RESPONSE REQUESTED & RECEIVED

75-1914 CERT TIMELY List 3, p. 8

MONELL v. DEP'T of SOCIAL SERVICES

CA 2: Gurfein, Hays, Timbers

P.S.

This petition raises two issues, both of which were decided adversely to petr/plaintiffs: (1) do the 1972 amendments to Title VII, extending that act to state and local employees, apply in cases judicially pending as of the effective date of the amendments; (2) is there a damage cause of action directly under the 14th amendment against a municipal employer, analagous to the implied cause of action in Bivens.

The second issue was one that we thought would be, but was not, reached in Mt. Healthy. The respondents concede that the law in the lower courts is in a state of disarray and that a circuit conflict exists. They do not point to any very forceful reason for not granting as to this issue.

If the case were to be granted, however, the first issue, being non-constitutional in nature, would of course appropriately be the first question to consider. My own view is that in Brown v. GSA and, in a different context, in the recent Robbins & Myers decision, this

Court has shown a willingness to extend the 1972 amendments retroactively to pending cases involving discriminatory acts prior to the effective date, in order to further the broad remedial purpose of Title VII. Each of those cases is strictly distinguishable, but I find the CA 2's distinction of Brown v. GSA unpersuasive. The CA 2 read Brown as resting on Title VII's having provided a new "procedural right"--the right to judicial review--for federal employees, who already had certain administrative remedies. But it is clear that this very defendant was under a constitutional obligation not to discriminate against pregrant women under LaFleur, and even though Title VII is a different cause of action, the critical point is that it did not obligate the municiapl employer to act from which he had been prior to Title VII's amendments. Hence, there is no injustice in applying Title VII retroactively. It is true that prior to 1972 the municiapl employer was free to discriminate without itself risking liability for back pay, since it is not a person under 1983. But the individual officials were personally liable

for back pay, the [redacted] employer [redacted] itself could be enjoined; [redacted] I see no basis for adopting Holmes' "bad man" theory to answer this retroactivity question.

As we move further and further from 1972, the retroactivity question becomes less and less important. But I think it stands as a barrier to reaching the important 14th amendment question, unless you think the analysis of the retroactivity question that I have offered is wrong. My sense is that the retroactivity question isn't important enough for full argument. Thus, I would either deny, or would grant, vacate, and remand with a short per [redacted] curiam reversing the CA 2 on the retroactivity question and remanding for further proceedings under Title VII.

GRANT, VACATE & REMAND w/ per curiam on Title VII retroactivity question

djm OPN: ptn at A28

There is now a response