

BENCH MEMO

No. 78-1779

Owen v. City of Independence

Cert to CA 8 (Bright, Ross, Van Oosterhout concurring)

VOTE:

GRANT: JPS, BRW, PS, WJB

JOIN 3: TM

DENY: WHR, LFP, HAB, Chief

This case raises the question whether municipalities have a qualified immunity against liability for damages in § 1983 actions.

FACTS

Petr is the former police chief of Independence, Mo. The city council passed a resolution charging petr with criminal conduct and providing that "investigative reports" on petr's conduct be turned over to a grand jury. The next day, the city manager fired petr without a hearing. In so doing, the city manager stated that he was referring reports on petr's conduct to the prosecutor for presentation to the grand jury. The Kansas City area media extensively covered this flap. Eventually, however, the grand jury refused to indict petr.

Petr then filed this § 1983 action, seeking declaratory and equitable relief including a discharge hearing, backpay, and attorneys' fees. The dist ct entered judgment for debts. CA 8 reversed, implying a right of action directly under the Fourteenth Amendment and holding that petr's discharge coupled with the adverse publicity infringed a due process liberty interest. The ct ordered an award of equitable relief, including backpay.

This Court GVR'd in light of Monell v. Dept. of Social Services (1978). On remand, CA 8 held that the applicability of § 1983 to municipalities made possible by Monell rendered unnecessary any consideration of a cause of action under the Fourteenth Amendment. Under § 1983, the CA concluded, a municipality was entitled to qualified immunity barring recovery by persons wronged by its good-faith conduct. Since in the CA's view the city officials could not have anticipated Board of Educ. v. Roth and Perry v. Sinderman, the city was immune from damages for the admittedly wrongful discharge.

DISCUSSION

The issue in this case is purely one of statutory intent: did the Congress of 1871, which enacted § 1983, intend to create any immunity for a municipality sued under that provision? Section 1983's language is indeed broad: it commands that "[e]very person who, under color of [state law,] subjects . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." On its face, this language would reach constitutional torts committed by a municipality, now that the Court in Monell has held that a municipality is a "person" for purposes of this statute. Furthermore, the legislative history of § 1983 indicates that Congress intended to bring municipalities into the statute's sweep, but it does not suggest that Congress intended to create any immunity for such entities.

The question becomes, then, whether in 1871 there was any tradition of municipal immunity so well settled in history and

practice that the Congress of that year must be assumed to have incorporated sub silentio the immunity into § 1983. Such historical evidence seems to be lacking. It seems fairly clear that in 1871 municipalities were generally, if not universally, held liable for torts committed on their behalf. Common-law insulation from suit had been overborne by widespread state statutes making municipalities accountable in court for tortious conduct.

The courts that have found the existence of some form of municipal immunity have relied on two theories. First, some have extended to municipalities the qualified immunity enjoyed by public officials against personal liability. This approach seems to run counter to the evidence surrounding the enactment of § 1983. At that time, public officials enjoyed such qualified immunity from personal liability out of concern for the harshness of a contrary result--placing public duties on a person, and then subjecting the person to personal liability for good-faith breaches of those duties. That immunity did not exist in 1871 as to actions against municipalities.

That the creation of such an immunity might or might not be a good policy decision is irrelevant, since the Court is not concerned solely with congressional intent as to § 1983. Yet, some of the lower courts have, as a policy matter, applied qualified immunity to municipalities on the theory that the absence of immunity will make public officials timid for fear of endangering the public treasury. These decisions not only overstep the role of the judiciary in interpreting statutes, but also misapprehend the public policy justification for qualified immunity for public officials. That immunity

protects people in the govt from losing their own money as the result of good-faith decisions. This policy has little or no applicability to municipalities. Indeed, it is proper to force public officials to consider potential municipal liability when they make decisions.

The second rationale supposedly supporting application of a qualified immunity to municipalities is founded on the fact that in 1871 such entities were insulated from certain types of tort liability. Such insulation arose from the common-law doctrine of sovereign immunity that immunized cities from suit based on their "governmental" activities. Cities were liable, however, for tortious conduct involving their "proprietary" activities and activities they were mandated by statute to carry out. Sovereign immunity was not immunity from damages; rather, it altogether precluded the filing of suit. That factor distinguishes it from § 1983: with respect to the Constitution, Congress, and not the states, was the sovereign, and by enacting § 1983 Congress obviously intended to allow the filing of suit against a municipality.

Municipalities in 1871 were also protected from suits seeking recovery for "discretionary" acts. If a city was not mandated to decide an issue a certain way, no one could bring suit to challenge whatever decision was made on the issue by the city. This doctrine has no application in the present case, since a municipality is mandated to follow the Constitution and federal law.

REVERSE

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