Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 1, 1989

MEMORANDUM TO THE CONFERENCE

Re: Cases held for City of Canton v. Harris, No. 86-1088

No. 87-2120, Jorda v. City of New Brunswick

Petitioner in this case claimed that he was beaten by police officers of respondent's police department, following his arrest by those officers. Petitioner sued respondent, the officers, and several others involved, raising both state and federal law claims. Among petitioner's claims was a §1983 claim against respondent, alleging that three of respondent's "policies and customs" had led to his injuries; petitioner complained of respondent's: (1) failure to train its officers; (2) weapons-carrying policies; and (3) lack of record keeping on the use of force by city police officers. The trial court directed a verdict on these claims for respondent, and petitioner appealed.

On appeal, the N.J. Superior Court Appellate Division affirmed this aspect of the trial court's holding. It characterized petitioner's claims as resting on "the alleged negligent customs and policies" of respondent. Petn. App. 14a-15a (emphasis added). Finding that our decisions in Daniels v. Williams, 474 U.S. 327 (1986) and Davidson v. Cannon 474 U.S. 344 (1986), had forbidden municipal liability under §1983 based on "simple negligence or lack of due care," the Appellate Division concluded that petitioner had not stated a proper claim under the statute. Id., at 15a. "[W]e conclude [that] an assertion of negligence existing through policies and customs on the part of municipal officials which may have led to an injury being inflicted by a municipal employee, even though inflicted intentionally by that employee, does not establish a cognizable cause of action against the municipality under §1983." Id., at 16a (emphasis added).

In his petition for certiorari, petitioner claims that the Appellate Division erroneously ignored a long line of cases that had established that municipalities could be held liable, under §1983, for their failure to train police officers. Petitioner claims that, had he been given the opportunity, he could have established that the city's training practices reflected a "deliberate indifference" to the rights of city residents.

Petition at 15-16. In response, the city simply argues that there was no basis in fact for petitioner's allegations of city negligence in the training or supervision of its police officers.

Though it is a close call, I will vote to deny the petition. If the Appellate Division had held, as petitioner suggests, that a claim of municipal "failure to train" amounting to a deliberate indifference towards the rights of city residents is not cognizable under §1983, then I would vote to GVR, since such a holding would be directly contrary to our decision in Canton. However, notwithstanding the state court's dubious reliance on Daniels and Davidson as support for its ruling, its decision was (if narrowly read) correct under Canton. That is, to the extent that the Appellate Division rejected petitioner's "failure to train" claim because it alleged "mere negligence" on the city's apart -- as the opinion below appears to conclude, see Petn. App. 15a-16a -- its decision was the correct one. Under our Canton decision, mere municipal negligence in training police officers does not state a claim under §1983.

It is possible that the Appellate Division, which described petitioner's complaint as alleging "negligence" on the city's part, misconstrued the nature of petitioner's claims; petitioner may have been prepared to show, as he claims now, that the city's malfeasance rose to the level of "deliberate indifference." However, such an error below, in my view, is not an adequate basis for a GVR, nor is it cause for plenary review here. Consequently, my vote is to deny.

No. 88-810, District of Columbia v. Parker, et ux.

Respondent, a robbery suspect, was apprehended by police after a lengthy car chase. Officers instructed respondent to "freeze;" respondent instead moved his hands towards his waist and turned to face the police officers. Fearing that respondent had a weapon, the officers fired on him. Respondent, who had no weapon, was left paralyzed.

Respondent sued petitioner under §1983, claiming that the city's failure to train officers in the proper use of firearms had led to the shooting, which, respondent claimed, violated his Fourth Amendment right to be free from seizure by unreasonable force. At trial, respondent relied on expert testimony suggesting that it was "unreasonable" for the officers to fire at respondent before they saw him draw a weapon. Petitioner, in response, sought an instruction from the District Court (D.D.C.; J.H. Green, J.) based on Tennessee v. Garner, 471 U.S. 1 (1985);

such an instruction would have differed sharply from the expert's testimony. The District Court refused the instruction. The jury returned a verdict for respondent, and petitioner's JNOV motion was denied.

On appeal, the D.C. Circuit Court of Appeals (Mikva, Gordon [sdj]; Williams [diss.]) affirmed. The Court of Appeals concluded that, under Monell, inadequate training could form a basis of municipal liability "where there is evidence of deliberate indifference manifest by systemic and grossly inadequate training." Petn App. 6a. The D.C. Circuit found sufficient evidence to support such a finding here. It also rejected petitioner's objection to the failure of the District Court to instruct the jury concerning the Garner rule; the Court of Appeals found the District Court's instructions "sufficient to convey the law," and found that petitioner had failed to comply with Fed. R. Civ. P. 51 by not stating a distinct objection to the jury instructions ultimately given by the District Court.

In dissent, Judge Williams agreed that the majority had applied the proper "deliberate indifference" theory of §1983 liability, but expressed his view that the facts here fell far short of the requisite elements of such a claim. The dissent also concluded that the District Court had erred in failing to instruct the jury on the Garner rule; in addition, the dissent found that petitioner's failure to object to the jury instructions was based on courtroom procedures established by the District Court, and did not constitute a failure to comply with F.R.C.P. 51.

In its petition here, petitioner reiterates the claims it made below, tracking the arguments made by Judge Williams' dissent. Respondent insists that the District Court's instruction on "reasonable force" was correct, and that there was adequate evidence to support liability on the §1983 claim.

I will vote to deny certiorari. The D.C. Circuit stated the proper standard for §1983 liability in these circumstances, accurately anticipating our holding in Canton. Even if the dissent below was correct in insisting that the facts here do not amount to "deliberate indifference," this critique of the holding forms no basis for a GVR, and does not raise a cert-worthy question.

As for the Garner-instruction claim: I have little doubt that the District Court erred in failing to instruct the jury on the constitutional standards for the use of deadly force established by Garner; petitioner may well have been held liable

for its officers' constitutionally-permissible use of force in this case. However, the Court of Appeals' rejection of petitioner's appeal rested in part on its alternate holding that petitioner had failed to comply with Fed. R. Civ. P. 51 at trial. While we, of course, have it within our discretion to grant review notwithstanding this default on petitioner's part, see, e.g., City of St. Louis v. Praprotnik, 108 S.Ct. 915 (1988) -- and while it is arguable, for reasons cited by the dissent below, that petitioner is not to blame for its failure to object pursuant to the rule -- I believe that the Rule 51 holding is adequate grounds for us to deny review in this case.

No. 88-5062, Molton v. City of Cleveland, et al.

Petitioner's son was arrested for being drunk and disorderly, and was placed in a city jail cell pending his booking (apparently because he would not cooperate with the processing). The young man committed suicide while in his cell.

Petitioner thereafter brought this §1983 suit against respondent, claiming that its inadequate training of the police officers who were in charge of jail operations had led to her son's death. A jury found for petitioner, and the District Court [N.D. Ohio; Krenzler, J.], entered judgment on her behalf.

On appeal, the Sixth Circuit (Kennedy, Ryan, Norris) reversed. Reviewing our cases in this area, and the diverging views of the Courts of Appeals, the panel concluded that municipal liability could only attach in these circumstances where a plaintiff demonstrated "gross negligence or recklessness amounting to deliberate indifference" on the part of the city. Petn App. A12. Here, the Sixth Circuit found, petitioner's evidence indicated "at most, mere negligence by the City." Ibid. Thus, the city could not be liable under §1983.

In her petition for certiorari, petitioner noted that a different panel of the Sixth Circuit, in City of Canton v. Harris, had applied a more lax standard of liability for §1983 plaintiffs in this circumstance. Petitioner asked this Court to reverse the decision below in the event that we affirmed in Canton. Petitioner also sought reversal of our holding in Monell; i.e., that respondeat superior liability was not available under §1983. The response by and large defended the correctness of the Sixth Circuit's decision below.

Deny

Certiorari should be denied in this case. The Sixth Circuit's decision here closely approaches the rule we established in Canton; if anything, it was arguably more favorable to petitioner than our holding in Canton. Therefore, a GVR would make little sense. Moreover, petitioner offers no compelling reason for re-examining our rule on respondeat superior municipal liability under §1983. Consequently, I will vote to deny review.

B.R.W.