AJ

X AJ

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Reply received, 4/1/91,
There's a split and the issue will recur.
The case is certworthy but I still
think the poor fact situation counsels denial.
"close but" still X
AJ 4/5/91

PRELIMINARY MEMORANDUM

April 12, 1991 Conference
List 1, Sheet 1, (Page 1)

No. 90-1279-CFX

Collins (§1983 claim against City dismissed)	Cert to CA5 (Wisdom, Davis & Barksdale)	
v.		
City of Harker Heights	Federal/Civil	Timely

1. *Summary*: The ct app affd the dismissal of petr's §1983 action against resp on the ground that petr had failed to make out a claim that the case involved an abuse of govt power. Petr correctly alleges a split on the issue. I recommend a grant because the issue appears important.

2. *Facts and Decisions Below*: Petr's husband worked for the City in its sanitation and sewer dept.

One day, he entered a manhole to clear a line and died of asphyxia.

Petr brought a §1983 action against the City, alleging that the City's custom and policy of deliberate indifference toward the safety of its employees caused her husband's death in violation of his constitutional right to be free from unreasonable risks of harm. The dct [WD Tex; W. Smith, Jr., J.] granted resp Rule 12(b)(6) dismissal, and the ct app affd: Not all cases alleging the requisite causation between a municipal policy or custom and the alleged constitutional deprivation lie under §1983. In this Circuit, there is a separate standard that must also be satisfied--an abuse of government power. The decedent's relationship with the City was one of employer and employee, rather than one in which the City, as government, acted against the decedent, as governed. There was no abuse of government power in this case. This was not a case in which the state so restrained the decedent's liberty that it rendered him unable to care for himself. It was not a case in which a government official, because of his unique position as such was able to impose a loss on the decedent. Nor was there a misuse of power made possible only because the City was clothed with authority of state law. Accordingly, this action cannot lie under §1983. We recognize that our holding is in conflict with CA8's

decision in Ruge v. City of Bellevue, 892 F.2d 738 (CA8 1989), in which that court reversed a Rule 12(b)(6) dismissal, holding that an abuse of government authority sufficient to state a cause of action under §1983 arises when a death, including that of a municipal employee, is caused by an inadequate municipal policy adopted with the requisite culpability.

3. *Contentions*: Petr contends that there is a circuit split on the question whether municipal liability under §1983 must rest in part on abuse of governmental authority. Petr also contends that the Court should take the case to determine whether the Texas Hazard Communication Act, which requires all Texas employers to inform and train their employees concerning workplace safety and to provide appropriate personnel protective equipment, creates a substantive due process liberty interest to be free from workplace hazards. Resp argues that CA8's decision in Ruge is an aberration and there is no need to correct its decision. It argues that petr's second contention is not in the case.

4. *Discussion*: Under City of Canton v. Harris, 109 S.Ct. 1197 (1989), a city is liable under §1983 if it causes a constitutional injury by a policy or custom that reflects a deliberate indifference to the constitutional rights involved. *Id.*, at 1204-1207. CA5's holding adds the requirement that the violation involve the abuse of

authority that is peculiarly the government's. According to CA5, it is not enough that a municipality as employer cause the requisite injury. The city must do so as an abuse of its governmental authority, apart from its status as employer. There is, as CA5 said, a circuit split on this point. In Ruge v. City of Bellevue, 892 F.2d 738 (CA8 1989), CA8 stated, "We deem a policy, if adopted and proven, that would show a city actively pursued conduct which was deliberately indifferent to the constitutional rights of its citizens, would reach constitutional dimensions and be actionable under the Civil Rights Act." *Id.*, at 742. CA2 has decided the scope of §1983 in a similar context in general agreement with CA5. In McClary v. O'Hare, 786 F.2d 83 (CA2 1986), CA2 affd dismissal of a complaint for failure to state a claim, stating that the Constitution "does not provide a remedy to a public employee that would not be available to a private employee subject to identical conduct by his employer." *Id.*, at 89. Petr alleges a conflict between CA5's decision and Cornelius v. Town of Highland Lake, 880 F.2d 348 (CA11 1989), cert. denied, 110 S.Ct. 1784 (1990). In Cornelius, the plaintiff clerk of the deft town sued the town after being abducted by state prison inmates assigned to a community work squad. CA11 reversed a summary judgment decision for the deft by the dct, holding that there was an issue of genuine material

fact as to whether the town owed the plaintiff a duty to protect her from the criminal actions of work squad inmates. The decision is arguably consistent with CA5's because it discusses the governmental role of establishing the work squad program. See id., at 357. It does not create a cause of action available to municipal employees solely by reason of the employment relationship. Similarly, petr's suggestion that CA5's decision is in conflict with CA3's holding in Stoneking v. Bradford Area School District, 882 F.2d 720 (CA3 1989), cert. denied 110 S.Ct. 840 (1990), is unfounded. That case did not involve a govt employee.

Petr's second contention--that the Court should take the case to determine whether the Texas Hazard Communication Act creates a substantive due process liberty interest to be free from workplace hazards--was not reached below.

5. *Recommendation*: Though the split is not widespread, I recommend a grant because the issue appears important.

There is a response.

March 25, 1991 Iman Anabtawi Opin in petn.

(SOC/Stanford/Silberman)

These are poor facts for addressing this issue. Given the shallow split, I recommend denial

X AJ. 4/1/91