BENCH MEMORANDUM

No. 75-1914 - Monell v. Department of Social Services

On July 26, 1971 petrs filed a class action against the New York City Board of Education and the Department of Social Services and their officials. The complaint alleged that these entities forced women employees to take unpaid maternity leaves in violation of § 1983 and their constitutional rights. Jurisdiction was predicated on 28 U.S.C. § 1343(3) and on Title VII. There was no allegation of jurisdictional amount.

The CA 2 held that because the 1972 Amendment to Title VII extending coverage to local governments did not apply retroactively, petrs could not rely on Title VII for jurisdiction over their claim for damages. The CA 2 also rejected § 1343(3) as a basis for jurisdiction, since neither the School Board nor the Department was a "person" within the intendment of § 1983. Finally the CA 2 rejected petrs' suggestion that the court order the city officials, sued in their official capacities under § 1983, to use city funds at their disposal to compensate petrs' class.

I

The most far-reaching argument presented by petrs is that county and municipal officials can be ordered under § 1983 to use public funds to compensate for constitutional violations. In support of this contention Amicus Curiae NEA points out that

this Court's decision in Monroe rested solely on an examination of the legislative history of the Civil Rights Act of 1871, rather than on any policy considerations, and NEA challenges that interpretation of the Congress' actions. In an appendix to its brief, NEA seeks to demonstrate that Congress had found the Sherman Amendment objectionable because it imposed an affirmative obligation on municipalities to undertake police protection even where state law did not impose such a duty, i.e., because the proposed statute would have required "protection of the laws" in addition to "equal protection of the laws."

I think that there is considerable merit to this analysis. Even if some of the objections to the Sherman Amendment were somewhat more broadly worded than NEA contends, e.g., remarks of Senator Poland quoted in Moor v. Alameda County, 411 U.S., at 709 n. 23, it is clear that the Congress was concerned with the imposition of strict liability on municipalities for the acts of private citizens, not with a more limited liability for acts of public officials in contravention of the terms of the Fourteenth Amendment.

Nevertheless, as NEA itself concedes, Brief at 26, Monroe is now far too much a part of the fabric of the law to be overruled at this time. Indeed, the Court deliberately passed up an opportunity to limit the impact of Monroe in its decision in Moor v. Alameda County, 411 U.S. 693 (1973). The plaintiff in that case sought to take advantage of 42 U.S.C. § 1988 -- which

authorizes the incorporation of state law into federal civil rights acts where these do not "furnish suitable remedies" -- because California law would assertedly have made the defendant county vicariously liable for civil rights violations by its sheriffs. Plaintiff pointed out that the principal objection to the Sherman Amendment identified in Monroe -- that Congress could not constitutionally impose liability on municipalities -- was inapplicable in this context, since the liability was imposed by state law. The Court rejected this argument, reiterating that Congress had intended to exclude municipalities, whatever their liability under state law, from the coverage of the Act.

Having rejected in Moor this rather ingenious attempt to circumscribe the impact of Monroe, I don't see how the Court can accede to the even more direct attack pressed here. Petrs do not rely on a different section of the statute, as was the case in Moor, nor do they rely on state law. Petrs would simply have the Court permit an inroad on Monroe based on the fiction that the individual official was himself being sued. I think that stare decisis requires that the Court reject this argument.

Petrs protest that the opinion in Kenosha prohibits a bifurcated reading of § 1983, one that would permit the courts to treat municipal officials as "persons" in suits for injunctive relief but not in suits for damages to be paid from the municipal treasury. One answer to this contention is that the courts can consistently treat the officials as "persons" by requiring them to pay damages as individuals for their past

constitutional violations and by enjoining them to conform their individual conduct in the future to the dictates of the law. A less simplistic answer may be that historically the courts have been unwilling to stretch the fiction of individual liability to compel the payment of damages with state funds. My impression is that this was true of the English system of writs, see, e.g., Jaffe, Judicial Control of Administrative Law 212 (1965), and it is certainly true of the law as it has developed under the Eleventh Amendment. Edelman v. Jordan, 415 U.S. 651 (1974). I think it a safe assumption that the Congress which passed § 1983 did not expect that the fiction of individual liability would be used to evade their decision with respect to municipal liability.

Finally, the interpretation proposed by petrs is hard to rationalize from a policy standpoint. As petrs point out (Brief at 34), their view of the statute would entail monetary relief only "where the defendant who engaged in the violation was the chief executive or policy making body of the city or county or some other high ranking official authorized to direct the expenditure of funds." Since the award would be paid with public funds, there would presumably be no need for the kind of personal immunity approved in Scheur v. Rhodes and Wood v. Strickland. Thus compensability would depend on neither the grievousness of the injury nor the state of mind of the individual official, just the fortuity that the responsible official has access to funds. This may not be a very fair system of liability. In any event,

its shape is so significantly different from the traditional treatment of sovereign immunity that some more definite form of congressional approval might be necessary.

II

Petrs' argument that the New York City Board of Education is a "person" within the meaning of § 1983 may be broken down into two separate contentions: first, that a school board or district sufficiently independent of county and municipal government may be regarded as a "person" within the meaning of the statute; and second, that the New York City School Board falls within that class. I will examine the more general proposition first.

Reasoning from this Court's decisions in Monroe and Moor, it is difficult to distinguish school boards from cities and counties. An independent school board stands in essentially the same relation to the State as a city or county. A Congress which felt that it could not constitutionally impose a liability on other local governmental bodies would not, in all likelihood, feel capable of imposing such liability on school boards. The The Court's decision in Moor seems to reflect this point of view, in referring quite generally to the "serious legislative concern as to Congress' constitutional power to impose liability on political subdivisions of the States." 411 U.S., at 708. (Emphasis added.) Moreover, from a policy standpoint, school boards have at least as great a need of protection as city and

county governments. School boards will often have fewer financial resources, more limited taxing and borrowing powers and less political clout in the state legislature and elsewhere. They perform a purely governmental function essential to our conception of a democratic society. Thus, whether the decision to exclude municipalities from the coverage of § 1983 was constitutionally based or more practically grounded, there is a strong argument that the logic of that decision demands that school boards be similarly excluded.

Petrs do not directly take issue with that reasoning, but argue that precedent and congressional acquiescense require a different result. The decisions that petrs cite do not compel that conclusion. There is an even more venerable line of precedent -- ultimately descended from a remark of Chief Justice John Marshall on the bench -- holding that "this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio." United States v. Tucker Truck Lines, 344 U.S. 33, 38 (1952); New v. Oklahoma, 195 U.S. 252, 256 (1904); United States v. More, 3 Cranch 159, 172 (1805).

Of course, it would not be very satisfying or prudent for this Court to leave the impression that its decisions affecting school boards -- some of its more crucial in the past two decades -- hang by the somewhat slender thread of counsels' failure to object to jurisdiction. One solution intimated by

the 2d Cir. opinion might be to explain these cases as lawsuits for injunctive relief that might have been brought against individual school board officials. An alternative solution, which would better explain the language in this Court's opinions apparently ordering relief against school boards as distinct entities, would be to view those lawsuits as actions for injunctive relief that might have been brought directly under the Fourteenth Amendment with § 1331 as a jurisdictional basis.* While the pleadings in those cases might not have contained the necessary allegations, that is a problem that might easily have been cured if timely objection had been made.** Thus with a

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*There is authority for this approach. Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U.S. 278 (1913), was an equitable action brought directly under the Fourteenth Amendment against a municipality. Although municipal officials were named as defendants, the case has not been viewed as one brought under § 1983. See Monroe v. Pape, 365 U.S. 167, 172, 212, 217 (1961).

Of course, a holding that a city could be sued directly under the Constitution for injunctive relief would not mean that a Bivens type damage remedy would be available.

**A federal statute provides, "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts," 28 U.S.C. § 1653, and the treatises agree that where jurisdiction did in fact exist at the commencement of an action, leave to amend should be freely granted to cure the failure to make proper jurisdictional allegations. 3 Moore's Federal Practice ¶ 15.09 at 945; 6 Wright and Miller, Federal Practice and Procedure § 1214. See also Bell v. Preferred Life Assurance Society, 320 U.S. 328, 242 (1943).

certain amount of effort, this Court's previous decisions in § 1983 actions against school boards might be explained away.

Similarly, the federal statutes cited by petrs and amici as accepting the liability of school boards do not require the conclusion that Congress has approved of this extension of liability under § 1983. It is equally possible that Congress believed that school boards were properly sued on the basis of the Fourteenth Amendment or by means of lawsuits against their officials. Indeed, it should be noted that Congress has enacted a statute specially providing the district courts with jurisdiction to hear claims of discrimination in the schools. 20 U.S.C. §§ 1706, 1708 (Supp. V 1975).

While this Court's handling of the school board cases over the past 20 years does not compel the conclusion that § 1983 applies to them, those decisions, and the absence of congressional objection, do have some persuasive force. "While we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed sub silentio, . . . neither should we disregard the implications of an exercise of judicial authority assumed to be proper for over 40 years." Brown Shoe Co. v. United States, 370 U.S. 294, 307 (1962). The real significance of the Court's previous § 1983 decisions involving school boards is not that they delineate any meaningful, logical limit on the scope of Monroe, but that they provide a useful landmark for one who doubts the validity of the interpretation of the legislative history underlying Monroe. If one

is inclined "to get off the trolley," these precedents indicate a convenient stopping place.

I would add that if one accepts the interpretation of the legislative history advanced in the amicus curiae brief, it might even be possible to forge a rational explanation for including school boards within the coverage of § 1983. Under that view, Congress objected to the Sherman Amendment because it imposed an affirmative obligation on municipalities to protect their citizens from the acts of other private citizens. There is no danger that such a liability will be imposed on school boards, since they have never been invested with that kind of police power. Suits against school boards under § 1983 are likely to be, as they have been in the past, actions to require that citizens be treated equally or with due process -- the kind of actions the framers desired.*

III

Even if an independent school board may be a "person within the meaning of § 1983, the Board of Education of New York City seems to be too much a part of city government to be considered a separate "person." The Board has no independent taxing powers. Its members are not elected. For administrative purposes the Board is treated as a branch of city government. Particularly

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*Along these lines one might point out that the two versions of the Sherman Amendment referred to "county, city or parrish" but not to school districts. I hesitate to rely on this argument, however, since there were probably few school boards at that time. See Brown v. Board of Education, 347 U.S. 483, 490 (1954).

interesting in the context of this lawsuit is the fact that the New York City Commission on Human Rights has been held to have jurisdiction over the Board's employees because the Board is a "city agency." Maloff v. City Commission on Human Rights, 38 N.Y. 2d 329, 342 N.E. 2d 563 (1975). While the issue is not free from doubt, it seems to me that the Board lacks the financial and political autonomy that would make it a distinctive "person."

I recognize that the Court could, by deciding the question of autonomy initially, pretermit any analysis of the more difficult question as to whether independent school boards are covered by § 1983. I do not think that this is a sound way of handling the case. The school board question will have to be decided sooner or later. Little is gained by postponing decision, since the facts and arguments in this case seem as useful as any others, but much litigative effort may be lost in other cases as well as this one if federal jurisdiction is ultimately found to be absent. I do not think that we should prolong any further this uncertainty about the contours of federal jurisdiction.

Finally, if § 1983 is held inapplicable, the case should be remanded to give petrs an opportunity to replead the basis of jurisdiction. I do not believe that petrs will be able to take advantage of § 1331, for they will not be able to show damages in the neighborhood of $10,000 per person. Nevertheless, our remand can indicate that the question of whether a city or county may be sued for damages under § 1331 remains an open one.

September 8, 1977

Charles Cole

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