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Pers case was remanded in light of Monell. On remand CA 8 held that Petr had a 1983 cause of action against the City, but also held that City was entitled to the qualified immunity described in Wood v Strickland. All this Q was left open in Monell, 9 Cir CA 8 was right.

PRELIMINARY MEMORANDUM

SUMMER LIST 7, SHEET 2

No. 78-1779

OWEN

v.

CITY OF INDEPENDENCE, ET AL.

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

Federal/Civil Timely (by ext.)

1. SUMMARY: In the 1977 Term this Court remanded this case for reconsideration in light of Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658(1978). The issues raised by this return engagement are whether municipalities enjoy a qualified immunity under § 1983 and whether that immunity extends to equitable relief as well as damages.

2. FACTS & DECISIONS BELOW: In 1972 petr was fired as chief of police of Independence, Missouri, without a hearing. He subsequently bought this action against the city of

I would deny.
Paul

Independence, the City manager, and the then members of the City Council, all in their official capacities. He seeks a declaration that his discharge violated his due process rights; he also desires reinstatement and backpay.

The DC originally held that petr could assert a claim against the City and its Council members in their official capacities under the Fourteenth Amendment, but denied petr relief on the merits. It concluded that the discharge did not deprive petr of a property interest in his job because he was an untenured employee. Nor did the action of the city in discharging him so stigmatize as to deprive him of liberty protected by the Fourteenth Amendment. Alternatively, the DC held that the city could assert a qualified immunity based on the good faith exercised by its officials in denying petr a hearing. It reasoned that the city officials could not have known that an untenured administrative official of a city was entitled to a statement of reasons for his discharge and an opportunity for a hearing. Board of Regents v. Roth, 408 U.S. 564 (1972), and Perry v. Sinderman 408 U.S. 593 (1972), were decided after petr's discharge.

The CA agreed that petr had an implied right of action against the city arising under the Fourteenth Amendment, citing Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). It disagreed with the DC, however, that there was no infringement of a liberty interest on the facts of this case. In 1972 the city manager instituted an investigation of the police department, including alleged

improprieties involving the police department's property room. As a result of this investigation, the city manager obtained statements of witnesses and reports from the city auditor and the city counselor. The DC found that as early as April 12, 1972, the city manager had decided to keep the witness statements and other reports confidential. The city manager informed petr of his inadequate administration of the police department, including maintenance of inadequate records and lack of control of the property room, which resulted in supposedly destroyed materials showing up in the hands of other people, including convicted felons. On April 13 the city manager formally announced to the mayor and City Council that discrepancies had been found in the administration of the property room, although there was no evidence to support allegations of a criminal nature. The DC found that on April 15 the city manager decided to fire petr. That decision, however, was not acted upon until April 18.

In the meantime, an acting city manager, unaware that the temporarily absent city manager intended to keep the information confidential, responded to a request by a lame-duck City Council Member by handing the investigation information over to him. At the next formal meeting of the City Council, this Council member, one Roberts, reported on that information, including allegations that petr had removed television sets from the property room for his personal use, that firearms found their way into the hands of "undesirables", that narcotics in the property room mysteriously disappeared, that

traffic tickets were "fixed," and that some felons were released from custody under unusual circumstances. After Roberts' report was read to the City Council, it passed his motion to make the information public. This occurred on the evening of April 17 and the next day the city manager fired petr. The city manager's information was turned over to a grand jury, which returned a "no true bill."

In concluding that petr had not been deprived of "liberty" by the firing, the DC found no causal relationship between Roberts' statements and the termination of petr's employment. Petr was going to be fired by the city manager anyway. Under the city charter, it was the city manager's decision alone, and he had informed the City Council that there was no ground for criminal charges. The CA disagreed with the DC's analysis on this point. For the CA it was critical that the City Council, an official organ of the city, released damaging information at the same time that petr was fired. The CA agreed with the DC that petr had not been deprived of "property" because the city charter of Independence gives the city manager the power to remove the police chief "when deemed necessary for the good of the service" and under state law, this is power to discharge at will.

As for a remedy, the CA noted that petr is now beyond mandatory retirement age. He was denied some employment opportunities because of the adverse publicity that accompanied his discharge. The CA concluded that the proper relief was the income petr would have enjoyed up to retirement had his good

name not be smeared, less the earnings he did have for that period. Although not strictly backpay the award was an equitable remedy in lieu of backpay. The CA also held that the good faith of the municipality was not a defense to exaction of monetary relief as an element of equitable relief. It reserved the question whether a good faith defense was available in an action for damages. Judge Van Oosterhout dissented. He thought that Roberts' statements could not be distinguished from those found not to infringe a liberty interest in Paul v. Davis, 424 U.S. 693 (1976)

This Court GVRed in light of Monell. On remand the CA held that by making § 1983 available in suits against municipalities, this Court made it unnecessary to rely on Bivens. Section 1983 was now the appropriate and exclusive remedy. Moreover, Independence was now entitled to qualified immunity, a conclusion it found implicit in this Court's Monell opinion. Although it reaffirmed its earlier conclusion that petr was deprived a liberty interest without due process of law, it reversed its earlier position as to the availability of a good faith defense. The immunity discussion in Monell was in a context where the requested relief was equitable relief in the nature of backpay, thereby indicating a good faith defense was available. Because city officials could not have anticipated the Roth and Perry decisions, the CA concluded that petr was entitled to no relief in this case.

3. CONTENTIONS: The issue in this case is whether the qualified immunity available to local officials under Wood v.

Strickland, 420 U.S. 308 (1975), is to be extended to cover local governmental bodies sued directly. The question was not decided in Monell, 436 U.S., at 701, and petr maintains that this case affords the Court an opportunity to settle the issue. Petr claims that the CA 8's finding of a qualified immunity here conflicts with Hander v. San Jacinto Junior College, 522 F.2d 204 (CA 5 1975), Hostrop v. Board of Junior College District No. 515, 523 F.2d 569 (CA 7 1975), and Bursey v. Weatherford, 528 F.2d 483 (CA 4 1975). Moreover, petr points out that the CA also denied him declaratory relief and attorneys' fees. He claims such broad immunity will effectively eliminate incentives to challenge the constitutionality of any governmental action not previously declared unconstitutional. Resps reply that qualified immunity is entirely appropriate under the fadts of this case. As for petr's argument that the CA improperly denied him declaratory relief and attorneys' fees as well as backpay, the resps retort that this was for all intents and purposes an action for money and that the incidental denial of other forms of relief is not independently certworthy.

4. DISCUSSION: Since the issue in this case was expressly reserved in Monell, the Court will undoubtedly have to confront it at some point and this case provides an opportunity. However, there appears to be no post-Monell conflict, and the Court may wish to permit further consideration of the question in lower courts before bringing the issue here.

There is a response.

7/3/79 Haar CA ops & DC op in petn