

80-396

City of Newport v. Fact Concerts

Cert to CA1 (Coffin, Cambell, Bownes)

Vote Grant: Chief, HAB (3), LFP, WHR

Deny: WJB, TM, PS, JPS, BRW

ISSUE

Are punitive damages under §1983 available against a municipality for constitutional violations by its officials.

BACKGROUND

Respts were granted a license to conduct a jazz festival. Petr and its officials became concerned that one group scheduled to play might attract a "rock crowd" rather than a "jazz crowd" and so tried to cancel the concert on a pretext. Respt succeeded in enjoining the city from cancelling the concert, but suffered substantial losses due to a poor turnout caused by the threatened cancellation. In a subsequent §1983 action, the jury awarded respts compensatory and punitive damages against the city. On appeal, petrs attacked the punitive damages award against the city. The CA, however, found that petrs had failed to preserve this objection by objecting to the charge on punitive damages at trial, as required by FRCP 51. The court concluded that it could not overlook this procedural error since petrs had not shown that the charge on punitive damages against

the city constituted plain error. The court reasoned that the issue of punitive damages against municipalities was an unsettled one and therefore a charge permitting the jury to find such damages was not plain error.

DISCUSSION

Neither party discusses the rule 51 issue but I think its fairly important. Although WHR's cert dissent that got this case granted glossed over the issue, the CA did not say that punitive damages were always available against a municipality. The court instead said that they would not address the issue because petr's had failed to preserve it for review and that the trial court's ruling was not plain error. In my view that should be the end of the case, but somehow it's been transformed into a discussion on the merits of whether a city can be liable for punitive damages. The only conceivable basis for hearing the case is the fact that the DC addressed the punitive damages issue in depth despite petr's failure to raise the claim at trial.

On the merits, petr contends that the Congress that enacted §1983 did not intend to allow punitive damages against municipalities, that no court at common law (from which §1983 immunities are derived) had allowed such damages, that there is no need for punitive damages against the municipal corporation since punitive damages are available against the individual officials, and that it is unfair to penalize taxpayers for the

damages caused by their elected officials when the taxpayers themselves did not intend such damages.

While petr's arguments do have some merit, they are not entirely persuasive. The common law cases cited by petr are distinguishable in that they involve different causes of action. In addition, the legislative history of §1983 clearly indicates that its central purpose was to deter unconstitutional conduct, and not simply to compensate for damages caused by such conduct. Limiting §1983 against municipalities to compensatory relief would partly undercut the deterrent effect of the statute. Although punitive damages are available against the individual official, it's not clear that limiting awards to such officials will always have the deterrent effect intended by the statute. Moreover, the fact that the taxpayers who end up paying the punitive damage award did not cause the conduct directly should not be dispositive in my view. They elected the officials that caused the harm, and the imposition of punitive damages in appropriate cases may have a salutary effect on government by letting the public know of the unconstitutional actions of elected officials. Moreover, petr's argument, if accepted, would also apply to compensatory damages, since the taxpayer in either case is paying for something he didn't do.

In sum, punitive damages should probably be available against municipalities in cases in which the unconstitutional conduct is egregious and intentional. Whether this is such a case is hard to say, since the CA never directly addressed the issue due to the rule 51 ruling. My view is that punitive

damages against the city might not have been appropriate here since the conduct -- cancelling a concert because of fears about the crowd it might attract -- does not seem to be the sort of intentional, egregious violation of constitutional rights that should be redressed through punitive damages. If the merits are reached, perhaps the case should be remanded for reconsideration by the CA.

AFFIRM? or REMAND

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March sitting.