

file

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

CHAMBERS OF

JUSTICE Wm. J. BRENNAN, JR.

April 25, 1978

Re: No. 75-1914, Monell v. Department of Social Services

Dear Potter,

Thanks so much for your memorandum of April 24.

Let me say in reply that I understand that Whit Peters and Bob Litt have reached agreement on all the points they discussed yesterday with the exception of three, which are: (1) footnote 57, which Whit and Bob did not discuss, but which your memorandum identifies as troublesome; (2) footnotes 55 and 60; and (3) the question of how to deal with the claims asserted against the Mayor of New York and the Commissioner of the Department of Social Services given that the City and the Department were dismissed and plaintiffs-petitioners did not appeal this dismissal.

I confess that your reaction to note 57 as a "time bomb" surprises me. I think it states a well-settled principle of common law and I included it in the draft to make sure that people understood the limited nature of the terms "vicarious liability" and "respondeat superior" that are used in the text, since these terms (as indicated in the parts of Prosser and Harper & James cited in the opinion) are often used in different ways by different authors. Given the need for clarity, I would prefer not to drop footnote 57, but would prefer simply to add the following to it: "Whether fault or negligence in hiring, training, or direction states a cause of action under § 1983 is, of course, a question we have not addressed and we express no view on it here." Would not that meet your concern that the footnote might be read to imply that we are holding in this opinion that § 1983 would follow the common law with respect to negligent hiring, training, or direction?

As to the last part of note 55, it was meant to say only -- and I really think it says no more than -- that where the Constitution imposes a duty to act, § 1983 provides an avenue of redress when officials are deliberately indifferent to that duty. It was not intended to suggest, and I thought did not decide, when the Constitution imposes such a duty. Moreover, I think the reference to Estelle is faithful to the jump-cited material in that opinion, which is:

"We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' Gregg v. Georgia, supra, at 173 (joint opinion), proscribed by the Eighth Amendment. . . . Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983." (emphasis added).

Since § 1983 does not distinguish between the Eighth Amendment and other types of constitutional violations, doesn't the last sentence of the quote necessarily decide that § 1983 goes as far as the Constitution with respect to deliberate indifference?

Note 55 is referenced in note 60 to allow me to keep Byron's language -- which I have unabashedly plagiarized in the text at page 34 -- as the description of the cause of action created by this opinion. I think Byron's language is particularly felicitous in describing the elements of the action in what is probably the more usual case of "positive" official policy leading to constitutional tort.

I would be willing to drop the material from note 55, where it is somewhat cumulative of Felix's language, but given my view that deliberate indifference is enough to hold a city under § 1983, I feel that I must qualify the text at note 60, which would otherwise seem to foreclose a deliberate indifference theory. You may differ with me on whether whether deliberate indifference is ever enough to hold a city, but can't we agree not to cut off either of our views in this case? This may be accomplished by having note 60 read as follows:

"60/ In adopting this phrasing, we do not intend to foreclose the possibility that, where the Constitution imposes a duty on municipal officials to act -- as the Eighth and Fourteenth Amendments do with respect to the medical needs of prisoners, see Estelle v. Gamble, 429 U.S. 97 (1976) -- and official policy is one of deliberate indifference to that duty, § 1983 provides an avenue of redress against a local government as an entity. See id., at 104-105."

Would this be satisfactory to you (along with dropping the Estelle material in note 55)?

The third problem is one I confess I have not thought a great deal about. It seems to me that, at least outside of the Eleventh Amendment context, a suit against an official in his official capacity and a suit against the entity of which the official is an agent amount to the same thing: in either case the relief sought is not relief against the official personally, but exercise of the powers of his office or payment of monies from the entity's treasury. Therefore, since we accepted for cert. along with the question of the suability of school boards, the question "Whether local governmental officials . . . are 'persons' within the meaning of 42 U.S.C. § 1983 when equitable relief in the nature of back pay is sought against them in their official capacities?", Pet. 8, I suppose I should add a footnote in an appropriate place saying something like: "Our holding today necessarily decides that local government officials sued in their official capacities are 'persons' under § 1983 for all purposes in those cases where a § 1983 plaintiff could also maintain an action against the local government, since official capacity suits are simply another way of pleading an action against a corporate entity."

On the other hand, the resolution proposed above leaves unanswered two things. First, what happens in the situation in which the corporate entity cannot be sued, i.e., the respondeat superior situation? I think the answer is that suit will not lie, since the equivalence between official capacity suits and suits against the entity need not be tortured here as it has been in the Eleventh Amendment context. Second, what should be the

result in this case in which petitioners-plaintiffs have "allowed" the City and the Department to be dismissed from the suit by failing to appeal their dismissal? I have no ready answer for this. It may be that the District Court can reinstate the City and Department or it may be that the courts below will feel they can go forward and grant relief without the City and the Department. Since we need not decide either of these issues now, my preference would be simply to add the footnote proposed above and leave it to the District Court and CA2 to sort out where this case goes from here.

I would appreciate any views you and other colleagues might have on how to resolve the last question. I hope to send a third draft to the printer in the next day or two, which would include the first two changes set out above plus other corrections we have agreed to make in response to comments by Bob Litt and by Sam Estreicher in Lewis' chambers.

Sincerely,

W.J.B., Jr.

Mr. Justice Stewart

Copies to the Conference