meanwhile, Praprotnik's new job turned out to consist of only unchallenging clerical duties for which he was greatly overqualified. Praprotnik bore with it until the Fall of 1983, when he was fired. The ostensible reason for Praprotnik's layoff was to hire two lower-level employees whose combined salaries would be the same as Praprotnik had been earning. Praprotnik appealed the layoff to the Civil Service Commission (the appeal is apparently still pending) and amended his lawsuit to charge that the layoff also was a violation of §1983.

At trial, the jury exonerated the individual defts, but it

found the City liable on both the due process and the first amendment claims. On appeal, the CA8 vacated the due process verdict, which is no longer at issue here. The CA affirmed the verdict based on the City's allegedly retaliatory conduct against Praprotnik's exercise of his first amendment rights. The CA first rejected the City's claim that it could not be held liable given that the individual defts were exonerated. The CA reasoned that, especially in light of some confusing jury instructions, the jury reasonably could have determined that at least the layoff was effected by city officials other than the named defts. Although petr preserves this question before this Court, the CA's conclusion on this score is unproblematic from a doctrinal point of view, and it is unlikely to receive much attention in this Court's review.

The controversial portion of the CA8's opinion is the holding that Praprotnik's injury was caused by an unconstitutional municipal policy, as required by this Court's decision in Monell v. New York City Dept. of Social Services (1978). The CA borrowed the analysis of a previous CA8 decision, Williams v. Butler. That case advanced a theory based on delegation of discretion to act: if an official makes a final decision on a matter that is within the scope of his officially delegated authority, then his act constitutes municipal policy for purposes of Monell. Applying this analysis, the CA found that the officials who effected Praprotnik's transfer and layoff had been delegated "appointing authorites" under the city charter, that their actions had been within the scope of that

authority, and that therefore the actions were properly considered municipal policy. The CA rejected the City's argument that the officials lacked final authority because their decisions were subject to the review of the Civil Service Commission. The court reasoned that the Commission had only a highly circumscribed scope of review, so that as a practical matter, the decision to transfer Praprotnik was controlled by his supervisors.

DISCUSSION

This Court established the basic guidelines for municipal liability under §1983 in Monell, where it held that municipalities can be subject to §1983 liability only for action taken "pursuant to official municipal policy." The Court made clear in Monell that municipalities could not be held liable in respondeat superior for the conduct of their employees, but the cases since Monell have been generally unsuccessful in setting precise boundaries for municipal liability. Two chief tests have emerged to compete for the Justices' favor. Justice Brennan's view, as set forth in the plurality opinion in Pembaur v. City of Cincinnati (1986) in which you joined, is that "municipal liability under §1983 attaches where--and only where--a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." The Chief Justice has preferred a test focusing on two factors: "(i) the nature of the decision reached or the action taken, and (ii) the process by which the decision was

reached or the action was taken." See id. (Powell, J., dissenting).

St. Louis is clearly off the hook under the second test, because the process followed in Mr. Praprotnik's transfer was basically ad hoc, not the kind of formalized procedure necessary to establish liability under that test. The case for liability is stronger under Justice Brennan's test, but there is the huge obstacle of footnote 12 in Justice Brennan's Pembaur opinion. Footnote 12 contains a hypothetical which Justice Brennan presumably included to maintain the plurality lineup but which casts a large shadow over this case. It reads as follows:

> Thus, for example, the 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.

This footnote appears to lend conclusive support to St. Louis's position. The individual defendants who made the decision to transfer Praprotnik were exercising discretion they had received from the city to hire and fire employees. Under the above analysis, the city cannot be charged with having a policy of transferring employees who exercised their first amendment

rights. At most, St. Louis seems to have had the policy of placing discretion in the hands of officials without sufficiently policing the officials' decisions to be sure they did not run awry of the Constitution; footnote 12 specifies, however, that the unconstitutional exercise of constitutionally delegated power does not give rise to municipal liability.

As I see it, footnote 12, unless disavowed as dicta, controls this case. Because you may not be satisfied with the result it portends, however, I will briefly outline three possible avenues of escape. The first is to assert that the City here did delegate its power to establish final employment policy to the individual defendants, and therefore liability attaches, as provided in footnote 12. This portrayal of events gibes poorly with the facts, however, especially in light of the system of review by the Civil Service Commission of individual employment decisions.

The second possible way out is to adopt the test used by the CA8, even though it may be somewhat at odds with portions of Pembaur and Monell. That test, derived from the CA8's decision in the Williams case, finds municipal liability for individual decisions made by municipal officials in their exercise of duly delegated final authority. This test seems untenable to me, because officials often act irresponsibly, and not any individual act may fairly be said to constitute official policy. The only municipal policy this test hinges on seems to be the policy of delegating responsibility to employees, and thus this test begins to sound a lot like respondeat superior, which the Court has

continually indicated is an improper basis for municipal liability under § 1983.

A third possible way to find liability is to adopt the test suggested in the amicus brief for the AFL-CIO. AFL-CIO argues that municipal liability always should attach to decisions respecting the granting or denial of benefits or privileges that belong to the municipality and that only the municipality can award. This test focuses on whether the alleged harm owed itself to the agents' official status. Thus, an unreasonable search harms the privacy interests of the individual whether or not the intruder is a municipal employee; by contrast, the decision to transfer in this case harmed Praprotnik only because the decisionmakers were acting in their official capacities and because the city "backed up" their decision by cutting off Praprotnik's paychecks. This test provides respondeat-superior-type liability for a carefully circumscribed class of actions involving municipal contracts, licenses, and employment decisions. It is a provocative and in some ways compelling suggestion; however, it was not argued below and is not supported (although neither is it refuted) by cases from this Court. Its adoption also would require abandonment of footnote 12.

In sum, although the area of municipal liability under §1983 is fairly open-ended, the cases point away from municipal liability here. I think it would be especially difficult to square municipal liability in this case with footnote 12 in the Pembaur opinion. I therefore recommend reversal.

REVERSE hl September 25, 1987

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