No. 86-772

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF ST. LOUIS,

Petitioner,

v.

JAMES H. PRAPOTNIK,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND THE PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO AS *AMICI CURIAE* SUPPORTING RESPONDENT

MICHAEL H. GOTTESMAN
L. HOPE O'KEEFFE
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

DAVID M. SILBERMAN
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006

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This brief *amici curiae* is filed with the consent of the parties, as provided for in the rules of the Court.

INTEREST OF THE *AMICI CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 89 national and international unions with a total membership of approximately 13,000,000 working men and women, many of whom work for state or local governments. The Public Employee Department, AFL-CIO is composed of 30 of the AFL-CIO's affiliated unions with a total membership of some 2,000,000 public employees. These *amici curiae*, and the public employees whom they represent, have a vital

interest in the principles that are developed to determine municipal liability under 42 U.S.C. § 1983 for unconstitutional actions visited upon citizens generally and public employees in particular.

STATEMENT OF THE CASE

This case presents yet another occasion for this Court to flesh out the line, first identified in *Monell v. New York City Department of Social Services*, 436 U.S. 658, 691-95 (1978), between those unconstitutional acts by municipal officers and employees for which municipalities may be held liable under § 1983 and those for which municipalities may not be held liable. As the prior decisions [1] reflect, the resolution of particular cases has turned on the precise nature of the challenged conduct and on the municipality's allocation of responsibility for policymaking. It is, accordingly, essential to begin by identifying precisely the conduct at issue in this case, and the rules by which the City of St. Louis has allocated responsibility for making policy with respect to such conduct.

1. Plaintiff (respondent in this Court) is an architect. He had been employed by the City for many years, and at the time of the transfer that triggered this suit was the senior "city planning manager" in the City's Community Development Agency ("CDA") (Pet. App. A2).

In 1980, plaintiff challenged a personnel decision of his superiors in the CDA, and secured a reversal of the decision from the City's Civil Service Commission. Prior to this incident, the formal evaluations of plaintiff's work had been uniformly glowing. In the evaluations following the incident, plaintiff's ratings were reduced, and in particular he was evaluated "inadequate" in "relationships."

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[1] *Monell, supra*; *Owen v. City of Independence*, 445 U.S. 622 (1980); *Polk County v. Dodson*, 454 U.S. 312 (1981); *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *Pembaur v. City of Cincinnati*, —— U.S. ——, 106 S.Ct. 1292 (1986).

A confidential memorandum from one of the raters, introduced at trial, disclosed that this evaluation was predicated substantially upon the expressed view of the Director of the CDA, Donald Spaid, that plaintiff was "sabotaging" the CDA, could not be trusted, and ought to be fired (*Id.* A2-A3).

Within a few months of this evaluation, plaintiff was involuntarily transferred from his position as "city planning manager" to a newly-created position in another city agency, the Heritage and Urban Design Division ("HUDD"). Although plaintiff's salary remained the same, his duties in the new position were largely clerical and did not utilize his architectural expertise. It is this transfer that gave rise to the instant lawsuit. (*Id.* A3-A4).

2. To understand the line of responsibility for plaintiff's transfer, it is necessary to review the division of decision-making authority with respect to employment matters in the City of St. Louis. The City Charter, adopted by vote of the residents of the city, contains an Article XVIII captioned "Civil Service." With respect to personnel selections and assignments of the type involved in this case, that article contains one general substantive directive and two specific substantive directives. The general directive is that:

> All appointments and promotions to positions in the service of the city and all measures for the control and regulation of employment in such positions, and separation therefrom, shall be on the sole basis of merit and fitness, which, so far as practicable, shall be ascertained by means of competitive tests, or service ratings, or both [JA 49].

The specific directives are (1) a prohibition on employment discrimination based on "race, political or religious opinions, affiliations or service" (JA 73-74), and (2) a ban on retaliation against employees for refusing to provide political contributions or services (JA 74-75).

Article XVIII of the Charter also creates a Civil Service Commission ("CSC") (JA 60-61), which is directed to prescribe "rules for the administration and enforcement of the provisions of this article" (JA 62). Additionally, Article XVIII empowers the CSC to serve as an appellate body resolving appeals challenging personnel actions (JA 63). The powers of the CSC are confined by the following provision entitled "Limitations":

> Except as provided in this section, the commission shall have no administrative powers or duties. Except as so provided, it shall have no power to direct or control any employee of the department of personnel or other employee of the city, or the action to be taken by any of them in any matter or case [JA 64].

Article XVIII further provides for a Director of Personnel (JA 64-65) whose duties include "[t]o pass upon, for compliance with the provisions of the charter and ordinances and . . . rules, and approve or disapprove as to compliance therewith, all . . . transfers, . . . separations, and other employment transactions affecting the status of employes" (JA 67).

As noted, Article XVIII empowers the CSC to make rules "for the administration and enforcement" of that article. The CSC has adopted extensive rules identifying the officials within city government who are to make personnel decisions and the procedures they are to follow, but the CSC's rules do not articulate any limitations on the substantive grounds that such officials may take into account in making personnel decisions of the type involved here. Thus, the CSC's only rule applicable to lateral transfers between departments is the following:

> Transfer of a classified employee from a position under the jurisdiction of one appointing authority to a position under the jurisdiction of another appointing authority may be made with the approval

> of the Director and the appointing authorities' consent . . . [JA 94].

The phrase "appointing authority" is, in turn, defined (in the City Charter) as any

> persons having power by law or ordinance, or by lawfully delegated authority, to make appointments to any position in the city service [JA 45].

In general, as is true of CDA and HUDD, the "appointing authority" is the director of the city agency.

In the instant case, plaintiff's transfer was initially proposed by Frank Hamsher, who had succeeded Donald Spaid as the Director of the CDA, the agency for which plaintiff worked. The Director of HUDD, the agency to which plaintiff was transferred, and the Director of the Office of Public Safety, the parent agency of HUDD, both agreed to create the new position in HUDD and to transfer plaintiff to that position (Pet. App. A3, A5, A9); the latter individual is a member of the mayor's cabinet (*id.* A7 n.3). The transfer was finally approved by the Director of Personnel who, as noted, is responsible for approving all such personnel actions.

Plaintiff sought to appeal the transfer to the City's Civil Service Commission, but the Commission dismissed the appeal on the ground that lateral transfers without reduction in salary are not reviewable (Pet. App. A4).

3. Plaintiff instituted this action under 42 U.S.C. § 1983, alleging, *inter alia*, that the transfer was prompted by his prior challenge to superiors in CDA and thus violated his First Amendment rights. Named as defendants in the suit were the City; Hamsher, the CDA head who had initiated plaintiff's transfer; Hamsher's successor as Director of CDA; and a CDA employee who had authored the critical evaluation of plaintiff following plaintiff's challenge to a CDA personnel

decision. Spaid, the CDA head who was responsible for the critical evaluation, was not named as a defendant, nor were any of the city officials (apart from Hamsher) who had participated in the transfer decision (Pet. App. A4-A6; JA 12-19).[2]

At the conclusion of the trial on plaintiff's complaint, the jury, although exonerating the individual defendants, returned a verdict in favor of plaintiff against the City "as to the plaintiff's claim against the [City] arising out of the issues of right to free speech and to petition for redress of grievances." The jury awarded plaintiff $15,000 in damages (J.A. 128).[3]

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[2] While plaintiff's suit was pending, plaintiff was laid off from his new job at HUDD, and he amended his complaint to allege that the layoff, too, was improperly motivated. The court of appeals did not reach that issue because it found that the transfer—which relegated plaintiff to a position in which he was unable to utilize his professional skills—was a constructive discharge (Pet. App. A14 & n.8). The City has not challenged that ruling in this Court, and thus no issue is raised here as to the City's liability *vel non* for plaintiff's layoff.

[3] The jury had been charged respecting municipal liability as follows:

> As a general principle, a municipality is not liable under 42 U.S.C. 1983 for the actions of its employees. However, a municipality may be held liable under 42 U.S.C. 1983 if the allegedly unconstitutional act was committed by an official high enough in the government so that his or her actions can be said to represent a government decision.
>
> * * * *
>
> A municipality is liable under 42 U.S.C. 1983 only for a constitutional deprivation pursuant to an unconstitutional governmental custom, usage or official policy knowingly followed by the municipality [JA 113, 115].

The city did not object to these instructions, nor did it challenge them on appeal. The city had proposed an additional instruction that "[a]n isolated incident of illegal conduct" cannot constitute a policy "such as would give rise to liability on the part of a municipality pursuant to 42 U.S.C. 1983," and that such liability requires a showing that the alleged illegal conduct is "systematic" (JA 127). The district court refused to submit that instruction, and the city's

On appeal, the city did not dispute that the First and Fourteenth Amendments forbid lateral transfers in retaliation for an employee's challenging prior personnel actions before a civil service commission, and the court of appeals did not address that question in its opinion. (Pet. App. A12). The city *did* challenge on appeal the adequacy of the evidence to support a finding that the transfer was thus motivated, but the court of appeals rejected that challenge, reasoning that the jury could have found that the critical evaluation of plaintiff was the result of plaintiff's protected activity, and that this evaluation had led to plaintiff's transfer. (*Id.* A12-A14). The appellate court further ruled that:

> (1) the city is liable for the transfer (*id.* A8-A11); and
>
> (2) the jury's verdict against the city is not inconsistent with the jury's exoneration of the individual defendants (*id.* A6-A7 n.3).

The city has brought here only these latter two rulings.

SUMMARY OF ARGUMENT

I. Last Term, in *Pembaur*, this Court elaborated on the rule, first established in *Monell*, that governs the liability of municipalities under 42 U.S.C. § 1983 for the unconstitutional acts of their agents: "[R]ecovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality'—that is, acts which the

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appellate challenge to that refusal was properly rejected on the ground that the requested instruction is inconsistent with this Court's decision in *Pembaur*, *supra*, 106 S.Ct. at 1298-99 (Pet. App. A18).

The test for municipal liability advocated by the city in this Court appears inconsistent with the instructions to which it consented in the trial court. Whether, in these circumstances, the Court will entertain the contention made here by the city is, of course, committed to the Court's discretion. *Compare City of Springfield v. Kibbe*, —— U.S. ——, 107 S.Ct. 1114 (1987), *with Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985).

municipality has officially sanctioned or ordered." In *Pembaur*, where the wrong consisted of an unlawful invasion of private property by police officers, the Court found the municipality liable only because the intrusion had been directed by the county prosecutor, the person "responsible for establishing final governmental policy respecting such activity," *i.e.*, "the final decisionmaker for the county."

The instant case involves the transfer of a public employee for constitutionally impermissible reasons. The city contends that its liability must be determined by the methodology employed in *Pembaur*, *viz.*, by examining whether the transfer decision was made by the persons responsible for establishing final city policy respecting such employment matters. As we show at pp. 17-23, that methodology would yield the conclusion in this case that the municipality *is* liable. But it is our more basic contention (discussed at pp. 10-16) that that is not the proper approach to determining municipal liability in a case of this type. It is neither necessary nor sound—and would lead to needless complexities and to untoward results—to focus on questions of authority as the means to determining acts "of the government" in a case concerning not *individual* acts of the type involved in *Pembaur* but *institutional* acts of the type involved here.

Pembaur, which involved a trespass by police officers that would have been treated as the act of those individuals alone but for the involvement of a final municipal decisionmaker, is different in kind from cases involving the denial of benefits or privileges that belong to the municipality and that only the municipality can award, *e.g.*, withdrawal of a municipal license or permit, cancellation of a municipal contract, or discharge of a municipal employee. In the latter situations, regardless of whether the municipal actor is a "final decisionmaker," the act inescapably is an act "of the municipality": while the municipality perforce acts through its agents, the

acts of the agents in these contexts inflict harm only because of the agents' *official* status, *viz.*, only because the agents are acting for the entity and because the decisions made by the agents are implemented *through the municipality's official processes.* When a public official announces the discharge of a municipal employee for constitutionally impermissible reasons, the announcement would have no significance if the municipality did not accept the discharge as official policy and implement it accordingly. It is the municipality, not the individual decisionmaker, which will remove the victim from its employment rolls, cease paying his salary, and deny him the opportunity to return to his desk and continue the performance of his duties. If a public official has the power to effect the discharge—*viz.*, if the municipality will treat the victim as no longer its employee by reason of the discharge—the municipality has "officially sanctioned" the discharge and thus is responsible for it. The same analysis applies to the transfer held unconstitutional in the instant case: because that transfer was an official act of the city, and was implemented accordingly, the city "officially sanctioned" the decision to transfer plaintiff irrespective of the status of those who decided upon the transfer.

II. In concluding that the jury's verdict against the city is not inconsistent with its verdict exonerating the individual defendants, the court below did not disregard this Court's holding in *City of Los Angeles v. Heller.* The court below correctly understood that decision, but concluded that in this case—where not all who participated in the decisionmaking had been sued, and jury instructions unchallenged by the city had been confused—the jury could consistently find municipal liability albeit exonerating the particular individuals sued. On the question thus presented—whether the court below was correct in its application of *Heller* to these unique facts—the decision below warrants affirmance.

ARGUMENT

I. THE MUNICIPAL LIABILITY ISSUE

A. This case presents a variant of a perennial question: when is an entity—here, a municipal corporation—to be held to have committed, and to be liable for, a legal wrong. Because corporations, unincorporated associations, and other entities are not natural persons, it is always a legal fiction to speak of an entity having acted improperly (or properly for that matter): only human beings—and not entities—are capable of being actors. But it has long been recognized that so long as entities enjoy the benefits of a separate legal status, it is fair and just—and, indeed, often necessary to effective law enforcement—to hold corporations, unincorporated associations and other entities legally responsible for certain acts of their officers, employees and other agents. And a rich body of common law jurisprudence has evolved to define the circumstances in which an entity is to be said to have entered into or breached a contract or to have committed a tort or a crime as the result of the acts of its agents.

In *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), this Court concluded that in enacting 42 U.S.C. § 1983 as part of the Civil Rights Act of 1871, Congress intended a different rule than the common-law rule of *respondeat superior* for determining the liability of municipalities for constitutional wrongs committed by municipal agents. The Court found in the statutory formulation of the § 1983 cause of action—"[e]very person who . . . subjects or causes to be subjected any citizen . . . to the deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured"—an intent to define and limit in a unique fashion the responsibility of municipalities for their agents' acts. In particular, the Court determined that:

> Congress did not intend municipalities to be held liable unless action pursuant to official municipal

> policy of some nature caused a constitutional tort. [436 U.S. at 691]

Accordingly, municipal liability attaches only

> when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . [*Id.* at 694.] [4]

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[4] While we accept that the line thus drawn in *Monell* controls this case, candor compels us to note our agreement with Justice Stevens' conclusion that the *Monell* line is inconsistent with "the text of 42 U.S.C. § 1983, . . . its legislative history . . . and the holdings and reasoning in several of our major cases construing the statute." *Oklahoma City v. Tuttle*, 471 U.S. 808, 834 (1985) (Stevens, J., dissenting). As Justice Stevens has observed, under *Monell* municipal liability turns on "interpretation of the word 'policy' "—a word that "does not appear in the text of § 1983." *Id.* at 841.

By its terms, § 1983 imposes liability upon a municipality to those whom the municipality "subjects, or causes to be subjected" to a constitutional violation. Because a municipality can "only act through human agents," *id.* at 835, the most natural reading of these words, Justice Stevens has argued, is that "municipalities are liable for the constitutional activities of their agents that are performed in the course of their official duties," *id.* at 842. For "if [a government agent's] relationship with his employer makes it appropriate to treat his conduct as state action for purposes of constitutional analysis, surely that relationship equally justifies the application of normal principles of tort law for the purpose of allocating responsibility for the wrongful state action." *Id.* at 839-40.

Moreover, as Justice Stevens has observed:

> At the time the statute was enacted the doctrine of *respondeat superior* was well recognized in the common law of the several states and in England. An employer could be held liable for the wrongful acts of his agents, even when acting contrary to specific instructions, and the rule had been specifically applied to municipal corporations, and to the wrongful acts of police officers. . . . [W]e have repeatedly held that § 1983 should be construed to incorporate common law doctrine "absent specific provisions to the contrary." . . . [*Id.* at 835-38]

Nor does the legislative history of § 1983 support a contrary conclusion, as Justice Stevens also has demonstrated. The fact that

Just last Term, in *Pembaur v. City of Cincinnati*, —— U.S. ——, 106 S.Ct. 1292 (1986), the Court elaborated on the *Monell* rule. In *Pembaur* the question presented was whether the city could be held liable for an unconstitutional search executed by two law enforcement officers at the specific direction of the county prosecutor. The Court answered that question in the affirmative.

In reaching that conclusion the Court began by explicating the theory of *Monell*:

> The "official policy" requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. *Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts "of the municipality"—that is, acts which the municipality has officially sanctioned or ordered. [106 S.Ct. at 1298, emphasis in opinion, footnote omitted.]

Given that theory, the *Pembaur* Court reasoned that "[i]f the decision to adopt [a] particular course of ac-

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the 1871 Congress rejected the Sherman Amendment—which would have "imposed an extraordinary and novel form of absolute liability on municipalities" for the acts of *private* citizens whom the municipality failed to control—"sheds no light" on Congress' intent with respect to the liability of municipalities for the acts of *public employees*. *Id.* at 839. Indeed, that "Congress seriously considered imposing *additional* responsibilities on municipalities without ever mentioning the possibility that they should have any *lesser* responsibility than any other person" impeaches, rather than supports, the *Monell* holding. *Id.* (emphasis in original). *See also Monell*, 431 U.S. at 893 n.57, where the Court, although finding rejection of the Sherman Amendment informative, acknowledged that "[s]trictly speaking, of course, the fact that Congress refused to impose vicarious liability for the wrongs of a few private citizens does not conclusively establish that it would similarly have refused to impose vicarious liability for the torts of a municipality's employees"; *id.* at 706 (Powell, J., concurring).

tion is properly made by that government's authorized decisionmakers, that surely represents an act of official government 'policy,' " *id.* at 1299, at least where the decisionmaker is "responsible for establishing final governmental policy respecting such activity," *id.* 1299-1300. The fact that a decision is made on an *ad hoc* basis with respect to a particular set of facts and does not establish a generalized rule of conduct is not relevant to the municipal-liability issue, as "government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations." *Id.* at 1299. On that basis, the Court found the county liable for the search executed in *Pembaur* because "[i]n ordering the Deputy Sheriffs to enter petitioner's clinic, the County Prosecutor was acting as the final decisionmaker for the county." *Id.* at 1301.

The city contends that the instant case must be resolved through the same mode of analysis utilized in *Pembaur*, *viz.*, that the decision challenged here must be shown to have been made by an authorized policymaker, who has final decisionmaking authority, in order to attach liability to the municipality. That approach would not avail the city in this case, for as we show *infra* at 17-23, applying that methodology would lead to a determination that the decision here *was* a decision "of the municipality." But as we first show, it is neither necessary nor sound—and would lead to needless complexities and to untoward results—to focus on questions of authority as the means to identifying acts "of the government" in a case concerning not *individual* acts of the type that were involved in *Pembaur* but *institutional* acts of the type involved here.[5]

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[5] We recognize that there is a *dictum* of four Justices in *Pembaur* that implicitly assumes that the methodology employed in the police misconduct cases would be applicable in cases involving the discharge of public employees. 106 S.Ct. at 1300, n.12 (Opinion of Brennan, J., joined by White, Marshall and Blackmun, JJ.). But the issue was not before the Court in *Pembaur*, and none of the

B. In *Pembaur*, as noted, the wrong at issue was the invasion of private property by two individuals conducting a search. The harm was inflicted on the plaintiff in that case by these two individuals and by their acts standing alone. Indeed the very same harm would have been inflicted had the individuals involved not worked for the county; the fact that the men who executed the search were employed by the county converted what would otherwise have been a trespass (if done by private actors) into an unconstitutional search, but did not add to the injury suffered by the plaintiff. In these circumstances, and given *Monell's* rejection of the proposition that every act of a municipal employee within the scope of employment is an act of the municipality, the *only* method available for determining whether the search in *Pembaur* was an "act of the [county]"—as distinguished from an "act of the employees"—was to inquire into the authority of those who committed and those who directed the commission of the search.

The situation is quite different, however, when it comes to decisions respecting the granting or denial of benefits or privileges that belong to the municipality and that only the municipality can award. Only the municipality can in a realistic sense grant, or withdraw, a municipal license or permit, for example; only the municipality can award, or cancel, a municipal contract; and only the municipality can hire, or fire, a municipal employee. Although in these, as in all other instances, the municipality necessarily acts through its agents, the acts of those agents in these respects inflict harm only because of the agents' *official* status; *viz.*, only because the agents are acting *for* the entity and because the decisions made by the agents are implemented *through the municipality's official processes.*

In this setting, we submit, it is beside the point to inquire into the formal authority of the decisionmaker in

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briefs in *Pembaur* suggested, let alone elaborated, the mode of analysis we set forth *infra*.

order to determine whether what is involved is an act "of the municipality." For actions which fall in the category of cases just described are, *by thier very nature*, not mere acts of an individual who is acting on his own, but acts "which the municipality has officially sanctioned or ordered," *Pembaur*, 106 S.Ct. at 1298 and are acts "for which the municipality is actually responsible," *id.*

The discharge of a public employee is of this character. When an unconstitutionally-motivated public official tells a public employee that he is fired, that announcement would have no significance if the municipality did not accept the discharge as official policy and implement it accordingly. The victim is employed by the municipality, not by the individual who decides upon the discharge. It is the municipality, not the individual decisionmaker, which will remove the victim from its employment rolls, cease paying his salary, and deny him the opportunity to return to his desk and continue the performance of his duties. Thus, whether or not the decisionmaker is a policy-making official or is acting under instructions from such an official, if he has the power to effect the discharge—*viz.*, if the municipality will treat the victim as no longer its employee by reason of the discharge—the discharge is an act "of the municipality." The municipality, by treating the victim as no longer its employee, has "officially sanctioned" the act of the wrongdoer in discharging him.

The point is confirmed by a consideration of the remedies to which a wrongfully discharged employee is entitled. Chief among those remedies is reinstatement. But only the municipality is empowered to reinstate an employee. The wrongdoer—assuming he still worked for the city in the same position—might be able to effect that remedy, but any order of reinstatement addressed to the wrongdoer would have to run against him in his "*official capacity*," for it is only in that capacity that he

would have authority to control who is to work for the municipality. And because "a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents," *Brandon v. Holt*, 469 U.S. 464, 471-72 (1983), such a judgment necessarily presupposes that the municipality is liable. Thus, if reinstatement is to be part of the appropriate remedy for a wrongful discharge—as this Court has long recognized it to be—the discharge itself must be an act of the employing entity without regard to where the individual who effected the discharge stood in the entity's chain of command.[6]

The same analysis applies to the transfer held unconstitutional in the instant case. When the three agency directors and the Director of Personnel jointly decided to restructure jobs across departmental lines, and to transfer plaintiff to a newly-created job in a different department—decisions that these officials were empowered to make—these decisions were plainly decisions "of the municipality." Plaintiff did not work for these individuals, he worked for the city. By reason of these decisions, the city required plaintiff to report to a new agency, perform the duties of a new job, take directions from new supervisors, and submit to the risk of layoff in a new setting governed by a different seniority system (Pet. App. A4). The city thus "officially sanctioned" the decision to transfer plaintiff.

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[6] There is, of course, no basis for bifurcating remedies and holding a municipality liable to a reinstatement order but not for backpay. As the Court stated in *Monell*:

> Nothing we say today affects . . . the conclusion reached in *City of Kenosha* [*v. Bruno*], see 412 U.S. [507], at 513 [1973], that "nothing . . . suggest[s] that the generic word 'person' in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them. [436 U.S. at 701, n.66; *see also, id.* at 712 (Powell, J., concurring).]

C. The city would fare no better, however, even if the methodology of *Pembaur* were utilized in this case. For it would remain true in *this* case that the transfer was an "act of the municipality" by virtue of the authority of the decisionmakers.

As we have seen, plaintiff was transferred as the result of a decision made by the heads of three city agencies who are designated "appointing authorities" for the City and have been delegated the authority to make employment decisions.[7] The transfer decision was approved by the Director of Personnel, whose powers, the Supreme Court of Missouri has stated, are "exercised . . . without control of a superior power other than the law." *Kirby v. Nolte*, 164 S.W. 2d 1, 8 (1942). These officials were authorized to act with only the most limited substantive constraints upon the scope of their decisionmaking, *i.e.*, the substantive provisions in the City Charter. The decision they made was final, and not subject to review at any level of the city government. Thus, the decision to transfer plaintiff was made by "the final decisionmaker[s] for the [city], and the [city] may therefore be held liable under § 1983." *Pembaur*, 106 S.Ct. at 1301.

The city's contention that the decision thus made was not "policymaking" by officials vested with the final au-

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[7] In this respect, St. Louis, like most large cities, differs from school districts in placing the locus of decision-making. In most school districts, decisions respecting the hiring, nonrenewal and discharge of teachers are made by the school board itself. In that setting, where individual employment decisions are made by the legislative body of the entity, this Court's opinions leave no doubt but that such decisions constitute action of the municipality and thus, if unconstitutional, render the municipality liable under § 1983. As the Court stated in *Pembaur*:

> [A] single decision by . . . a [properly constituted legislative] body unquestionably constitutes an act of official government policy. *See, e.g., Owen v. City of Independence*, 445 U.S. 622 (1980) (city council passed resolution firing plaintiff without a pretermination hearing). [106 S.Ct. at 1298.]

thority to make that policy rests upon three premises that will not withstand scrutiny. We address each in turn.

1. The city first argues that it is inconsistent with *Monell's* rejection of *respondeat superior* liability to treat the decision of these officials as the act of the municipality. In the city's view, there is no distinction between the "low-level police officer" in *Tuttle*, 471 U.S. at 830 n.5, 831 (concurring opinion of Brennan, J., joined by Marshall and Blackmun, JJ.), and the high-ranking city officials who made the decision in this case (one a member of the mayor's cabinet, another with broad and autonomous powers over personnel matters that are "exercised . . . without control of a superior power other than the law," pp. 5, 17, *supra*). But the difference in the status of the decisionmakers cannot be so cavalierly ignored. What *Monell* disclaimed by its rejection of *respondeat superior* liability was the imposition of municipal liability "solely on the basis of the existence of an employer-*employee* relationship with a tortfeasor," 436 U.S. at 692 (emphasis added); *see also id.* at 691, 693, 694. That relationship was deemed different in kind from "decision[s] officially adopted and promulgated by that body's *officers*," *id.* at 690 (emphasis added), *viz.*, "those whose edicts or acts may fairly be said to represent official policy," *id.* at 694. And as the Court stated in *Pembaur* in words that warrant quoting again:

> [A] government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's *authorized decisionmakers*, it surely represents an act of official government "policy" as that term is commonly understood. [106 S.Ct. at 1299; emphasis added.]

2. The city next argues that because the City Charter states certain employment policies, and creates a Civil

Service Commission, it necessarily follows that no authority to make final employment policy can reside in the officials who acted here.[8] That is a patent *non-sequitur*. "Employment policy" is not an inherently indivisible entity; there are a vast range of employment decisions that a municipality will be called upon to make, and a wide variety of policy questions that can be posed in making even a single employment decision. Some policies (*e.g.*, a prohibition of race discrimination) may be appropriate for city-wide application, while others may be more appropriately fashioned by individual agencies to meet their particular needs. It is not surprising that in a large city like St. Louis the organic law will state *certain* employment policies, while leaving to other city decisionmakers the development of further such policies.

The only substantive employment policies pertinent to job transfers established in the City Charter are that decisions be made on the basis of "fitness and merit" and that there be no discrimination on the basis of race, religion, or participation (or non-participation) in political activity. It can hardly be contended that this exhausts the range of potential policy considerations pertinent to the subject matter that was under consideration here: the transfer of job functions from one city agency to another, the restructuring of a job within the recipient agency, and the involuntary transfer of an employee from one agency to another to fill that job.

To be sure, the City Charter does create a Civil Service Commission. But, that Commission has *not* presumed to

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[8] The city also argues, of course, that even if these officials could make *some* employment policies, the decision they made here was contrary to a policy set forth in the City Charter and for *that* reason not binding on the city. That is a conceptually different argument from the one we address here, and we deal with it separately at pp. 21-23, *infra*.

adopt additional substantive policies respecting inter-agency lateral transfers, and instead has delegated all substantive authority respecting such transfers to the heads of the agencies involved and the Director of Personnel (*supra*, pp. 4-5); *viz.*, to the very persons who made the decision here. Further, whatever might be the significance of the Commission's authority to entertain *appeals* of personnel decisions when that authority is applicable (see pp. 23-24, *infra*), the Commission ruled in this case that it was *without* authority to entertain an appeal from plaintiff challenging the transfer decision. In sum, the city's governing rules place the final authority for establishing policy respecting inter-agency lateral transfers, beyond the limited policies stated in the City Charter, in the decisionmakers who actually made the decision here.

The Court in *Pembaur* dealt with a situation in which either of two county officials "could establish county policy under appropriate circumstances," and indicated that the municipality would be liable if *either* had made the decision in question. 106 S.Ct. at 1301. And four Justices observed in *Pembaur*, more generally:

> [L]ike other governmental entities, municipalities often spread policymaking authority among various officers and official bodies. As a result, particular officers may have authority to establish binding county policy respecting particular matters and to adjust that policy for the county in changing circumstances. [106 S.Ct. at 1300 (opinion of Brennan, J., joined by White, Marshall and Blackmun, JJ.).]

The city relies upon another passage in the opinion for those four Justices which stated that "if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a

basis for county liability" and that this would be true "even if the Board left the Sheriff discretion to hire and fire employees," *id.* at 1300, n.12. But that passage continued: "However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions *would* represent county policy and could give rise to municipal liability," *id.* (emphasis in opinion). Nothing in that passage precludes the possibility that a governing body could set certain employment policies itself while delegating to executive officials the authority to set others, and the passage clearly stands for the proposition that where such is the case the decisions of the delegateee within the scope of the delegation "*would* represent [municipal] policy and could give rise to municipal liability."

3. Finally, the city contends that in this case the City Charter establishes a policy with which the transfer decision conflicts, *viz.*, that personnel decisions "shall be on the sole basis of merit and fitness." That declaration, the city contends, left no room for the agency heads and Director of Personnel to decide upon and implement a policy which based a transfer on the fact that the employee in question had challenged his superiors. For two reasons, that contention is without merit.

First, whatever might be the significance under *Monell* of a policy in the city's organic law so specific that it clearly and unambiguously prohibited municipal agents from taking particular actions that they nonetheless proceeded to take (*e.g.*, a command that no personnel decisions be motivated by race), a generalized declaration that personnel decisions should be based on "merit and fitness" is not of that character, at least in the run of cases. A declaration that broad leaves an all but unlimited scope for interpretation of a kind that itself constitutes "policymaking."[9] And the power to make such

[9] Those who authorized the City Charter well understood that the "merit and fitness" provision would not impose meaningful con-

policy necessarily will be placed in some final decision-maker—in this instance, those who made the decision to transfer plaintiff.

The city's brief suggests that it is inconceivable that an employee's criticism of his superiors to the Civil Service Commission could be deemed to bear on his "merit and fitness" to continue working under those superiors (Pet. Br. 29). But that proposition is by no means self-evident. *See, e.g., Pickering v. Board of Education*, 391 U.S. 563, 570 n.3 (1968). Here, the officials empowered to make the final decision for the city respecting the transfer of plaintiff *did* believe that his challenge to his superiors bore upon his "merit and fitness"; the formal evaluation of plaintiff—which was prepared to measure those very qualities—was downgraded in the category of "relationships" because of his challenge.

Moreover, if generalized declarations such as the "merit and fitness" provision in St. Louis' City Charter could exonerate municipalities from the consequences of the decisions made by their high-ranking officials, Congress' establishment of municipal liability in § 1983 would be rendered nugatory: every municipality could insulate itself from liability for all acts of its designated policymakers by the simple injunction in its organic law: "do right, not wrong,"—or, more precisely, "do not violate the federal constitution." Indeed, under the city's thesis even decisions of the *city council* would not create municipal liability in the face of such a command.

The consequence of the city's argument would thus be to vitiate the "central aim" of § 1983: to make whole

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straints upon delegated policymakers; the inclusion in the Charter of *specific* prohibitions against discrimination in personnel decisions on the basis of race, religion, and political activity demonstrates that even consideration of *those* factors was not thought adequately foreclosed by the simple injunction that decisions be based on "merit and fitness."

the victims of unconstitutional action, *Owen*, 445 U.S. at 650. As the Court explained in *Owen*:

> A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees. . . . Yet owing to the qualified immunity enjoyed by most government officials, . . . many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense. Unless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated. [*Id.* at 651, footnote omitted.]

The breadth of municipal exoneration sought by the city here, if adopted by the Court, would have consequences even graver than those found unacceptable in *Owen*.

D. Unlike the decision to transfer plaintiff, which was not reviewable by the Civil Service Commission, the later decision to lay-off plaintiff *was* appealable to that Commission.[10] Had the court below ruled the layoff to be an unconstitutional act, and imposed liability upon the municipality therefor, a separate question respecting the meaning of *Monell* would be presented: whether a policy decision is "final" (and thus a proper predicate for municipal liability) although the victim is afforded an appeal, after the injury has begun to be inflicted, to a "quasi-judicial" tribunal of the municipality [11] which does not make a *de novo* decision but instead accords substantial deference to the executive decisionmaker (Pet. App. A11).

That question is *not* presented, however, because the court below did *not* rule the layoff to be an unconstitu-

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[10] Plaintiff filed such an appeal from his layoff, but the CSC has held the appeal in abeyance pending resolution of this lawsuit (Pet. App. A5).

[11] The Supreme Court of Missouri has characterized the Commission's appellate function as "quasi-judicial." *Kirby v. Nolte*, *supra*, 164 S.W.2d at 10.

tional act (see *supra*, p. 6 n.2). The city agrees that this is so (Pet. Br. 11, 15, 32 n.11), and accordingly restricts its discussion of municipal liability to the transfer (*id.* 15-31). There can be little doubt that, if a municipality provided a review mechanism *before* implementing an official's personnel recommendation, liability could not attach to the municipality until the ruling of the reviewing body (for no injury would be suffered prior to that point). It is a much thornier question whether the availability of quasi-judicial review *after* a decision has been implemented and injury has been suffered should preclude municipal liability.[12] Because the issue is not presented in this case, we do not address it.

II. THE ALLEGEDLY "INCONSISTENT VERDICTS" ISSUE

In *City of Los Angeles v. Heller*, —— U.S. ——, 106 S.Ct. 1571 (1986), this Court held that a jury's verdict exonerating the lone municipal agent alleged to have inflicted a constitutional injury foreclosed the plaintiff from thereafter litigating a claim that the municipality itself was liable:

> This [verdict], it seems to us, was not only conclusive as to Officer Bushey, but also as to the city and its police commission. They were sued only because they were thought legally responsible for Bushey's actions; if the latter inflicted no constitutional injury on respondent, it is inconceivable that petitioners could be liable to respondent. [*Id.* at 1573.]

Invoking *Heller*, the city contends that the jury's verdict against the city was inconsistent with its verdict exonerating the individual defendants.

Critical to the decision in *Heller* was that "[t]he jury was not instructed on any affirmative defenses that might

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[12] Among other things, the Court would have to take into account its rulings that exhaustion of administrative remedies is not required before instituting suit against a governmental entity for damages under § 1983, *see Patsy v. Board of Regents*, 457 U.S. 496 (1982).

have been asserted by the individual police officer," *id.* at 1572. As the Court explained:

> Respondent urged, and the Court of Appeals apparently agreed "that the jury could have believed that Bushey, having followed Police Department regulations, was entitled in substance to a defense of good faith. Such a belief would not negate the existence of a constitutional injury" . . . .
>
> *The difficulty with this position is that the jury was not charged on any affirmative defense such as good faith which might have been availed of by the individual police officer.* [106 S.Ct. at 1573, emphasis added.]

Ordinarily, the individual defendants in § 1983 actions assert a qualified immunity defense, and that defense is submitted to the jury. When that occurs, a jury verdict exonerating the individual defendants may mean only that the jury, albeit finding a constitutional wrong, was persuaded that the defendants had established their immunity. There is, accordingly, no inconsistency in such a case between a verdict exonerating the individuals and one holding the municipality liable, for the municipality does not share the individuals' qualified immunity. *Owen, supra.*

In the instant case, plaintiff did not sue all those who participated in the decisions he challenged, and, as the city acknowledges, the instructions to the jury respecting liability of those individuals he *did* sue were "badly bungled" and the court of appeals was "manifestly dissatisfied" with them (Pet. Br. 33, n.12). As there was no objection to these instructions (*id.*), the city cannot escape the consequence of the jury confusion thus engendered—a confusion that the court of appeals concluded might have led the jury to believe it was authorized to exonerate the individuals sued even if it believed a constitutional wrong had been committed (Pet. App. A6-A7 n.3, A14-A15 n.8). It was that potential for confu-

sion that persuaded the court below that *Heller* was inapplicable (*id.*).

The correctness of the appellate court's application of *Heller* to these facts can have no conceivable relevance to any case arising hereafter. Accordingly, apart from observing that the jurors would have to have been logicians to comprehend the pertinent instructions as a whole (or, more precisely, to comprehend that the instructions were impenetrable),[13] we do not explore the issue further.

Were this Court to conclude that the jury's verdicts were inconsistent, a new trial would be required, for there is no way of knowing which way the jury would have ruled if forced to resolve the inconsistency. *Heller*, 106 S.Ct. at 1577 & n.15, and cases cited thereat (Stevens, J., dissenting). That course was not decreed in *Heller*, because there was no inconsistency in jury verdicts in *Heller*: the trial had been bifurcated, the trial of the claim against the individual defendant resulted in a verdict for that defendant, and this Court concluded that in light of that verdict there was no warrant to proceed with a trial against the municipality.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

MICHAEL H. GOTTESMAN
L. HOPE O'KEEFFE
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

DAVID M. SILBERMAN
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006

[13] The pertinent instructions appear at JA 110, 114, 118-19, 120-21, 123.