

MM

U.S., at 210 (Brennan, J. dissenting) ("We January 5, 1992

Mr. Justice:

Re: Collins v. Harker Heights, No. 90-1279

I don't think I am going to be of much help to you in this case since we seem to disagree. I think Justice Stevens opinion is solid and may provide some clarification in this virtually impossible area of law. I also think it is narrowly written. However, I disagree with it, although not necessarily with the result.

Justice Stevens, citing the complaint, claims that petr is asserting a constitutional right to a minimal level of workplace safety. slip op, at 10. In the next sentence of the complaint, however, petr asserts a constitutional right to be free from injury resulting in death. App. 7 This different twist on what interest is being asserted allows Justice Stevens to decide the case easily -- obviously the Constitution does not mention workplace safety rules. The problem with that interpretation is that many of the Court's past cases concerned govt creation of unreasonable risks of harm. See e.g. Daniels and Davidson. Justice Stevens distinguishes those cases by limiting them to custody situations only: "the State owes a duty to take care of those who have already been deprived of their liberty." slip op., at 12. In that way Justice Stevens continues this Court's limitation of due process protections to inmates only.

I disagree; I think there are numerous situations where the State has intervened in a person's life and has a responsibility for his well-being outside the custody context. See Deshaney, 489

U.S., at 210 (Brennan, J. dissenting) ("Wisconsin's child-protection program thus effectively confined Joshua DeShaney within the walls of Randy De Shaney's violent home until such time as DSS took action to remove him."); White v. Rochford, 592 F.2d 381 (CA7 1979) (Police officers violated due process when, after arresting the guardian of three young children, they abandoned the children on a busy stretch of highway at night.)

The far more difficult question for me is whether, assuming that custody is not the only example where the state has an affirmative obligation to protect its citizens, in this context the City has an affirmative obligation. Justice Stevens resolves this difficult question with an ipse dixit: "Petitioner cannot maintain, however, that the City deprived Collins of his liberty when it made, and he voluntarily accepted, an offer of employment." Slip op., at 12. I think this conclusion is simplistic. It seems plainly wrong to believe that an individual "voluntarily" accepts every condition of employment, even those he does not know about, when he accepts the job. Collins' situation is an example. Mr. Collins did not voluntarily accept being placed in a dangerous situation; his contention is that nobody told him it was dangerous. If the City had warned Mr. Collins of the dangers of sewer work, and he accepted employment, then the city should not be liable for his injuries. Likewise, if Collins knew sewer work was dangerous or had previously been rendered unconscious in the sewer, his willingness to continue on the job without safety equipment could be considered voluntary. In this situation, however, Collins was

completely at the mercy of the City; it told him to do something dangerous under penalty of being fired and took away any opportunity he had to help himself by refusing to equip him or inform him of the dangers. a procedural due process claim. The

Thus, I disagree with Justice Stevens' contention that the state never has a constitutional duty to protect the life of its employees even if it knowingly and deliberately places them into a situation of mortal danger without warning. I realize that there are problems with this approach. Every §1983 case opens the possibility of floodgates of litigation against municipalities. But that concern is not enough for me to consider it proper to deny relief to those who have been harmed by government action. my file

✓ That being said, I think petr probably cannot survive a 12(b)(6) motion. I would decide the case on the first question discussed by Justice Stevens: whether petr has alleged sufficiently a basis for imposing liability on the City for the conduct of its agents. The standard as Justice Stevens makes clear is if the city's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants. Slip op., at 8. Petr only alleges three facts relevant to the City's liability: 1) the City did not train or warn; 2) several months prior Collins' supervisor had been rendered unconscious in the sewer; and 3) Texas had passed a law, the Texas Hazard Communication Act, that required training and information to employees handling dangerous

chemicals.¹ To me those bare allegations just do not reach the standard of deliberate indifference.²

One other note on the Justice Stevens opinion. He asserts that petr did not bring a procedural due process claim. The complaint is terrible, and one is hard pressed to decipher what constitutional amendment is at issue. It could be construed as presenting both a substantive and procedural dp claim, and petr argued both up here. However, it does not appear that petr argued the procedural right in either the dct or CA5. I think Justice Stevens' decision to assume only a substantive right argument is fair, and useful in limiting the negative implications of the case.

Justice White is still inclined to reverse. He is having his clerk look into a few questions, and plans to make his decision whether to write separately shortly.

¹ This third factor is particularly weak evidence because it is not clear that the statute applied to sewer workers. Texas has interpreted it so, but resp's argument to the contrary is strong enough to suggest that the City may have been unaware of its applicability to sewer workers.

² Although the dct's analysis was not an example of clarity, I think this is the basis for its granting of the motion to dismiss.