No. 86-772

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF ST. LOUIS,

Petitioner,

v.

JAMES H. PRAPROTNIK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

(1) Was the jury correctly instructed regarding the scope of municipal liability under Monell v. New York City Department of Social Services, 436 U.S. 658 (1978)?

(2) Was there sufficient evidence to support the jury verdict imposing liability on the defendant city?

(3) Was the jury's verdict against the defendant city inconsistent with its verdict in favor of the three individual defendants?

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STATEMENT OF THE FACTS

Respondent James Praprotnik, a licensed architect, was originally hired by the City of St. Louis in 1968. (Tr. 1:25-26). During the decade that followed respondent rose rapidly through the ranks of civil service employees, repeatedly rated as "superior" by his supervisors, and awarded double step increases in his salary. (Tr.1:37-43, 49-51). By 1980 Praprotnik was the Director of Urban Design in the city's Community Development Staff; in that management position he supervised a staff of architects and other professionals, (Tr. 1:30-31, 2:174, 3:144), and met and worked directly with city officials at the highest levels. Respondent's outstanding abilities have never been in dispute in this litigation; on the

contrary, the city attorney insisted on stipulating to respondent's abilities, and repeatedly objected to the introduction of any further evidence on the subject. (Tr. 2:93, 140-41.)

Despite respondent's unquestioned abilities, there occurred in the spring of 1980 a drastic change in the manner in which St. Louis' highest ranking officials treated Praprotnik. During a 44 month period from April 1980 until December 1983 Praprotnik was repeatedly suspended and reprimanded, and given "inadequate" ratings. In April 1982, Praprotnik was transferred to an essentially clerical position on the staff of the Heritage and Urban Design Commission, and respondent's own position at CDA was given to one of his subordinates. Shortly after Praprotnik was transferred, HUD officials began a series of efforts

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to lay him off on the ground that he was overqualified for his new position. On December 23, 1983, respondent was notified that he was being laid off effective December 30. (Tr. 1:84, 85, 2:9-11). The existence of this 4 year pattern of adverse personnel actions was uncontested; as the city correctly observed, "[w]hat was hotly disputed at trial was the state of mind of the ... City officials"[1] responsible for those actions.

Respondent alleged, and the jury concluded, that respondent's transfer and layoff were motivated by a desire to retaliate against him for certain actions protected by the First Amendment. The city has never denied that the actions which allegedly triggered the retaliation were protected by the First Amendment.

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1 Id., pp. 17, 30-38.

In the court of appeals the city argued there was insufficient evidence to support a finding of any illicit retaliatory motive,[2] but the city chose not to seek review of that factual issue by this Court. The questions presented by the petition concern whether the city can be held liable for any unconstitutional purposes which may have motivated respondent's superiors.

(1) Respondent's Constitutionally Protected Conduct

The series of events which culminated in respondent's dismissal began with a controversy regarding whether the Director of the Community Development Agency could require prior approval whenever an agency employee wished to engage in any after-hours employment. A

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2 Brief for Defendant-Appellant City of St. Louis, No. 85-1145-EM (8th Cir.) p. 3.

pre-existing city-wide personnel practice required all municipal employees to fill out a form disclosing any outside employment; an architect who had private clients was obligated simply to state that he or she was "self employed." (Tr. 2:36-37, 118, 122). Beginning around 1978, however, CDA Director Donald Spaid began to insist that any professional employee, such as an architect, also obtain prior agency approval of every specific client for whom that employee proposed to do any work. (Tr. 2:37-38, 139). Respondent Praprotnik and other CDA employees objected to this new requirement on two grounds. (Tr. 2:30, 102, 3:217-18). First, they insisted that any such requirement be put in writing; the CDA Director for unexplained reasons adamantly refused to do so. (Tr. 3:235; cf Tr. 2:103, 118, 140). Second,

respondent and other employees objected that the prior approval requirement was an unwarranted intrusion on their privacy and personal conduct. (Tr. 2:34, 3:217-18).

By the spring of 1980 this controversy had been festering for two years. On April 8, 1980, the agency directed respondent to submit a written list of every person for whom he had done any architectural work since November, 1978. (Tr. 2:34). No other agency employee had ever been required to submit such a written list. (Tr. 2:34-35, 3:235-36). The statement submitted by respondent listed four small projects for personal friends and acquaintances, such as designing a room addition for his father-in-law. (Exhibits I-1, I-3). CDA officials never suggested there was anything improper in any of these

projects, or that any of them involved any conflict of interest. Nevertheless, on April 29, 1980, the agency suspended respondent for two weeks without pay, alleging that he had failed to obtain the required prior approval for one or more of the projects. (Tr. 1:46, 2:31, 3:216). Respondent insisted that he had indeed sought and obtained such advance approval. (Tr. 1:48, 2:32, 37, 39).

Respondent appealed his suspension to the city Civil Service Commission. Respondent and his superiors gave conflicting testimony before the Commission regarding whether the four projects had been disclosed and approved in advance. The Commission evidently chose to credit respondent's testimony; the Commission found no violation of the CDA prior approval policy, reversed respondent's suspension and awarded him back-

pay. (PX 25; Tr. 1:47, 3:220). The Commission criticized respondent only for failure to seek a definitive explanation of the CDA disclosure and approval policy. (Id.)

Both CDA Director Spaid, and Charles Kindelberger, the CDA Director of Urban Design, were angered by the appeal and by respondent's testimony. Respondent testified at trial that Kindelberger had warned him of Spaid's hostility.[3] Kindelberger himself conceded that both he and Director Spaid were angered by

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[3] Tr. 1:54-55:

"Q ... What did Mr. Kindelberger say to you about that?

A. [Respondent] At the time, it was that 'the director, Mr. Spaid, is very down on you.' That was his exact words.

Q. Did he tell you why he was down on you?

A. He stated that I had lied before the Commission, the Civil Service Commission".

what had occurred during the Civil Service Commission appeal:

> "Q. Did Mr. Spaid say something to the effect that he was down on Praprotnik?
>
> A. [Kindelberger] That sounds right.
>
> Q. And that he felt he had not been honest, had not testified honestly at the Civil Service Commission, or words to that effect?
>
> A. I don't know if Mr. Spaid said it, but I know I felt it at the time.
>
> Q. That's what you felt that at the time?
>
> A. Yeah.
>
> Q. So that you were then concerned, too, because the ruling had come out against you; hadn't it?
>
> A. Well, I didn't agree with the ruling."

(Tr. 3:237). Kindelberger made that reference to the disputed Civil Service Commission appeal and testimony when Praprotnik inquired why CDA subsequently

attempted to reduce his salary. (Tr. 1:54).

The second incident also involved high level umbrage over testimony given by respondent. In the fall of 1981 the city was considering acquiring a sculpture by the controversial modern sculptor Richard Serra. Acquisition of the sculpture was strongly favored by the Mayor and by some influential private citizens, including Emily Pulitzer, the wife of the owner of the St. Louis Post Dispatch. (Tr. 3:180, 250). The Heritage and Urban Design Commission called respondent to testify about the proposal. (Tr. 2:4, 2:89). In his testimony respondent disclosed that, contrary to the representations of the sculpture's proponents, the sculpture at issue had been offered to and rejected by an earlier city administration. (Tr. 2:89). Respondent

also revealed that placement of the sculpture would require demolition of structures recently erected by the city at a cost of $250,000. (Tr. 2:5).

These disclosures triggered what one witness described as a "flap" within CDA, where respondent then worked. (Tr. 2:95). According to respondent he was admonished by Director Hamsher that that information should have been kept secret from HUD:

> Q. ... Now, after you testified before the Commission, did you have any conversation with Mr Hamsher?
>
> A. Yes. I was called into the office immediately the following morning. And together with Mr. Hamsher and also Mr. Kindelberger, was told that certain information that I had stated at the Commission meeting that I should have 'muffed it.'
>
> Q. You shouldn't have.
>
> A. I should have conceal it, you know, from them -- from exposure to the Commission.

(Tr. 2:4-5). The mayor's staff was present when respondent testified before the Commission, (Tr. 2:90), and there was some indication that the Mayor himself was displeased by the disclosures which respondent had made. (Tr. 3:250). Respondent suggested at trial that the hostile reaction to his testimony regarding the Serra sculpture was rooted in part in lingering anger over his Civil Service Commission testimony. (Tr. 2:5; 4:29). A CDA official subsequently admitted giving respondent a lower job performance evaluation because of the Serra sculpture incident. (Tr. 3:52).

(2) The Adverse Personnel Actions, 1980-83

Because the incidents leading to respondent's layoff spanned almost four years, and because respondent was as of 1980 a senior civil servant, a large

St. Louis Officials Involved in Actions Against Respondent Praprotnik

Agency	Official
Board of Estimate and Apportionment	Mayor Schoemehl
	Board of Alderman President Thomas Zych
	Comptroller Paul Berra
Mayor's Office	Frank Hamsher, Deputy Director of Development (after June, 1982)
	John Temporiti, Administrative Assistant to the Mayor
	William Lynn Edwards, Executive Director of Development
Department of Personnel	Director of Personnel William Duffe
Division of the Budget	City Budget Director Jack Weber
Community Development Agency	Director Donald Spaid (until April, 1981)
	Director Frank Hamsher (April, 1981 to June, 1982)
	Director Deborah Patterson (after June, 1982)
	Charles Kindelberger; Director of Urban Design
	Alvin J. Karetski, Deputy City Planning Director
Heritage and Urban Design Commission	Commissioner Henry Jackson (until February, 1983)
	Commissioner Rob Killen (after February, 1983)
Department of Public Safety	Director Thomas Nash

number of high level city officials participated in the various adverse actions of which respondent complained at trial. We set forth on the opposite page a list of the 16 officials involved, together with the office or agency in which they served. That list includes the city's three highest elected officials, among them the Mayor, eight agency directors or commissioners, and three members of the Mayor's personal staff. Director Nash was also a member of Mayor Schoemehl's cabinet. (Tr. 1:78). Among these 16 individuals, however, only three were named defendants when the case came to trial; the city successfully opposed joinder of several additional defendants, including the Mayor,[4] and former Commissioner Jackson had left the state and could not be served. (J. App. 2, N.R. 4,

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[4] See J. App. 5, 22-23.

5). The fact that many of the allegedly responsible officials were not among the named defendants is of considerable importance in understanding the jury's verdict and the issues on appeal.

Respondent Praprotnik's difficulties began shortly after he testified before the Civil Service Commission. Earlier, in April 1980, respondent had received his regular annual performance evaluation; respondent was rated "good" and recommended for a two step salary increase. (Tr. 2:42, 3:97; PX 18). Subsequently, however, Director Spaid ordered that respondent be given a new interim rating. (Tr. 3:101, 226). As a result of this special October 1980 rating, CDA proposed to reduce respondent's salary by two steps. (Tr. 1:54, 2:43). Defendant Kindelberger admitted that the disputed civil service appeal

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had been discussed when Praprotnik was re-rated in October 1980. (Tr. 3:236-37). There was conflicting evidence regarding which official was responsible for the salary reduction. The actual directive was signed by defendant Kindelberger, the CDA Director of Urban Design. (DX J-2). At the trial, however, Kindelberger insisted that Director Spaid personally had ordered the salary reduction.[5] Respondent appealed the salary reduction to the Department of Personnel; Personnel Director Duffe approved a salary cut, but limited the reduction to a single step. (Tr. 3:104)

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5 Tr. 3:226:

"Q. Did Mr. Spaid direct you to reduce him by two steps?
A. [Kindelberger) Yes, he did.
Q. Did he state why?
A. Well, I think he just -- I don't remember his specific concerns or the specific working but he just said that was the way it was going to be."

On October 30, 1980, the Civil Service Commission issued its order overturning respondent's two week suspension; although the Commission found no violation of CDA policies, the Commission authorized CDA to reprimand respondent "for his failure to secure a clear understanding" of what those policies were. (Tr. 3:221). On January 13, 1981, defendant Kindelberger issued to respondent a written reprimand "for your having entered into consulting arrangements over the last several years without proper authority". (Tr. 3:238). This was precisely the allegation which the Civil Service Commission had refused to sustain. Kindelberger admitted at trial that the substance of the reprimand "was not factually correct." (Tr. 3:238).

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During the 18 months following the civil service appeal, there was a substantial reduction in respondent's authority and responsibility at CDA. Two-thirds of the employees in the section supervised by respondent were either shifted, along with their jobs, to other units, or were laid off. (Tr. 1:57-58, 3:157). Respondent was frequently excluded from meetings of other management officials. (Tr. 1:57, 2:141). Several of respondent's colleagues regarded these developments as being directed at respondent personally. (Tr. 2:141, 3:4-5). Respondent submitted to Director Hamsher a written appeal regarding this reorganization of responsibilities, but Hamsher never responded. (Tr. 1:58). There was some dispute regarding which senior city officials were responsible for this curtailment of

respondent's authority and work; defendant Kindelberger, for example, testified he could not recall whether or not he had advocated any of these changes. (Tr. 3:225).

In October 1981, respondent was again subject to an annual performance evaluation. Prior to 1980 respondent had generally been rated superior or "good" and been awarded a raise. (Tr. 1:37-43). In October 1981, however, respondent was rated only "adequate" overall, and was denied any raise; for the first time in his 13 years at CDA respondent was rated "inadequate" on one part of his evaluation. (Tr. 1:64-65). Respondent appealed the evaluation to the Department of Personnel. While that appeal was pending, defendant Kindelberger wrote a memorandum urging that a critical portion of Praprotnik's personnel records be

deliberately withheld from his lawyer. (Tr. 2:58, 106; 3:228-31, 252-53). One of the supervisors who rated respondent admitted having based his evaluation in part on the fact that Director Hamsher was still angry over the Serra sculpture incident. (Tr. 2:4-6, 3:44-45). In discussions with the Department of Personnel, the two CDA supervisors who had evaluated respondent admitted having improperly colluded in preparing their assessments (Tr. 2:109, 124, 125). The Department of Personnel directed that the respondent's "inadequate" rating be raised to "adequate", and that respondent's overall performance be reevaluated by CDA. (Tr. 2:105-09, 3:48). CDA, however, never gave respondent the mandated reevaluation; Alvin Karetski, a senior CDA supervisor, testified that no reevaluation was performed because he

personally "didn't agree with" the Department of Personnel. (Tr. 3:48-49).

In April 1982, respondent was transferred from CDA to the Heritage and Urban Design Commission. This transfer led inexorably to respondent's loss of his job; at CDA respondent's seniority protected him from being laid off, but at HUD respondent was the only employee in a job which was soon abolished. (Tr. 3:124). Top St. Louis officials gave sharply conflicting accounts of who decided to transfer respondent from CDA to HUD. The transfer was actually announced by CDA Director Hamsher. (Tr. 1:67). Hamsher, however, insisted the real decision was made by the Mayor, and that CDA was merely following orders. (Tr. 3:200). William Edwards of the Mayor's office, on the other hand, testified that the Mayor merely accepted

the recommendation of Director Hamsher. (Tr. 2:185). The director of the Department of Personnel, William Duffe, testified the decision had been made jointly by himself, Director Hamster, and Commissioner Jackson. (Tr. 3:144). But in his pre-trial deposition, Duffe suggested the decision would have been made by the Board of Estimate and Apportionment (Tr. 2:180), a view which was shared by respondent. (Tr. 1:75). There was documentary evidence indicating the transfer had been approved by Jack Weber, the city Budget Director (PX 129; Tr. 1:74). Respondent attempted to appeal the transfer to the Civil Service Commission but the Commission declined to hear the appeal because it believed that the transfer had not injured respondent. (Tr. 3:119).

The transfer to HUD might not have

led to respondent's layoff if he had had an important function at that agency, but at HUD respondent was given essentially menial clerical tasks.[6] Again, however, city officials disagreed about who was responsible for those menial assignments. HUD apparently maintained that from the outset it simply had no need or place for a person with respondent's managerial and architectural skills. (Tr. 1:71, 2:90). CDA Director Hamsher insisted, on the other hand, that he intended to transfer to HUD most or all of the work respondent had earlier been doing at CDA. (Tr. 1:68, 3:171-7). Hamsher argued that HUD Commissioner Jackson was responsible for assuring that that transfer of functions from CDA actually occurred. (Tr. 3:197). Personnel Director Duffe testified that

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6 Tr. 1:67-68, 73, 77; 2:14-16, 67, 85, 154-55; 3:254-55.

the head only approved respondent's transfer because Hamsher assured him that respondent's job responsibilities were being moved as well, and that he did not know that this representation was not carried out. Had he subsequently learned what respondent was really doing at HUD, Duffe insisted, he would have questioned the propriety of the transfer itself. (Tr. 3:128). Documentary evidence, however, showed that within months of the transfer to HUD, a memorandum was sent to Duffe describing respondent's menial responsibilities, and noting that Praprotnik was "grossly overqualified" for his new position at HUD. (PX 92; Tr. 1:80; see also DX E3, DX E4, DX E9).

Respondent's brief tenure at HUD was marked by continued hostility from higher authorities. On October 16, 1982, Commissioner Jackson decided, on the

basis of an adverse performance evaluation, to reduce respondent's salary; that salary reduction was overturned by the Service Rating Appeals Board. (Tr. 1:79-81, 2:68-70). In March 1983 respondent's position at HUD was reclassified from a level 59 to a level 55; there was conflicting testimony regarding whether the Civil Service Commission or the Department of Personnel was responsible for the reclassification. (Tr. 1:81, 3:113). This reduction had the practical effect of precluding respondent from receiving further raises. (Tr. 2:26). In response to an inquiry from HUD, Personnel Director Duffe explained that the reclassification was based on interviews with HUD officials regarding respondent's particular responsibilities at HUD. (Tr. 2:71). Both respondent and Commissioner Killen, however, testified that no such

interviews had ever occurred. (Tr. 2:71-73, 167, 168). At two other unspecified times in 1983 respondent was reprimanded and suspended by Director Killen; both actions were appealed to the Civil Service Commission, which apparently took no action on those appeals. (Tr. 2:72-73).

Beginning in the fall of 1982 there were repeated attempts to lay off respondent. On November 4, 1982, Commissioner Jackson requested that the Department of Personnel issue a layoff list for HUD (PX 133); on the same day Director Duffe issued such a list, which contained only one name -- James Praprotnik. (PX 134). A letter announcing the layoff was drafted, but for unexplained reasons was never sent. (PX 135; Tr. 1:78-79). In February 9, 1983, then Acting Commissioner Killen proposed to

Director Nash that respondent's job be abolished. (PX 137). On July 1, 1983, Commissioner Killen wrote to John Temporiti, the Mayor's Chief of Staff, requesting a budget change that would have eliminated respondent's position. On November 2, 1983, Commissioner Killen submitted to Director Patterson a HUD budget that excluded respondent's job. A layofff notice was finally issued in late December, 1983, effective on the 30th of that month. (Tr. 1:84, 85).

The relevant agency heads again gave sharply conflicting accounts regarding who decided to lay off respondent. Commissioner Killen asserted the decision was for Directors Nash and Patterson to make. (Tr. 2:172). Director Nash insisted that CDA Director Deborah Patterson made the decision, since HUD received all its funds from CDA. (Tr.

2:193). Director Patterson testified that Director Nash had made the initial recommendation, which was actually approved by the Board of Estimate and Apportionment, and that she had no authority to veto the layoff. (Tr. 3:58-63, 67). Director Duffe asserted that Nash and Killen had made the decision. (Tr. 2:182). Respondent appealed the lay off to the Civil Service Commission; for reasons not explained in the record the Commission never acted on that appeal. (Tr. 2:73, 3:118).[7]

(3) The Defense of the Individual Claims. At trial the office of the St. Louis City Counsellor undertook to

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[7] In the eighth circuit, petitioner suggested that, despite an unexplained delay of several years, it was "altogether possible" that the Commission might act on the appeal and restore respondent to his job. Petition for Rehearing and Suggestion for Rehearing En Banc, p. 10. Petitioner no longer advances such a contention.

represent the three individual defendants as well as the city itself. One of the primary defenses offered by the city attorney on behalf of the three individual defendants was that the allegedly unconstitutional treatment of which respondent complained had been the work of high ranking officials other than the three named defendants.

In her opening statement the assistant city attorney stressed that during the period in question respondent had worked under four agency Directors, two of whom were not among the named individual defendants. (Tr. 1:19). During the presentation of respondent's case, the city attorney used her cross examination to emphasize that the actual layoff order had been signed by Commissioner Killen, not by one of the named defendants (Tr. 2:83), and that although

respondent had been verbally abused by a member of the Mayor's cabinet, that Cabinet Member too was not a named defendant. (Tr. 3:8). At the close of respondent's case, the city attorney moved on behalf of the individual defendants for a directed verdict, arguing that the individuals actually responsible for the treatment of which respondent complained were not the named defendants, but Directors Killen, Nash and Spaid, and Supervisor Karetski. (Tr. 3:14-26).

The city's own case focused heavily on an effort to lay any blame on individuals who were not among the named defendants. Defendant Kindelberger insisted he had given respondent a low rating only because ordered to do so by CDA Director Spaid. (Tr. 3:226). Defendant Hamsher insisted the Mayor had

personally ordered the transfer of respondent to HUD, and denied having "pushed" for that decision. (Tr. 3:199-200). Director Hamsher also insisted that, if no job functions had been transferred from CDA to HUD, that was the fault and responsibility of HUD Commissioner Jackson. (Tr. 3:197). Defendant Patterson disputed testimony by Director Nash and Commissioner Killen that she made the final decision to lay off respondent, insisting that Nash had sole authority over that question. (Tr. 3:59-60, 62-63). In the face of indisputable documentary evidence that the Serra sculpture incident played a role in respondent's adverse 1981 rating, the city called as a defense witness Supervisor Alvin Karetski, who testified that he had done this on his own initiative, and not under orders from defendants

Kindelberger or Hamsher. (Tr. 52).

Much of the city attorney's closing argument emphasized the city's contention that defendants Patterson, Hamsher and Kindelberger were not the sole or primary culprits:

> [T]his case is an attempt to hang all the ills that ever occurred to James Praprotnik on three people, all the ills that occurred over a four-year period and under four different bosses ... on three people. And I don't think that's fair at all; I really don't....
>
> Chuck Kindelberger ... was Al Karetski's second rater. Unfortunately, he agreed with Al Karetski, and they rated Mr. Praprotnik adequate. Al Karetski is not a defendant in this thing. Chuck Kindelberger is. He wasn't even the first rater, but he's going to take the rap for that if you find against him on that....
>
> Now, another thing I would like you to consider is, who is not a defendant in this matter. Who is not a defendant. Donald Spaid is not a defendant. Donald Spaid is the guy who laid that first suspension on ... who allegedly got so angry that he would go to any lengths to retaliate, directed his subordinates to retaliate.

> Donald Spaid is not a defendant in this case. Okay?
>
> Who laid Jim Praprotnik off? Who really laid him off? Who signed off on the form? Rob Killen signed on the form.... It was his decision....
>
> Who else is not a defendant? Rob Killen's boss, Tom Nash. Tom Nash allegedly approved it and went along with Rob Killen. Do you see him here? Nope. Lets hang it on these guys.
>
> Let me think who else is not here? Henry Jackson was the commissioner of Heritage and Urban Design when Jim Praprotnik first got transferred over there. Henry Jackson is the one who gave him all the rotten assignments.... Frank Hamsher testified that once this man went over there, he didn't have anything to say about what he did. He understood he would be doing work at the same level. But Henry didn't see it that way.... Henry Jackson's not a defendant. He's not here to answer for his actions. So I'd like you to bear that in mind, too, when you consider what happened to Mr. Praprotnik .. and who should pay for it.

(Tr. 4:48-52).

Counsel for respondent replied by insisting that the city should be held

liable even if, as the city attorney had suggested, the particular high officials responsible for the constitutional violation were not among the named defendants:

> [Counsel for the defendants] said we didn't sue enough people. Well, may be we didn't but ... we brought the ones we felt had mistreated Mr. Praprotnik.
>
> Now, she says maybe there are other high officials we should have brought in; that's why we sued the City of St. Louis. If other high officials did this to him, then the City is responsible.

(Tr. 4:56). After substantial deliberation the jury returned a verdict against the defendant City of St. Louis, but in favor of the individual defendants Hamsher, Patterson, and Kindelberger.

SUMMARY OF ARGUMENT

I. Appellate courts are not authorized to reconsider de novo whether a constitutional violation was caused by an official policy or action. Appellate review of a jury verdict under Monell is limited to determining whether the jury was properly instructed, and whether there was sufficient evidence to support the jury's decision. Rule 51, F.R.C.P..

II. The jury instructions regarding municipal liability were drafted and proposed by the city itself. The actual instructions to the jury did not direct it to impose liability for any constitutional violation caused by an official with "final authority." The eighth circuit's legal theory, regarding "final authorities", whatever its meaning, simply was not the basis on which the

jury was charged.

Municipal liability under Monell extends in some circumstances to officials exercising delegated authority. The policy at issue in Monell itself was adopted by an Assistant Deputy Administrator of the city Department of Social Services, exercising delegated authority, not by any individual with what petitioner describes as "ultimate authority." The prosecuting attorney in Pembaur v. City of Cincinnati, 89 L.Ed.2d 452 (1986), had no direct or "ultimate" authority over deputy sheriffs, but was exercising authority delegated to him by the county sheriff.

The existence of a municipal rule prohibiting a particular constitutional violation does not invariably immunize the city from liability for such a violation. Such rule, like the osten-

sible state legal rights of freedmen in 1871, may have little influence on actual government practice. Monroe v. Pape, 365 U.S. 167 (1961). The existence of such a rule is relevant to, but not conclusive of, a Monell claim.

III. There was ample evidence to support the jury verdict. Petitioner urged the jury to conclude that in St. Louis personnel policy was made solely by the Civil Service Commission, the Department of Personnel, and the Board of Service Rating Appeal. Respondent argued that policy could also be made by the individuals alleged to have been involved in the retaliatory dismissal -- the Mayor, the Mayor's staff and Cabinet, and half a dozen agency Directors and Commissioners. These conflicting contentions presented essentially factual issues properly left with the jury.

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IV. The jury verdict against the city was entirely consistent with the jury's verdict exonerating the three named individual defendants. The evidence indicated that at least 13 other high ranking city officials might have been responsible for the retaliatory dismissal. The city attorney, in her closing argument on behalf of the three individual defendants, repeatedly insisted that any constitutional violation had been the work of city officials other than those three defendants.

ARGUMENT

I. WHERE A JURY HAS FOUND A CITY LIABLE UNDER MONELL, THE ROLE OF AN APPELLATE COURT IS LIMITED TO REVIEWING CHALLENGED INSTRUCTIONS AND ASSESSING THE SUFFICIENCY OF THE EVIDENCE

The threshhold question presented by this case is whether, as petitioner appears to assume, appellate courts have the authority to decide de novo whether a constitutional violation was caused by an official policy or action within the meaning of Monell. Petitioner argues:

> Who speaks for the city? And when does he who may speak for the city speak for the city, and how does he do so? Finding answers to these difficult questions has been the task of the lower federal courts and of this Court since ... Monell.

(P. Br. 15-16). Petitioner thus urges that on appeal this Court should decide for itself which high level St. Louis authorities in the years 1980-83 were officials "whose edicts or acts may

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fairly be said to represent official policy." Monell, 436 U.S. at 695. We contend that neither Monell nor the Seventh Amendment permit an appellate court to disregard in this manner the verdict of a federal jury.

The decisions of this Court do not authorize such a de novo appellate reconsideration of a matter previously presented to and determined by a Seventh Amendment jury. In Oklahoma City v Tuttle, 85 L.Ed 2d 791 (1985), the city petitioner urged this Court to make its own determination regarding whether the alleged constitutional violation was the result of a municipal policy or practice.[8] This Court declined to do so, restricting its inquiry to an evaluation of the correctness of the challenged jury

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[8] Brief for Petitioner, No. 83-1919, p. 21.

instruction. 85 L.Ed.2d at 802-04. In Springfield v. Kibbe, 94 L.Ed 2d 293 (1987), the Court emphasized that even a purely legal issue regarding the meaning of Monell could not ordinarily be addressed on appeal unless that question had been preserved and presented as a challenge to a jury instruction. 94 L.Ed.2d at 297-98.

In this case, as in Tuttle and Kibbe, the jury was asked, with the consent of both parties, to decide whether the defendant city could be held liable under Monell. In all three cases the juries were instructed that liability could be based only on an official policy of practice, and not merely on the doctrine of respondent superior.[9] The appellate courts are not, of course, at liberty to simply disregard the verdict

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9 See, e.g., id. at 21.

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A jury verdict in a Monell action is not, of course, immune from appellate scrutiny. If a municipal defendant wishes to frame and preserve for appeal some issue of law, the defendant can do so, provided that, as required by Rule 51, F.R.C.P., it objects to the instructions given by the trial judge and makes clear, through its own proposed instructions or in some other manner, what direction it contends should have been given to the jury. In the absence of such an objection under Rule 51, a party is still free to argue, subject to the constraints of the Seventh Amendment, that the evidence was insufficient to satisfy the legal standard articulated in

the unchallenged jury instructions. But the ultimate question of whether a city should be held liable under Monell, like the ultimate question of whether a Title VII defendant engaged in intentional discrimination, is not an issue which the appellate courts are authorized to reconsider de novo. Cf. Pullman Standard Co. v. Swint, 456 U.S. 273, 287-89 (1982).

Any appellate attempt to make such a de novo determination regarding municipal liability would ordinarily run afoul of the Seventh Amendment. In most actions brought under Monell there are critical disputes of facts regarding the cause and circumstances of the alleged constitutional violation. Any application of Monell ordinarily requires determination as to the identity, rank, authority and role of each of the government officials

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involved. In this case, for example, there was sharply conflicting testimony regarding which of the high ranking St. Louis officials involved had actually made the decisions of which respondent complained. Other issues often bearing on Monell, such as the existence and scope of delegated authority, the degree of knowledge and supervision by higher authorities, and the extent to which relevant written rules were systematically ignored or enforced, all raise essentially factual problems. Questions of causation and foreseeability are factual matters which have traditionally been consigned to the jury in tort or contract actions. The parties in a case such as this will often be in disagreement regarding which policy or practice, official or otherwise, caused the constitutional violation complained of.

In Monell litigation it will only rarely be possible to identify a substantial core of undisputed acts to which an appellate court would apply any legal principles properly preserved under Rule 51.

In the evaluation of such often conflicting evidence, a jury will frequently be required to rely on its understanding of the realities of government in the jurisdiction at issue. The application of Monell, like the implementation of White v Register, 412 U.S. 755,769 (1973), frequently turns on an "intensely local appraisal" of the evidence presented. Otherwise similar testimony might lead a local jury to quite different conclusions depending on whether the incident at issue involved, for example, the city of Chicago or a small term in downstate Illinois. In

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resolving a Monell claim a jury must bring to its deliberations some fundamental knowledge of the local government and politics. In the instant case, for example, counsel for respondent in his closing argument urged the jury, without recorded objection, to weigh the evidence in light of its understanding of the structure and operation of the St. Louis City government.[10] Appellate courts are uniquely ill-equipped to evaluate evidence in this informed manner.

The application of Monell is rarely a mechanical task, even when the relevant facts are largely undisputed. Monell

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10 "I think that we must bear in mind what happens in the City of Saint Louis. We know that this is a political town. We know that when a person does certain things, exercises maybe certain rights or speaks up about things about the Serra Sculpture, particular [sic], if Mr. Pulitzer is interested in it or the mayor's interested in it, that person may be on his way out the door, even though he has civil service status."

authorizes the imposition of liability on a city where a constitutional violation was caused by "those whose edicts or acts may fairly be said to represent official policy." 436 U.S. at 694. (Emphasis added). The standard of "fairness" under Monell, like the standard of reasonableness in tort, often requires the finder of fact to apply to the evidence a degree of judgment and common sense. There are innumerable possible variations in the number and authority of the officials who might be involved in a particular constitutional violation, and in the governmental context in which those officials serve. Monell does not and could not purport to draw a bright line clearly distinguishing which combinations of circumstances would and would not "fairly" give rise to municipal liability.

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Tuttle and Kibbe adhere to the traditional constraints on appellate review of jury verdicts. Within this well established approach an appellate court can evaluate legal issues preserved by timely objections to jury instructions, and can inquire into the sufficiency of the evidence to satisfy the standard set forth in the instructions. But if an appellate court determines that the instructions were either proper or unchallenged, and that the evidence was sufficient to support a verdict under those instructions, the role of the court is at an end; in such circumstances the court is not free to substitute its own evaluation of the evidence for that of the jury.

II. THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY REGARDING THE SCOPE OF MUNICIPAL LIABILITY UNDER MONELL

The district court gave the jury two

instructions, both drafted by the counsel for the city, regarding the scope of municipal liability under Monell. Those instructions explained that "as a general principal a municipality is not liable under 42 U.S.C. § 1983 for the actions of its employees," and that municipal liability is limited to constitutional violations "visited pursuant to an unconstitutional governmental custom, usage or policy knowingly followed by the municipality." (JA 113, 115)(Emphasis added). The court further explained, in words framed by the city itself, that official policy included acts of "high government officials". (JA 113). Petitioner did not object to these instructions in the district court, in the court of appeals, or in its petition for certiorari.

In this Court, however, petitioner

advances in this Court a variety of legal arguments which, if correct, would require the conclusion that the instructions framed by petitioner's own counsel, and agreed to and used by the district judge, were erroneous or inadequate. We urge that petitioner cannot challenge in this manner the instructions to which it consented at trial, and that the substance of those instructions was, in any event, entirely proper.

(1) Liability under Monell is not limited to systematic practices, but encompasses as well even a discrete action taken by "those whose edicts or acts may fairly be said to represent official policy." Monell, 436 U.S. at 694; Pembaur, 89 L.Ed.2d at 463. In the instant case counsel for respondent repeatedly made clear that the claim against the city was based, not on an

assertion of a widespread practice of retaliation, but on an allegation that the retaliatory measures directed by city officials of such high rank that their conduct in even a single case might fairly be said to represent official policy.[11] Petitioner acknowledged in its eighth circuit brief that at trial "plaintiff relied exclusively on the theory that a ... constitutional tort inflicted on him by 'high City officials', was sufficient to impose liabil-

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11 Respondent relied on this "high government official" standard in seeking reinstatement of the City as a defendant. (JA 28-32). The district court made clear it was allowing the case to proceed against the city solely because of this contention. (Order of Oct. 5, 1984, p. 2). Respondent relied on the "high government offical" theory in his opening statement (Tr. 1:4), closing argument (Tr. 4:31-34), and opposition to the City's request for a directed verdict. (Tr. 3:29, 4:23). The city attorney expressly agreed that municipal liability could be based on acts of "high ranking officials." (Tr. 3:28).

ity on the City".[12]

At the conclusion of the testimony counsel for petitioner proposed an instruction authorizing the imposition of liability on a city because of actions of a "high government official", which was accepted by the district court and utilized verbatim as instruction No. 15, provided:

> 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. (JA 113) (Emphasis added).

Petitioner did not request that the trial court define in greater detail what constituted a "high government official", and did not suggest that the trial judge,

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[12] Brief for Defendant-Appellee City of St. Louis, No. 85-1145-EM (8th Cir.), p. 24.

rather than the jury, should decide which of the officials implicated in the case were "high government officials".

In this Court, however, petitioner now attacks Instruction No. 15 as lacking in "precision". (P. Br. 14 and n.5). We recognize that there may be circumstances in which a particular additional clarifying instruction, if requested in a timely fashion, might be helpful or even necessary. But the language of Instruction No. 15, as drafted by counsel for petitioner, seems to us entirely serviceable. The terms of the instruction comport with the requirement of Monell that municipal liability be limited to cases involving actions by officials whose conduct can "fairly be said to represent official policy." Given the enormous variety of ways in which authority is distributed within the

tens of thousands of local government bodies in the United States, it would be manifestly impossible to frame any instruction or combination of instructions that could delineate in most or even many cases which officials were and were not of sufficient stature to speak for a particular locality. Monell litigation frequently presents complex disputes about the authority, responsibility, conduct, selection, supervision, disciplining and training of the various officials involved. In determining what mix of circumstances is sufficient to show that the actions of the responsible officials represented official policy, juries often must rely on their common sense and on their judgment regarding the fairness of imposing liability on the city. Monell does not suggest that the courts must or

should undertake the Sisyphean task of attemptint to frame instructions so "precise" that they specify exactly which officials under which circumstances can fairly be said to speak for a city.

(2) Petitioner devotes much of its brief to criticizing the eighth circuit's opinion regarding when a city employee with "final authority" over an issue is for that reason a municipal policymaker. (P. Br. 15-24). Petitioner reads the court of appeals opinion to hold that whenever a particular decision of a city employee is not subject to de novo review by higher authorities, that employee is ipso facto a municipal policymaker, and every decision involved is an official city policy.

We do not understand the appellate court to have adopted such a sweeping rule. In the court of appeals the city

argued that, even if Nash, Killen, and the others had delegated authority to make municipal personnel policy, they lacked "final authority" with regard to any decision if that decision was "reviewable by others." (See Pet. App. A-9).[13] In response to that contention,

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[13] Brief for Defendant-Appellant City of St. Louis, No. 85-1145-EM (8th Cir.) pp. 26-27):

> "Although each individual defendant had responsibilities for making initial personnel and budgeting decisions affecting City employees subject to them, none of them had final authority in this regard. By law, their personnel actions had to be (and were) reviewed by the director of personnel, and could also be (and were) reviewed by the civil service commission. Their budget decisions were reviewable by the City's board of estimate and apportionment including the Mayor, comptroller, and the president of the board of alderman, and the City's board of alderman.... The decision of [Nash and Killen] was also reviewable by others...."

In its eighth circuit Reply Brief the city described the issues presented by this case as including, whether a city

the eighth circuit merely concluded that, where an official otherwise has authority to make municipal policy, he or she does not "automatically" cease to be a policymaker solely because of the presence of some limited appeal process. (Pet. App. A-9). The holding of the

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could be held liable under Monell "where ... a civil service system assured that final employment decisions were not made even by the policymakers identified by plaintiff as being illegally motivated in their conduct." Reply Brief, p. iv. Petitioner urged in that Reply Brief:

> "Even accepting that ... the Mayor or the City's board of estimate and apportionment were involved in the decision to transfer and lay plaintiff off .. or that ... Killen ... and Nash ... were 'policymakers' ... [p]plaintiff's case is still patently defective for the simply reason that none of the 'high officials' he mentions in his brief were the final authority in personnel decisions for the City. Under the City Charter ... only the civil service commission of the City had ultimate control over employment decisions".

Id., p. 6. (Emphasis in original).

eighth circuit is not that the absence of an appeal process creates policymaking authority, but that the availability of such an appeal process does not necessarily insulate a city from liability for actions that would otherwise constitute official policy. The court of appeals' actual holding is clearly correct. Meritor Savings Bank v. Vinson, 91 L.Ed.2d 49, 63 (1976).

Had the "final authority" theory criticized by petitioner actually been embodied in an instruction directing a jury to impose liability on that basis, we agree that the giving of such an instruction would have been reversible error. But in this case, of course, there never was any such instruction.

Petitioner urges this Court to hold that no municipal official can be a policymaker under Monell unless the

official is what petitioner characterizes as an "ultimate authority". (P. Br. 22-26). Under this proposed doctrine a high ranking municipal official, no matter how great his or her authority or responsibility, would not be an "ultimate authority" if he or she was "subject to the direction and control of any other city official." (P. Br. 25). The central tenet and significance of petitioner's proposed "ultimate authority" doctrine is that a city could never be held liable for a practice, policy, or action adopted by an official exercising delegated authority. (P. Br. 26-27). Prior to the filing of its brief on the merits, petitioner expressly acknowledged, both in its original petition (Pet. 12), and in the court of appeals,[14] that

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14 Petition for Rehearing and Suggestion for Rehearing En Banc, No. 85-1145-EM (8th Cir.) p. 6 (an "individual

municipal liability could be based on the exercise of delegated policymaking authority.

The "ultimate authority" doctrine now proposed by petitioner is clearly inconsistent with the decision in Monell itself. The unconstitutional layoff policy in Monell had not been adopted by the New York's Mayor or City Council, or any other official immune from "control" by higher authorities. The written city-wide regulations in Monell did not require a pregnant woman to leave her job, but merely insisted that she receive "the approval of the agency head."[15] The agency head, who was under

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employment decision is transmuted into a government policy ... where the government has 'delegated its power to establish final employment policy' to the particular decisionmaker").

15 The regulation is quoted in "Civil Rights Litigation After Monell", 79 Col. L. Rev. 213, 220 (1979).

the direction and control of the Mayor, had only delegated not "ultimate" authority. In the head of the New York City Department of Social Services the agency head did not himself make any decision regarding layoff practices, but delegated that responsibility to an Assistant Deputy Administrator for Personnel Management.[16] It was the Assistant Deputy Administrator, exercising re-delegated authority, who adopted the practice of laying off all women who were more than five months pregnant. Despite the manner in which this decision was made, this Court had no doubt that the layoff rule constituted an official policy under Monell.

In Pembaur the county prosecutor who authorized the break-in there at issue had no "ultimate authority" over the

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16 Id.

deputy sheriffs who entered Dr. Pembaur's office. In issuing that directive, the prosecutor was acting under a "delegation of authority" from the Sheriff's office. 89 L.Ed.2d at 466. The decision to refer the matter to the County Prosecutor was made, not by the County Sheriff, but by an unnamed "supervisor" in the Sheriff's office, 89 L.Ed.2d at 458, to whom the Sheriff had evidently delegated the authority to make such referrals. Although the County Prosecutor, in giving a legal opinion, was not subject to the "direction and control" of the Sheriff or the unnamed supervisor, both the Sheriff and that supervisor retained direction and control over the policy decision, and could have overridden the prosecutor's advice and instruction had they wished to do so. Justice Brennan emphasized that "authority to make municipal policy may

be granted directly by a legislative enactment or may be delegated by an official who possess such authority". 89 L.Ed.2d at 465. Neither the concurring opinions nor the dissenting opinion in Pembaur indicated any disagreement with this view.

If, as petitioner suggests, a city could never be held liable for policies adopted by officials exercising "delegated" authority, municipalities could effectively nullify Monell by the simple expedient of delegating critical decisions to officials other than the "ultimate authorities". Where a mayor knew or suspected that a proposed policy was unconstitutional, he or she could insulate the city from liability merely by directing that a deputy mayor or an agency head actually decide to adopt that policy. It is inconceivable that the

framers of section 1983 could have intended to permit the law to be evaded in this manner.

Even in the absence of such a deliberate scheme to immunize a city, the proposed "ultimate authority" doctrine would often have the practical effect of eviscerting Monell. In any given city there would be only a handful of officials who were "ultimate authorities"; within the executive branch, the mayor would frequently be the only person who satisfied petitioner's proposed test. None of the policies, rules, and regulations adopted by city agencies would, on petitioner's view, constitute "official" policies. An agency head with a staff of thousands, a multi-billion dollar budget, and control over the lives of millions of city residents, would on petitioner's view be a mere "underling" (P. Br. 27)

whose actions could not, as a matter of law, "fairly be said to represent official policy". Although the conduct of municipal in many large cities is generally governed by longstanding binding written regulations, on petitioner's view those regulations would be simply irrelevant unless they were personally approved by the mayor, rather than by an agency head or board under the direction and control of the mayor.

Petitioner suggests that in order to ascertain whether an official was subject to the "direction and control" of another official, it would be necessary merely to consult the local charter or state legislation. But the actual distribution of direction and control within a government body is often far from apparent, and may in reality differ substantially from the allocation suggested

by a reading of the applicable written rules. Experience at the federal level demonstrates the ease with which reality may differ from the such literal rules. The FBI under J. Edgar Hoover, for example, was officially under the direction and control of the Attorney General; in practice, however, Director Hoover had virtually total autonomy, dealing with Attorneys General and Presidents as if he were a sovereign power. Conversely, the statutory mandate of the Civil Rights Commission contemplates it will be completely immune from direction or control by executive officials; some congressional critics, however, have suggested that in reality the relationship of the Commission to the White House is more that of a lap dog than a watch dog. Such disputes illustrate the enormous problems that could

arise if liability under Monell turned largely on who exercised control and direction over whom within a given city.

We do not suggest that every city worker who exercises any form of delegated authority is for that reason alone a municipal policymaker. Clearly many are not. On the other hand, the decisions of this Court do reflect a variety of situations in which an exercise of delegated authority would fairly be characterized as an official act or policy. If city policy expressly authorizes, but does not require, city employees to take a given action, such as shooting at unarmed non-dangerous fleeing felons, an employee who makes the delegated decision to engage in that authorized conduct can fairly be said to act on behalf of the city. See Springfield v. Kibbe, 94 L.Ed.2d 293, 303

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(1987)(O'Connor, J., dissenting). Cf. Tennessee v.Garner, 85 L.Ed.2d 1 (1985). If city officials deliberately close their eyes to the existence of a particular unconstitutional practice, that inaction would effectively delegate to subordinates the authority to engage in that abuse, cf. Brandon v. Holt, 469 U.S. 464, 467 and n.6 (1985); petitioner appears to concede that a city could be held liable in such a situation. (P. Br. 27). If a city official delegates to subordinates carte blanche in a particular area, such a complete "failure of supervision" would provide an appropriate basis for relief against the city itself. Monell, 436 U.S. at 694 n.58. See generally J. Lobel, Civil Rights Litigation and Attorney Fees Annual Handbook, v. 2, pp. 35-37 (1986).

On petitioner's view only one person

or board within a given city, such as a civil service commission, could make personnel policy within the meaning of Monell. Such an "ultimate authority" might delegate to individual agencies or their directors authority to make personnel rules for particular agencies, but for Monell purposes those rules would not be "policies" at all, even if clearly within the authority delegated by the "ultimate authority." This doctrine is entirely inconsistent with what St. Louis, and most other cities, in practice regard as official policy. In justifying Praprotnik's original two week suspension, both the city attorney and the city's witnesses asserted that discipline was appropriate because respondent had allegedly violated the personnel policies applicable to the Community Development

Agency.[17] On petitioner's view a CDA agency rule regarding secondary employment would be an official policy under municipal law, a rule which all agency workers were required to obey on pain of suspension, or dismissal, and a rule which the city Civil Service Commission would enforce if violated. Yet the same rule, petitioner suggests, would not be official policy for federal law purposes under Monell. Neither Monell nor its progeny contemplated such an incongruous result.

(3) Petitioner asserts, finally, that a city can never be held liable under Monell if the municipality had in effect a rule prohibiting the constitutional violation at issue. (P. Br. 24-25, 28-31). Were that the law, petitioner

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17 Tr. 2:31-32, 118-20, 122, 216-18; 3:209.

might have been entitled to an instruction to that effect had a timely request been made at trial. In fact, however, petitioner never asked for any such instruction; in this Court petitioner argues at length that a retaliatory layoff would violate the city charter (P. Br. 29-30), but no such contention was made to the jury or trial court. We agree that a jury could and should consider whether an alleged constitutional violation was contrary to a municipal rule, but we disagree with petitioner's suggestion that the mere existence of such a prohibition would always be absolutely conclusive of the issue of municipal liability.

Petitioner does not, of course, contend that a federal constitutional prohibition against retaliatory dismissals is an expression of St. Louis

municipal policy. Neither the framers of the First Amendment, nor the federal judges who have interpreted that guarantee, could be "fairly said to represent" official St. Louis' policy. At times in our history cities and states have openly and defiantly adhered to policies which they knew full well violated the constitution and laws of the United States; de jure segregation remained an official policy in certain regions long after Brown v. Board of Education, 347 U.S. 483 (1954). This Court in Owen v. City of Independence, 445 U.S. 622 (1980), was divided as to whether a city could be held liable for good faith constitutional violations, but every member of the Court in Owen agreed that a city would be held liable for policies that it knew or should have known were unconstitu-

tional,[18] a view which pretermits any suggestion that a municipal practice must be deemed not "official" under Monell whenever the practice is patently unconstitutional. Petitioner does not suggest that the existence of a clear federal constitutional prohibition against retaliatory dismissals is of any relevance in determining the substance of St. Louis municipal policy.

What petitioner does contend is that a municipality can acquire absolute immunity from liability under Monell by the simple expedient of adopting a prohibition against a particular constitutional violation. Once that was done, a municipal policymaker who directed or engaged in such a violation would, on

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[18] See, e.g., 445 U.S. at 669 (Powell, J., dissenting) ("[L]iability should not attach unless there was notice that a constitutional right was at risk").

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petitioner's view, be acting "contrary to orders". (P. Br. 25). This immunity is not limited to instances in which a city has adopted such a prohibition "in so many words" (P. Br. 29); it is enough, petitioner suggests, that such a restriction was "implicit" in the city charter or other official policy. (Id.). On this view a city might conceivably acquire immunity from suits over retaliatory dismissals if the city adopted a rule requiring municipal employees "to obey the first Amendment", or even directing them "to obey the United States Constitution and the decisions of the Supreme Court." There are, we believe, three distinct reasons why such a prohibition, whatever its specificity, should not be given conclusive weight in determining municipal liability under Monell.

First, although a policy prohibiting retaliatory dismissals would make such dismissals less likely, another municipal policy might nonetheless actually cause such constitutional violations. A plaintiff in a Monell action need not prove that the city had an unconstitutional policy, so long as he or she establishes that a city policy foreseeably caused the constitutional violation at issue. In Springfield v. Kibbe, 94 L.Ed.2d 293 (1987), Justice O'Connor noted in her dissenting opinion that even though a city might have entirely constitutional guidelines regarding the use of deadly force, the city could still be held liable if its inadequate training or supervision policies predictably led to an unconstitutional shooting. 94 L.Ed.2d at 300-04. Justice O'Connor suggested that it might well be difficult

to prove the existence of such a causal connection, but agreed that a plaintiff was entitled to an opportunity to attempt to do so. (Id.).

The policies for which Monell holds a municipality accountable are the official actions or practices that establish the operative rules of action which guide the conduct of subordinate employees. A city policy is important to those employees and to the private citizens whose rights may be at stake, only because, and to the extent that, the policy actually determines how city workers will act. A written municipal policy forbidding retaliatory transfers, or the use of unwarranted lethal force, might well have the practical effect of establishing the operative standard of conduct. On the other hand, the significance of such a substantive rule

might be largely dissipated if the city also had a policy of never actually enforcing those prohibitions, a policy implemented by refusing to scrutinize allegedly retaliatory transfers, (see Pet. App. A-11), or by refusing to investigate or redress incidents of police brutality. See Brandon v. Holt, 469 U.S. at 468 n.6. Similarly, the existence "of a nominal prohibition would be of little significance if in practice responsible city officials routinely authorized, required or engaged in the very conduct forbidden by "the dead words of ... written text." Monell, 436 U.S. at 691 n.56. Here, for example, the St. Louis Employee Manual expressly provides that no employee may be transferred without his consent (Tr. 3:122), but the Director of Personnel insisted that the city in practice would transfer employees

regardless of their opposition. (Tr. 3:132). The appropriate weight to be given to a municipal prohibition against a particular constitution violation is necessarily a factual matter, defendant on a variety of other circumstances, to be addressed in the first instance by the jury or trial judge.

Second, an "order" is only as authoritative as the individual who issues it. In many cases, as here, there will be a substantial dispute regarding which municipal official can be fairly said to make official policy. The finder of fact might reasonably conclude in a given case that those who "violated" a nominal rule could as fairly be regarded as municipal policymakers as those who adopted the rule itself. In the instant case the jury might have concluded that, although the city charter implicitly

disapproved of retaliatory dismissals, in respondent's case a decision to engage in such retaliation had been joined in by the Mayor, the Director of the Department of Personnel, and half a dozen other agency Directors and Commissioners. In such a situation Monell would certainly authorize imposition of liability on a municipality.

Third, the interpretation of section 1983 must reflect the legislative history of that statute. The primary concern of the framers of the 1871 Civil Rights Act was that, although the southern states had enacted legislation which gave nominal protection to the rights of freedmen and union sympathizers, in practice the actual policies of those states was to disregard and violate those very rights. Senator Pratt emphasized that the actual treatment of blacks and

union men was very different than the ostensible rules found in state statutes:

> Plausibly and sophistically it is said the laws of North Carolina do not discriminate against them; that the provisions in favor of rights and liberties are general.... But it is a fact .. that of the hundreds of outrages committed upon loyal people ... not one has been punished .... Vigorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid.[19]

As this Court noted in Monroe v. Pape, 365 U.S. 167, 180 (1961):

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced.

Congress had "no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty". 365 U.S. at 176. See also

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[19] Cong. Globe, 42nd Cong., 1st Sess., p. 505 (1871).

id. 365 U.S. at 174-180; "Civil Rights Litigation After Monell", 79 Col. L. Rev. 213, 231-34 (1979).

Against that background it is inconceivable that the framers of section 1983 contemplated that, by the simple expedient of adopting a rule against racial discrimination or any other type of unconstitutional action, a city could acquire absolute immunity from liability even where subsequent municipal policies or actions actually caused such constitutional violations.

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III. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY VERDICT

A. The Constitutional Standard

The Seventh Amendment severely restricts the extent to which the verdict of a properly instructed jury may be reviewed by a federal court. In assessing the sufficiency of the evidence on which a jury based its verdict, neither a trial judge nor the appellate courts are free "to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other conclusions are more reasonable." Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29, 35 (1944). A case must be submitted to the jury "if evidence might justify a finding either way . . .", Wilkerson v. McCarthy, 336 U.S. 53, 55 (1949), and "fair-minded men

might reach different conclusions." Bailey v. Central Vermont R. Co., 319 U.S. 350, 353 (1943). A jury verdict may be overturned only in the extreme case in which there is only one possible conclusion that a rational jury could have drawn from the evidence. In enforcing the commands of the Seventh Amendment, this Court has recognized several distinct principles restricting appellate review of the sufficiency of the evidence to support a jury verdict.

First, "the decision as to which witness was telling the truth . . . [is a] question[] for the jury." Ellis v. Union Pacific R. Co., 329 U.S. 649, 653 (1947). If a witness with personal knowledge of a disputed fact testifies before a jury, the jury's conclusion with regard to that fact is ordinarily conclusive. "[I]t would be an undue invasion

of the jury's historic function for an appellate court to . . . judge the credibility of witnesses." Lavender v. Kurn, 327 U.S. 645, 652 (1946). When a jury chooses to believe the testimony of a witness with such personal knowledge of a disputed fact, the Seventh Amendment precludes a federal judge from questioning the veracity of that witness. Conversely, a jury may choose to infer from the demeanor of a witness that he or she is lying about the event or incident at issue. The demeanor of a witness may convince a jury

> not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.

Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952)(Hand, J.). Credibility will ordinarily be critical when two witnesses give conflicting testimony about the same subject. Where a case turns on the motivation or knowledge of a particular individual, and that individual testifies before the jury regarding those issues, resolution of the dispute will often be based on the credibility of that witness.[20] A jury's assessment of the credibility of a witness in such circumstances is essentially immune from judicial reconsideration. Cf. Anderson

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20 See Fishman v. Clancy, 763 F.2d 485, 488 (1st Cir. 1985)("where state of mind is crucial to the outcome of a case, 'jury judgments about credibility are typically thought to be of special importance'"); Knapp v. Whitaker, 757 F.2d 827, 843 (4th Cir. 1985)("The credibility of the witnesses . . . [is] within the purview of the jury, especially in a case such as this which turns, in large measure, upon the defendants' motive . . .").

v. Bessemer City, 470 U.S. 564, 575 (1985).

Second, the drawing of inferences from both disputed and uncontroverted testimony is ordinarily a matter for the jury alone. "The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable." Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29, 35 (1944).

> Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer . . . know more of the common affairs of life than does one man; . . . they can draw wiser and safer conclusions from . . . facts . . . than can a single judge.

Sioux City & Pacific R.R. Co. v. Stout, 84 U.S. 657, 664 (1874).

Third, an appellate court cannot weight conflicting evidence, or the conflicting inferences supported by different portions of the record.[21] Neither may an appellate court rely on evidence which the jury might have chosen to discount.[22] Thus an appellate court ordinarily evaluates only whether the evidence which supports the prevailing party, together with all reasonable inferences, could rationally support the jury's verdict, and does not consider possibly conflicting evidence supporting

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21 Gunning v. Cooley, 281 U.S. 90, 94 (1936); Baltimore & Ohio R.R. Co. v. Groeger, 266 U.S. 521, 524 (1975); Great Northern Railway Co. v. Donaldson, 246 U.S. 121, 124 (1918); Corinne Mill, etc., Co. v. Toponce, 152 U. S. 405, 408 (1894).

22 Lavender v. Kurn, 327 U.S. 645, 653 (1946); Hepburn v. DuBois, 37 U.S. 345, 376 (1838).

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the losing party.[23] Any appellate consideration of evidence offered by the losing party would in most circumstances be constitutionally impermissible, since such consideration would generally require an appellate court to weigh or evaluate evidence in a manner reserved for the jury itself. This restriction has a substantial historical foundation, since under a common law demurrer to evidence, from which the modern motions for directed verdict and judgment n.o.v. derive, the moving party could not offer or rely on any evidence of its own.[24]

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[23] Gunning v. Denver & Rio Grande Western R.R. Co., 375 U.S. 208, 210 (1963); Webb v. Illinois central Railroad Co., 352 U.S. 512, 513-14 (1957); Wilkerson v. McCarthy, 336 U.S. 53, 57 (1949); Corinne Mill, etc. Co. v. Toponce, 152 U.S. 405, 408-09 (1894).

[24] Slocum v. New York Life Insurance Co., 228 U.S. 364, 388-95 (majority opinion), 409-17 (Hughes, J., dissenting)(1913).

For these reasons, a verdict in favor of a prevailing plaintiff can virtually never be overturned if the plaintiff has adduced sufficient evidence to establish a prima facie case. Cf. United States Postal Service v. Aikens, 460 U.S. 711, 715 (1983); Pleasants v. Font, 89 U.S. 116, 117 (1875).

Fourth, deference to the verdict of a jury is particularly important in a case such as this seeking redress for unconstitutional conduct by government officials. Justice Rehnquist correctly observed in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), that the Seventh Amendment was adopted in part because its framers believed that juries would often be more vigilant than judges in enforcing fundamental liberties. 439 U.S. at 343-44 (dissenting opinion). Many of the inalienable rights for which

the colonists fought had originally been recognized and enforced by juries rather than by judges. It was jurors, not judges, who first limited the use of libel law in the Zenger case, restricted unreasonable searches and seizures in the Wilkes case, protected religious freedom in Penn's Case, and refused to permit imposition of capital punishment for relatively minor criminal offenses. T.A. Green, Verdict According To Conscience (1985). Where, as here, the vindication of fundamental rights and liberties is at issue, federal judges should be particularly reluctant to interfere with the institution which the Seventh Amendment contemplated would prevent, and provide redress for, violations of the Constitution.

Finally, in assessing the sufficiency of the evidence to support a

jury verdict, an appellate court will ordinarily accord substantial weight to the views of the trial judge.

> [I]t is seldom that an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict . . . . [T]he judge is primarily responsible for the just outcome of the trial. . . . He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record . . . . [A]n appellate court will pay large respect to his judgment.

Patton v. Texas & Pacific Railway Co., 179 U.S. 658, 660 (1901).[25] Many of the considerations underlying deference to a trial judge's own findings of fact under Rule 52 are equally applicable to a trial judge's assessment of the sufficiency of the evidence heard by a jury. Supervis-

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25 See also Dick v. New York Life Insurance Co., 359 U.S. 437, 447 (1959); Wilkerson v. McCarthy, 336 U.S. 53, 74 (1949)(Jackson, J., concurring).

ing jury trials is a major role of federal district judges.

> The rationale for deference . . . is not limited to the superiority of the trial judge's position to make determinations of credibility . . . [W]ith experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.

Anderson v. Bessemer City, 470 U.S. at 574-75. Where the trial judge and an appellate panel have both upheld the evidence as sufficient to support a disputed verdict, their concurrent assessment carries particular weight in this Court. Story Parchment Co. v. Paterson Parchment Paper, 282 U.S. 555, 560 (1931); Patton, 179 U.S. at 660.

B. The Trial Court Context

In assessing the sufficiency of the

evidence to support a jury verdict, an appellate court should ordinarily begin with a review of the closing arguments of counsel. It is often difficult on the basis of the testimony and exhibits alone to clearly understand the nature of the factual disputes which a particular jury was asked to resolve. In many cases there will be matters of fact about which the parties agreed, and which thus were simply ignored by both during the presentation of the evidence. Conversely, the evidence actually introduced may suggest to an appellate court the existence of an issue which was not seriously presented or pursued at trial, since the attorneys were aware of circumstances which made that line of inquiry clearly unfruitful. By using the closing arguments as a point of departure, an appellate court can minimize the

danger that it might resolve the case on some issue extraneous to the actual factual dispute at trial.

In addition, due deference to the preeminent factfinding role which a jury plays under the Seventh Amendment dictates that a party be required to present its factual arguments to the jury itself. As a general rule no party is permitted to advance on appeal factual or legal contentions not raised and preserved below. A party appealing the denial of a motion for a directed verdict must ordinarily confine its brief on appeal to arguments that were first made to the district court which heard that motion. It is no less important that such factual contentions also be squarely presented to the jury itself. The jury trial will not be the "main event", rather than a "try out on the road", if litigants are

permitted to defer framing their factual contentions until the case is on appeal. Cf. Anderson v. Bessemer City, 470 U.S. at 575. In virtually any case it will be possible for an attorney with a modicum of ingenuity to frame some hypothetical question not addressed by the evidence, or to conjure up some possible inference never argued for at the trial itself. The central issue on an appeal from the denial of a motion for a directed verdict and for judgment n.o.v., however, should be the sufficiency of the evidence bearing on the factual disputes actually presented to the jury, not the ability of appellate counsel to conjure up new factual issues, however intriguing, which the jury itself was never asked to decide.

In her closing argument the city attorney did not contend that retaliatory

layoffs were prohibited by the city charter, that the mayor and various agency heads involved were without authority to make any policies, or that any of the individuals who had taken action against respondent had exceeded their delegated authority. The factual contention offered by the city appears to have been that the jury should regard the municipal civil service commission and certain other agencies, rather than the Mayor and his Cabinet and staff, as speaking acting on behalf of the city. We set out in the margin the full text of the city's argument.[26] The city's motion

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[26] Tr. 4:55-56:

"I would like to point out to you that, far from following an unconstitutional policy, the City of Saint Louis, at least in this case, went to the opposite extreme. We had available a civil service system and a variety of administrative boards -- the service rating appeal board, the director's office -- which Mr. Praprotnik made use

for a directed verdict was limited to the same factual issue.[27] That question should be the focus of appellate scrutiny of the sufficiency of the evidence.

C. The Relevant Evidence

Petitioner did not suggest below, and does not argue here, that it is inherently implausible that a Mayor, his

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of. They were available. So, far from following an unconstitutional policy, we offered him every opportunity for redress and he got it. He got it. In many cases the Commission -- in just about every case the commission never completely ruled in his favor, but in every single case he got some redress, he got modified. That's all I wanted to say on that subject."

27 Tr. 3:28-29:

"I understand that you can be liable -- a municipality can be held liable if its high ranking officials are allowed to violate someone's constitutional rights. I fail to see how you can find any evidence that the City of Saint Louis did that. On the contrary, the City of Saint Louis has, in place, the Civil Service Commission, which in Mr. Praprotnik's case has redressed what he has viewed as wrongs of the high ranking officials."

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or her Cabinet, or agency heads could be municipal policy makers. In some cities such officials are doubtless the only officials who make municipal personnel policy. Elsewhere some citywide rules might be made by a special personnel agency or commission, while individual agency heads were given delegated authority to establish other official policies for workers in their particular agencies. In New York City, for example, there was evidently such concurrent policymaking authority at the time when Monell itself was litigated.

The central factual defense advanced by petitioner at trial was that in St. Louis neither the Mayor, his Cabinet, or ordinary agency heads had no authority, concurrent or otherwise, to make official personnel policy. Rather, petitioner evidently contended, exclusive authority

to make such policies was in the hands of the Civil Service Commission, the Department of Personnel, and the Service Rating Appeal Board. In order to sustain its request for a directed verdict, the burden on petitioner was to establish that no rational jury could have concluded that in the City of St. Louis either the Mayor, the Mayor's Cabinet, or the Director or Commissioner of any agency other than the Department of Personnel had any authority to establish official policy regarding personnel matters. Although a reasonable jury could conceivably have sustained petitioner's contention, there was ample basis on which the jury could have concluded otherwise.

The City Charter provisions establishing the Civil Service Commission make clear that the Commission has no

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general authority or capacity, exclusive or otherwise, to regulate personnel matters. The Commission itself is composed of three part time members whose annual salary may not exceed $1680. (Tr. 3:93). The primary responsibility of this part time Commission is to adjudicate administrative appeals arising under the civil service rules. (J.A. 63, section 7(d)). Except for enforcing civil service rules established by the charter or local ordinances:

> The commission shall have no administrative powers or duties ... 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 them in any matter or case.

(J.A. 64; section 7(h)). If the Commission favors the adoption of any new municipal employment practice, its only recourse is to recommend such action to the mayor and aldermen. (J.A. 62;

section 7(b)). Thus in many respects the city charter actually establishes a prohibition against policymaking by the Civil Service Commission.

The Director of the Personnel Department testified at trial that he had no control over the substance of personnel practices or decisions, but was empowered only to ascertain whether personnel policies and actions adopted by others were correct as to "form". (Tr. 3:90-92, 125; Pet. App. A-9; cf. J.A. 67, section 9 (i)). Although the Charter authorizes certain other activities by the Director, they are generally ministerial in nature. (J.A. 65-69). The record contains no explanation of the authority or responsibilities of the Service Rating Appeals Board.

A number of the events disclosed at trial substantially undercut petitioner's

characterization of the role of the Commission, Department and Board. In defending the proposed two week suspension imposed on respondent in 1980, the city attorney repeatedly argued that respondent had violated, not any citywide policy regarding secondary employment, but a CDA agency policy established by Director Spaid. That contention, and the evidence offered by the city in support thereof, were clearly inconsistent with the city attorney's later suggestion that an agency head such as Director Spaid had no authority to make personnel policy, and with petitioner's argument in this Court that Spaid's successor, Director Hamsher, also had no authority to establish personnel policy. Similarly, the record did not support the city's suggestion that the Civil Service Commission, through its disposition of

appeals, exercised effective control and scrutiny of agency personnel practices. Between 1980 and 1984, the Commission simply refused to act on four of the appeals filed by respondent. The Commission's refusals included the two critical appeals filed by respondent in this period -- the appeal of the 1982 transfer (Tr. 3:119), and the appeal of the 1983 layoff. (Tr. 2:72-73). In the face of that inaction, the jury was certainly not obligated to conclude that the Commission was seriously enforcing a prohibition against retaliation, or any other rule.

Finally, it was far from certain that the agencies characterized by the city itself as policymakers were themselves untainted by the alleged retaliatory scheme. Personnel Director Duffe acknowledged that he was involved in both

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the transfer and reclassification decisions. (Tr. 3:113, 144); Duffe's insistence that he knew nothing of respondent's work assignments at HUD was directly contradicted by documentary evidence. (See pp. 22-23, supra). If the jury concluded that Duffe was significantly involved in furthering or facilitating the retaliatory scheme, that conclusion would have called into question both the role of the Personnel Department, of which Duffe was the Director, and that of the Civil Service Commission, of which Duffe was the Secretary. (J.A.87). Under these circumstances the jury was certainly not required to conclude, as the city argued at trial, that none of the high government officials involved in the retaliatory scheme were themselves municipal policymakers.

IV. THE JURY VERDICT AGAINST THE CITY WAS NOT INCONSISTENT WITH THE JURY'S VERDICT IN FAVOR OFTHE INDIVIDUAL DEFENDANTS

The jury's verdicts regarding the city and the individual defendants are, considered in light of the evidence and closing arguments, both consistent and entirely comprehensively. Petitioner grounds its challenge to the consistency of the verdicts on two essential premises -- that the only possible constitutional violation was an illicit purpose in transferring Praprotnik to HUD, and that the sole person responsible for that transfer was defendant Hamsher. Reasoning from these premises, petitioner argues that there was no rational basis on which a jury could exonerate Hamsher while imposing liability on the city. (P. Br. 31-32). But both of the underlying premises are clearly incorrect.

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Petitioner does not contend that the jury must have based its verdict against the city on the motive behind the transfer, rather, petitioner contends that this was the rationale of the eighth circuit. "[T]he theory upon which the court of appeals settled was that the unconstitutionally motivated act was the transfer." (P. Br. 34). But the evidence heard by the jury presented at least two entirely distinct theories on which the jury might have imposed liability. First, the jury could have concluded that the transfer itself was legitimate, and that the unconstitutionally motivated act was assigning Praprotnik such menial duties that a layoff was inevitable. Defendant Hamsher insisted he had no control over those assignments, arguing that the responsibility for such matters lay with

Commissioner Jackson (Tr. 3:178, 197); the city attorney urged in her closing argument that Jackson not Hamsher was responsible for those assignments. (Tr. 4:51-52). Second, the jury could have concluded that the transfer and HUD job assignments were legitimate, and that only the layoff itself was the result of a retaliatory motive. There was conflicting testimony as to whether responsibility for the layoff decision was in the hands of the Board of Estimate and Appeal, the Mayor, the Mayor's staff, Commissioner Killen, Director Nash, or one of the three named defendants. The jury could of course have exonerated Hamsher and the other named defendants if it believed another official had in reality made the improperly motivated layoff decision.

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Even if one assumes that the sole or critical illicitly motivated action was the transfer, the jury verdicts are still not inconsistent. Petitioner asserts that "there is no dispute but that the transfer was Hamsher's decision". (P. Br. 42). On the contrary, the trial testimony contained just such a dispute. Under questioning by counsel for respondent, Hamsher refused to take responsibility for either making or even aggressively advocating the decision to transfer Praprotnik, insisting that the real decision was the Mayor's alone.[28]

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28 "Q. Isn't it fair to say, Mr. Hamsher, that you initiated the thing, that you sort of recommended it through the mayor's office, sort of pushed to get it done?

A. I wouldn't say I pushed to get it done. I recommended it to the mayor. The mayor made a decision. And when the mayor makes a decision, all of us who work for him try to carry it out."

At another point Hamsher insisted that Director Nash had played a major role in initiating the transfer. (Tr. 3:199). In light of that testimony, the jury could rationally have concluded that the Mayor or Director Nash, rather than defendant Hamsher, were responsible for the transfer and had acted for illicit retaliatory purposes.

The substantial evidence of culpability by the Mayor and other non-defendant officials, while strengthening the case against the city, tended to undercut respondent's claim that the three named defendants were the particular officials responsible for the retaliatory dismissal. A reasonable jury might also have believed that

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Tr. 3:200. See also Tr. 2:185 (deposition of William Edwards)("the mayor had the final decision").

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respondent's dismissal was the result of a retaliatory motive on the part of one or more of the high officials involved, but have concluded that respondent simply failed to meet his burden of proving that the three particular officials named as defendants were the culpable parties.

CONCLUSION

For the above reasons the judgment of the court of appeals should be affirmed.

Respectfully submitted,

CHARLES R. OLDHAM*
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