No. 86-772

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF ST. LOUIS,
Petitioner,

vs.

JAMES H. PRAPROTNIK
Respondent.

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

PETITIONER'S REPLY BRIEF

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I.

INTRODUCTION

The filing of the briefs of plaintiff and of plaintiff's amicus (The AFL-CIO) has placed this case in a remarkable posture. Plaintiff now abandons the opinion of the Eighth Circuit: he notes that the final authority theory upon which the Eighth Circuit decided the case (Pet. App. pp. A-8 - A-11); *Praprotnik v. City of St. Louis,* 798 F.2d 1168, 1173 - 1175 (8th Cir. 1986) was injected into the case for the first time on appeal, and confesses that "[h]ad 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." Brief of Respondent, p. 57. Plaintiff thus proceeds to defend, not the Eighth

Circuit's opinion, but rather the Eighth Circuit's judgment affirming the district court's judgment against the City. In asking the Court "to consider grounds supporting his judgment that differ from those in which the Court of Appeals rested its decision", plaintiff requests the Court to use authority that it has reserved for "exceptional cases". *Heckler v. Campbell,* 461 U.S. 458, 468 n.12 (1983).

Likewise, plaintiff's amicus makes no attempt to defend the Eighth Circuit's opinion; rather, plaintiff's amicus urges the Court to repudiate its cases and hold that in a special category of cases - employment cases, and cases involving municipal licenses and contracts - municipal liability may be imposed without regard to the identity or the authority of the municipal actor or decisionmaker. Brief of AFL-CIO, pp. 7-9, 14-17. The theory is, of course, respondeat superior by another name.

Though worthy of being remarked upon, it is not surprising that the test by which the Eighth Circuit decided the case in plaintiff's favor has now been repudiated. During the course of this litigation the City of St. Louis has been a stationary object made the target of marksmen who have constantly changed their positions. Plaintiff's initial complaint, and his amended complaint (J.A. 12-19), alleged nothing relevant to the City other than that plaintiff and the individual defendants were City employees. That is, the pleadings were based upon a respondeat superior theory. Plaintiff's next theory of liability was set forth in his opening statement: "We contend that this then constituted a custom or practice on the part of the City over a period of years to eliminate people for their exercise of their rights of appeal and for whatever other reasons that existed. That then makes the City responsible." (R. 1-14). In the vocabulary of *Pembaur v. City of Cincinnati,* 475 U.S. 469, 89 L.Ed.2d 452, 106 S.Ct. 1292 (1986), plaintiff alleged that the City of St. Louis had a "fixed plan of action to be followed under similar circumstances consistently and over time," *Pembaur,* 89 L.Ed.2d at 463; or a "rule of general applicability." *Pembaur,* 89 L.Ed.2d at 475 (Powell, J., dissenting).

The next theory upon which liability was sought to be fixed upon the City was that expressed in Instruction 22, the confused verdict director (J.A. 118-119). This instruction will be discussed in more detail below; for now, it is sufficient to state merely that the basis for liability thus expressed was then, again in the vocabulary of *Pembaur,* "a course of action tailored to a particular situation," *Pembaur,* 89 L.Ed.2d at 463, namely, a decision to retaliate against a particular person - plaintiff. As stated, the Eighth Circuit imposed liability on yet another basis, that of the final authority theory. It is thus no surprise that this theory has now, in turn, been jettisoned. Plaintiff seeks to vindicate the jury's verdict on the "theory" upon which he claims the jury was instructed; and plaintiff's amicus, in sponsoring its own theory, brings the case full circle by urging respondeat superior liability.

We reply below to the contentions of both plaintiff and plaintiff's amicus. Before turning to those contentions, however, it is necessary to comment on plaintiff's statement of facts. Plaintiff offers the Court a fantastic tale in which no fewer than sixteen high level city officials conspired, over four years, to oust a midlevel bureaucrat from his employment with the City. Brief of Respondent, pp. 12-13. The Court will be aware of the inherent implausibility of this account, especially in its reliance on the notion that the officers of a new city administration would be animated by a desire to punish plaintiff for a civil service appeal he pursued against the administration that it had defeated. The Court will also note that the facts as they were rendered in the Eighth Circuit's sympathetic opinion affirming plaintiff's judgment bear only a slight resemblance to the wild story related in plaintiff's brief. What the Court may not be aware of is that plaintiff misrepresents and mistates the record in many specific instances. For example, plaintiff represents that the Director of Personnel testified that the Board of Estimate and Apportionment (comprised of the Mayor, Comptroller and President of the Board of Aldermen) made the decision to transfer plaintiff. Brief of Respondent, p. 21. In fact, the Director testified only that the Board could transfer functions of an appointing

authority or department head (R. 2-180). There was never any indication in the record that the Board was involved in personnel decisions of city agencies. Plaintiff claims "Hamsher insisted the Mayor had personally ordered the transfer," Brief of Respondent, pp. 29 & 30, when Hamsher actually testified that he initiated the transfer and that Jackson, Nash and the Mayor did no more than approve it (R. 3-199-200). Another gross misrepresentation of the record occurs on pages 27 and 28 of plaintiff's brief. Plaintiff attempts to demonstrate that Patterson and Nash both denied that they made the decision to lay plaintiff off by pointing the finger at the other. The record reveals that Patterson's only involvement in Heritage was to approve its budget and that she did not participate in personnel decisions (R.3-59, 62). There are many other examples, and it would unduly lengthen this brief to bring each to the Court's attention. We ask the Court to exercise great caution in considering plaintiff's statement of the facts.

II.

The Error is Preserved

We dispute plaintiff's contention that consideration of the issue of whether judgment was properly entered against the City of St. Louis is one confined to review of the instructions for plain error, and the sufficiency of the evidence to support the verdict returned in response to those instructions.

"[T]he failure to object to an instruction does not render the instruction the 'law of the case' for purposes of appellate review of the denial of a directed verdict or judgment notwithstanding the verdict." *City of Springfield v. Kibbe,* 480 U.S. ____, 94 L.Ed.2d 293, 301, 107 S. Ct. 1114, (1987) (O'Connor, J., dissenting); see also *Hanson v. Ford Motor Company,* 278 F.2d 586, 592-593 (8th Cir. 1960) (Blackmun, J.). Here, all of the defendants, including the City, filed a pre-trial Motion For Summary Judgment, or, in the Alternative, For Judgment on the Pleadings. Defendants argued as follows:

> "In the instant case, Plaintiff has failed to even allege the existence of any such policy. In fact, Plaintiff refers to City "policy" only in one instance in his complaint — at paragraph 29(c), wherein he claims the City's layoff policy (see Exhibit C) was *not* followed. In the absence of allegations of impermissible policy, or of facts indicative that such policy exists, the City, itself, may not be held liable."
>
> Memorandum in Support of Motion for Summary Judgment or, in the Alternative, for Judgment On the Pleadings, p. 16. (emphasis in original).

Defendants continued:

> "Thus, Defendant City of St. Louis would submit that summary judgment should be entered in its favor and against Plaintiff, as Plaintiff has failed to allege that his claimed deprivation of civil rights was the result of the execution of any official policy of the City of St. Louis." *Id.*

Without a doubt, the City was entitled to judgment on the pleadings: plaintiff's complaint failed to state a claim upon which relief could be granted because the "complaint lack[ed] an allegation regarding a required element necessary to obtain relief . . .", 2A Moore's Federal Practice ¶12.07[2.-5], namely, that plaintiff's injury was caused by a policy of the City. See *Henry v. Farmer City State Bank,* 808 F.2d 1228, 1237 (7th Cir. 1986) (complaint failing to allege the act was taken in furtherance of municipal policy properly dismissed). Thus, the view we urge now - that the judgment against the City was improper because there is no evidence of a city policy causing injury - was raised at the early stage of an attack upon plaintiff's pleading, and it is an issue before the Court completely apart from the error in the instruction.

Secondly, the City preserved the issue of whether there was evidence that a city policy had illicitly injured plaintiff by its Rule 50(a) motion for directed verdict at the close of plaintiff's case (R. 3-28); which motion was renewed at the close of all the

evidence (R. 4-21-22); and which formed the foundation for the City's Rule 50(b) j.n.o.v. motion.

"The directed verdict is normally used in two overlapping categories of cases. First, where there is a complete absence of pleading or proof of an issue or issues material to the cause of action or defense. This is the situation that historically gave rise to the device of the directed verdict. Second, where there are no controverted issues of fact upon which reasonable men could differ." 5A Moore's Federal Practice ¶50.02[1]. "The motion for a directed verdict tests the legal sufficiency of the evidence to take the case to the jury; and thus raises a question of law." *Id.* at 50.03[2]. "The standards for granting a motion for judgment n.o.v., on which the constitutionally of such action depends, are the same as those governing the direction of a verdict." *Id.* at 50.07[2].

In the City's motions for directed verdict, and in its motion for judgment notwithstanding the verdict, the City contended, as it does now, that there was a complete absence of pleading and a complete absence of proof on an issue material to plaintiff's cause of action: that plaintiff had suffered a constitutional injury resulting from a decision made by a policymaker of the City of St. Louis acting within the scope of his policymaking authority. The question of law we raise here was thus raised in the district court by the appropriate techniques.

Thirdly, the City did complain of the instructions in a substantial and meaningful way. As plaintiff contends, Instructions 15 and 17 were offered by the City. However, those instructions were offered as part of a package that included Instruction No. A (J.A. 127) that would have required, as a prerequisite for the imposition of liability upon the city, a showing that "the alleged illegal conduct is both systematic and municipally supported." If Instruction A had been given to the jury along with Instruction 15, the vague formula in Instruction 15 allowing a verdict against the City for the acts of "high" officials would have been given the necessary definition: an of-

ficial would have been "high enough in the government so that his or her actions can be said to represent a government decision" (Instruction 15) only when that person occupied a position high enough so that the official's conduct could be "systematic" (Instruction A); that is, an official is high enough only when he has the authority to make rules of general application. Though the articulation in the proposed instruction is somewhat different from the articulation in our brief in this Court, the position is essentially the same. These proposed instructions would certainly have required a finding for the City because there was no evidence that the City had a "systematic" policy of retaliation, or that Hamsher was an official high enough to make city-wide policy.

The policy issue is preserved, independent of whether the instructions are plain error.

III.

The Instructions Were Plain Error

Plaintiff spends the principal portion of his argument, Brief of Respondent, pp. 47-80, contending that the jury instructions were proper and that the verdict returned in response to them should be sustained. How ironic, then, is plaintiff's amicus' observation that "the jurors would have to have been logicians to comprehend the pertinent instructions as a whole (or, more precisely, to comprehend that the instructions were impenetrable)"! Brief of Respondent's Amicus, p. 26. Because plaintiff's amicus is right and plaintiff is wrong, the verdict cannot stand.

Plaintiff's attempt to vindicate the instructions is very carefully circumscribed. Plaintiff's defense is limited to Instructions 15 and 17, which have never been criticized by defendant, despite plaintiff's representation. The crucial instruction was Instruction 22, the verdict director on plaintiff's First Amendment claim, and that is the instruction we criticized in

our opening brief.[1] See Brief of Petitioner, p. 33 n.12. That instruction commanded the jurors to return a verdict for the plaintiff if they found certain facts; and the instruction commanded the jurors to return a verdict in favor of the defendants if they found other facts. That critical instruction was illogical, it was inconsistent, it delegated to the jury the right to decide questions of law, and it omitted essential elements of a §1983 claim against municipalities. We will not repeat the discussion of the various deficiencies in Instruction 22 contained in our principal brief. Brief of Petitioner, pp. 32-33 n.12. Plaintiff makes no effort to respond to our argument, but instead seeks only to vindicate the "correctness" of that portion of Instruction No. 15 which states in the abstract that "a municipality may be held liable under 42 U.S.C. §1983 if the alleged 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," (J.A. 113) repeated concretely in element 3 of the verdict director (Instruction 22) as "that defendants Hamsher, Patterson and Kindleberger are high government officials of the City of St. Louis with the right to make policy decisions and to speak for the defendant City of St. Louis." (J.A. 118). Thus, even if plaintiff's defense of Instruction 15 and, by implication, element 3 of Instruction 22 is successful, the undefended deficiencies remain.

However, neither instruction No. 15 nor instruction No. 22 is remotely adequate. It is undoubtedly true that municipalities *may* be held liable if the unconstitutional act is committed by an

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[1] The importance of verdict-directing instructions, and the necessity that such instructions be complete, is noted at 88 C.J.S. Trial §351. See also *Cabana v. Bullock*, 474 U.S. 376, 88 L.Ed.2d 704, 715 n.2, 106 S.Ct. 689. (1986), where the Court held that it is to be presumed that the jury heeds that instruction which is "more comprehensive and more specifically tied to the facts presented to the jury." Here, Instruction 22 was the comprehensive instruction which specifically tied the facts presented to the abstraction set forth in Instruction 15.

official high enough in the government so that his action may be fairly said to represent a governmental decision. It is no doubt true the city *may* be held liable for decisions of those with the right to speak for the city, for a city may be held liable "where action is directed by those who establish government policy . . ." *Pembaur,* 89 L.Ed.2d at 464. But who has the right to establish government policy and when does he do so? The sharp division of opinion on this Court demonstrates just how difficult it is to answer these questions. Since "whether an official has final policymaking authority is a question of state law"; *Pembaur,* 89 L.Ed.2d at 465, the court must instruct the jury as to whom the policymakers are. And certainly, then, another panel of the Eighth Circuit, in another §1983 case, correctly ruled that an instruction providing a definition of "official policy" is necessary for "policy" is a term not readily understandable by jurors. *Westborough Mall, Inc. v. City of Cape Girardeau,* 794 F.2d 330, 337-339 (8th Cir. 1986). The reason why it is necessary becomes apparent when we recall the function instructions play in our system of justice. "It is the duty of a court in its relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of the trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in these issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law." *Pleasants v. Fant,* 89 U.S. 116, 121-122 (1875). Proper jury instructions give no latitude for the jury to interpret the law, and instructions which allow a jury to make an unguided determination on an issue that determines liability are erroneous. *Monitor Patriot Co. v. Ray,* 401 U.S. 265, 277 (1971).

In the case at bar, the jury was not provided with rules of law which they could apply in considering whether a city policy inflicted a constitutional injury upon plaintiff, the instructions

were not clear, it cannot be supposed that the jury followed such rules, and the result is that the verdict makes little sense. Rather, the jurors exercised the roving commission which they had been given to make an unguided determination as to whether an official who was "high enough" was sufficiently engaged so as to make it "fair" that the City be held liable. But, while everybody agrees that cities should be held liable only when it is fair to do so, there are many different views of what is fair in this context. By not instructing the jury as to what the law considers fair, the trial judge failed to protect the parties from jurors left to grope in the dark for principles of law they were not equipped to find.

As we have urged, the district court's errors in not granting the City's motions for directed verdict and for judgment notwithstanding the verdict require reversal for the evidence did not meet the standard the law requires for imposing liability upon a city. However, even if plaintiff is correct and the instructions are the "law of the case," the judgment must be reversed. Had the court's error in giving Instruction 22 been less egregious, there might be an important issue as to whether the Court's review should be confined to a "plain error" standard, or whether a less fettered review would be in order. See *Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 255-258 (1981). If so, we would urge that unrestricted review is appropriate because of the current "state of evolving definition and uncertainty" *id.;* because the "question is also important and likely to recur in § 1983 litigation" *id;* and because of the rejected instructions that we proffered. But it does not really matter here, for instructions which are "impenetrable", as we argue, and plaintiff's amicus admits, surely meet the plain error standard that reaches "obvious instances of injustice or misapplied law." *Id.* See also *Pipefitters v. United States,* 407 U.S. 385 (1972) (judgment reversed on basis that instructions omitting essential element constituted plain error).

IV.

The Ultimate Authority Theory Is Not Inconsistent With Monell

We reply briefly to the principal arguments put forward by plaintiff and by plaintiff's amicus against the ultimate authority theory that we urged in our principal brief is the correct analysis by which issues of municipal liability are considered.

a. Plaintiff contends that the ultimate authority doctrine is inconsistent with *Monell* and with *Pembaur*. Brief of Respondent, pp. 59-62. It is not. It may very well be that the unconstitutional rule in *Monell* was not a rule promulgated by an ultimate authority. However, the defendant in *Monell* admitted that it had a city-wide policy of compulsory maternity leave, *Monell v. Dept. of Social Services*, 436 U.S. 658, 661 n.2 (1978); in any case, there is little doubt that the rule, even if not promulgated by an ultimate authority, was an open and notorious one known to the ultimate authority. As we explained in our main brief, the ultimate policymaker's "tolerance of the custom is his [the ultimate authority's] policy, and his policy is the county's policy for which it might properly be held liable". Brief for the Petitioner, p. 27. This is also the response to plaintiff's complaint that "none of the policies, rules and regulations adopted by city agencies would, on petitioner's view, constitute official policies," Brief of Respondent, p. 63. Even though not always directly promulgated by ultimate authorities, such formal policies would, almost by definition, be sufficiently notorious that the ultimate authority's tolerance of the rules would be city policy.

Likewise, *Pembaur* is completely consistent with the position we advocate. The prosecutor in *Pembaur* was an ultimate authority, not because he had the authority to discipline sheriff's deputies who did not follow his instructions, but because the Court, showing "great deference to the interpretation of state law by the courts of appeals," *Pembaur* 89

L.Ed.2d at 466 n.13, believed that the prosecutor had the authority to "instruct" and "command" the deputies under the pertinent Ohio statute. *Pembaur,* 89 L.Ed.2d at 466.

b. Plaintiff conjures up a scheme whereby ultimate authorities will delegate all of their authority in a deliberate scheme to protect their cities from §1983 exposure. Brief of Respondent, pp. 62-63. Certainly, city officials may wish to limit their governments' exposure to §1983 liability, but they have many other competing considerations in conducting local government which are more compelling. The likelihood that officials would abdicate their power to make decisions solely with a view to minimizing their cities' exposure to §1983 liability is as likely as states abolishing local units of government in favor of governing directly so as to make maximum use of the Eleventh Amendment bar. The argument betrays a complete lack of realism.

c. Plaintiff claims that "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," Brief of Respondent, p.69, and argues that the existence of such a rule should not immunize a city. *Id.* pp. 69-80. Plaintiff's amicus makes a similar criticism. Brief of AFL-CIO, pp. 21-23. These arguments misconceive our point: We do not contend that the mere adoption of a written rule prohibiting the constitutional violation at issue immunizes the city; rather, we contend that the adoption of a *policy* forbidding the constitutional violation at issue immunizes the city. The distinction, of course, is that the City's policy (decisions made by ultimate authority) may vary from the written rule, which might be nothing more than a subterfuge or a dead letter. We agree with plaintiff's argument that the formal or explicit rule is nothing more than evidence of the policy, which the fact-finder may or may not find persuasive, and which the fact-finder may or may not find outweighed by other evidence tending to show that the policy of the city policymakers actually was something different.

However, in the present context, there was no evidence (contrary to plaintiff's prediction, R. 1-14), other than the single case involving plaintiff, that tended to show that the City's formal policy[2] of non-retaliation was belied by an actual practice to the contrary. And we know from *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) that a reasonable inference cannot be drawn from this single incident that the city had a rule of general application favoring retaliation based on plaintiff's case alone.

If a city's rule forbidding the constitutional violation at issue does, in fact, establish or reflect the city's policy regarding such violations, the city is not liable because its policy has not caused the violation. If the city's rule forbidding the constitutional violation issue does not, in fact, establish or reflect the city's policy, the city may be held liable if the city's true policy is the moving force causing the constitutional injury.

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[2] Plaintiff's amicus claims to doubt that the City's charter forbids supervisors to retaliate against employees for filing appeals to the Civil Service Commission. Brief, AFL-CIO, p. 22-23. In *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) the Court held that the government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests, for to do so "would allow the government to produce a result which [it] could not command directly." This common sense cannon of construction is equally applicable here: If the City of St. Louis could punish an employee for filing a civil service appeal, it would be allowed to produce a result which it could not command directly, *viz.*, prevention of employees from filing appeals with the Civil Service Commission. Plaintiff's amicus also doubts that it is self-evident that an employee's criticism of his superiors could be deemed to bear on his merit and fitness, citing *Pickering v. Board of Education*, 391 U.S. 563, 570 n.3 (1968). Brief of AFI-CIO, p. 22. Indeed, it is not self-evident. The point we make, however, is that it is self-evident that making use of a civil service appeals process cannot be deemed to bear on the employee's fitness and merit within the scope of a charter that provides for a civil service appeal system, something not hypothesized in the *Pickering* footnote. This point is affirmed by the testimony of the City's Director of Personnel, the chief administrator of the City's civil service system (J.A. 64-68), that retaliatory personnel decisions are improper (R.3-117).

V.

There Is No Evidence That A City Policymaker Caused An Injury To Plaintiff's Constitutional Rights

In Part III of his argument plaintiff contends that the evidence was sufficient to support the verdict. As we have argued, the instructions failed to sufficiently define the key element of the City's liability. That deficiency makes it difficult to fruitfully discuss the sufficiency of the evidence to support the verdict required by the instructions as is demonstrated by plaintiff's limiting his discussion of the relevant evidence, which he contends is the central issue on appeal, to 7 pages (Brief of Respondent, pp. 96-103) of a 109-page brief. In any case, plaintiff entirely misrepresents the evidence as to the function that the Civil Service Commission plays in the City of St. Louis, something that the use of ellipses allows him. Article XVIII, §7(d) of the Charter, upon which plaintiff places such reliance (Brief of Respondent, p. 99), provides in full as follows:

> (h) **Limitations.** *Except as provided in this section,* the commision shall have no administrative powers or duties. *Except as so provided,* it shall have no power to direct or control any employee of the department of personnel or other employee of the city, or the action to be taken by any of them in any matter or case. Neither the commission nor any of its members shall have power to take any action except by majority vote in meeting asembled. (J.A. 64)

We have italicized the critical portions plaintiff deleted because the exceptions are so important. In particular, section seven provides that "[t]he commission shall have the power, and it shall be its duty: to prescribe, and to amend from time to time as such action is deemed to be desirable, rules for the administration and enforcement of the provisions of this article and of any ordinance adopted in pursuance thereof, and not inconsistent therewith;" (J.A. 62)

The scope that these rules must encompass are set forth in subsections (a) through (w) of Section 3, and is broad indeed (J.A. 50-57). And the evidence is that the Commission has promulgated the requisite rules for the administration of the system (Defendant's Exhibit BBBB-4; R. 3-77). And, contrary to the contention of plaintiff's amicus, Brief of AFL-CIO, pp. 18-20, and of plaintiff, Brief of Respondent, p. 99-100, the rules so adopted establish substantive policies. Among other things, the rules define actions that may be the basis for discipline (Defendant's Exhibit BBBB-4; pp. 39-40; R. 3-77), forbid discrimination in employment (id. p. 57), forbid retaliation for complaints of discrimination (id.), and forbid sexual harassment (id.). Employment decisions, including transfers, that violate these substantive rules are unlawful. See *Bates v. City of St. Louis,* 728 S.W.2d 232, 235 (Mo. App. 1987) (transfer in violation of civil service rule set aside). The Commission does make employment policy; certain employment policies are also made jointly by the Commission, the Board of Aldermen and the Mayor (J.A. 62-63); but no employment policies are made by the director of the community development agency. The Missouri Supreme Court has accurately described the duties of the Civil Service Commission as "mainly quasi-legislative or judicial." *Kirby v. Nolte,* 164 S.W.2d 1, 9 (Mo. banc 1942). As a quasi-legislative body the Commission establishes the rules; as a quasi-judicial body the Commission determines whether the rules have been violated.

The proper understanding of the role of the Civil Service Commission exposes the defect in the efforts of plaintiff's amicus (Brief of AFL-CIO, pp. 20-21) to deal with discussion in part II-B of Justice Brennan's opinion in *Pembaur* where Justice Brennan distinguishes between granting an employee discretion in the exercise of a function, and the delegating to that employee the power to establish policy. An employee exercises discretion when he makes decisions; an employee makes a policy when he establishes criteria by which decisions are made. That is, an employee is delegated final authority to establish

municipal policy only when he is given the authority to establish rules of general application. Nobody gave Frank Hamsher, or any other defendant, the authority to establish the criteria according to which city employment decisions are to be made. In particular, nobody told Frank Hamsher that he could establish city policy on retaliation or on transfers. The criteria for making personnel decisions are set forth, in the first instance, in the City Charter; and they are set forth, within the scope of the Charter, in the rules of the Civil Service Commission.

There was no evidence that Frank Hamsher, or any other city official who plaintiff claimed participated in either the transfer or the layoff decision, and who was impermissibly motivated, was delegated the power to make final employment policy on behalf of the City of St. Louis.

VI.

The Verdicts Are Inconsistent

In the second point presented we contended that the verdicts exonerating the individual defendants are inconsistent with the verdict against the City of St. Louis, just as the verdict exonerating the individual defendant in *City of Los Angeles v. Heller,* 475 U.S. ____, 89 L.Ed.2d 806, 106 S.Ct. 1571 (1986) precluded a verdict against the City of Los Angeles. We argued that the Eighth Circuit's technique for evading *Heller* — making an inference that the jury's verdict exonerating Frank Hamsher, whom the court believed to have been the policymaker, reflected a jury finding that Hamsher did not directly cause plaintiff's injury[3] — was error because the principles of proximate causation applicable to individual defendants are not different

[3] The Eighth Circuit relegated the issue to a footnote where it explained that "[t]he failure of the jury to find the individual named defendants responsible for Praprotnik's damages can be justified by the fact that the named defendants were not the supervisors directly causing the layoff, when the actual damages arose." *Praprotnik,* 798 F.2d at 1173, n.3.

from those applicable to municipal corporations. Just as he did in response to the first issue raised, plaintiff makes no effort to defend the opinion of the Eighth Circuit in his advocacy of the consistency of the verdicts. What is new, however, is that the plaintiff abandons not only the Eighth Circuit, but also the Seventh Amendment, and the instructions.

Plaintiff argued in connection with the first issue presented that "[a]ny appellate attempt to make . . . a *de novo* determination regarding municipal liability would ordinarily run afoul of the Seventh Amendment." Brief of Respondent p. 42. Thus, "the court is not free to substitute its own evaluation of the evidence for that of the jury." *Id.* p. 47. Now, however, the verdicts are not deemed to be a response to the district court's instructions, but rather a response to the closing arguments! *Id.* p. 104. Based on the evidence and the closing arguments, plaintiff speculates that the verdict against the City may have been predicated on either of two theories: (1) "that the unconstitutionally motivated act was assigning Praprotnik such menial tasks that a layoff was inevitable," *Id.* p. 105; or (2) that "[t]he jury could have of course exonerated Hamsher and the other named defendants if it believed another official had in reality made the improperly motivated layoff." *Id.* at 106.

Plaintiff's argument is wrong, first of all, because it ignores the fundamental principle that "it is the duty of the jury to follow the law, as laid down by the court." *Herron v. Southern Pacific Company,* 283 U.S. 91, 95 (1931) *citing* Justice Story in *United States v. Balliste,* 2 Summ. 240, 243, Fed. Cas. No. 14545. "It is a basic premise of our jury system that the court states the law to the jury and that the jury applies the law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense." *Paoli v. United States,* 352 U.S. 232, 242 (1957). As this Court does not speculate that the jury does not follow the

instructions of the court, *Graham v. United States,* 231 U.S. 474, 481 (1913), neither can the plaintiff here speculate that the jury did not do its duty in order to vindicate the verdicts.

The jury was not told that it could return a verdict against the city based upon the assignment to plaintiff of menial duties; rather, the jury was instructed that liability was to be based upon the "decision to transfer and lay plaintiff off" (J.A. 118). Nor was the jury told that the City could be held liable if officials other than the defendants "made" the layoff; rather, the jury was told that the City could be held liable if "defendants Hamsher, Patterson and Kindleberger are high government officials of the City of St. Louis with the right to make policy decisions and to speak for the defendant City of St. Louis" (Id.) If the jury returned its verdict against the City based either upon Jackson's assignment of menial duties to plaintiff, or upon a layoff decision made by persons other than Hamsher, Patterson, and Kindleberger, the jury did not follow the instructions, and the judgment must be reversed.

Secondly, even if the jury's verdict could be sustained on the theory that the verdict was responsive to plaintiff's closing argument rather than to the court's instructions, plaintiff's argument fails because it is predicated on a characterization of his case in general, and his closing argument in particular, that is false. Plaintiff states that he argued that the City could be held liable even if the individual defendants were not believed to be guilty of misconduct. Once again, plaintiff relies upon a none too scrupulous use of ellipses. The complete passage from which plaintiff quotes is as follows:

> But she [counsel for defendants] said we didn't sue enough people. Well maybe we didn't, but *I think we got the ones that are primarily responsible. I'm talking about Mr. Hamsher and Mr. Kindleberger. They're sitting over there. And I think we got the right ones. And* 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. *If Mr. Hamsher and Mr. Kindleberger did it, the City is responsible, if they did it, the City is responsible, if they did it pursuant to a policy, custom or usage.*
>
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The portions of plaintiff's closing argument that he replaced by ellipses, or otherwise excised from the passage as he quoted it in his brief, are italicized. The restoration of the missing portions make it clear that plaintiff's theory of the case, as espoused in his closing argument, was fully consistent with the instructions given the jury — liability was to be imposed upon the city for a decision made by three persons: Hamsher, Patterson, and Kindleberger.

b. The jury's verdicts are inconsistent. The jury was instructed that its "verdict must be for the plaintiff James Praprotnik and against the defendants" if it found that each of six propositions were true (J.A. 118). If we believe that the jury followed that instruction, the verdict in favor of plaintiff and against defendant City of St. Louis necessarily means that the jury believed each of the six propositions was true. Yet if we believe that the jury followed that instruction, the verdicts against plaintiff and in favor of each of the individual defendants necessarily mean that the jury believed that at least one of the six propositions was not true. Similarly, the jury was instructed that their "verdict must be for the defendants and against the plaintiff" if the jury believed that each of three other propositions was true (J.A. 119). Thus, the verdicts in favor of the individuals necessarily means that the jury believed that all three of these propositions were true; and the verdict against the City necessarily mean that the jury believed that at least one of the three propositions was not true.

c. The verdicts, then, are inconsistent. The only question that remains is the remedy. Normally inconsistent verdicts require

resubmission of the verdicts to the jury or a new trial. Plaintiff's amicus asserts that a new trial is required here, arguing that *Heller* does not control for the trial in the case at bar was not bifurcated as in *Heller*. Brief of AFL-CIO, p. 26. To the contrary: plaintiff's decision not to appeal the judgments exonerating the individual defendants has allowed those judgments to become final, and there can be no retrial of plaintiff's case against them. Therefore, the posture is analogous to that in *Heller*, except that here it is the persons whom plaintiff nominated as the policymakers (Hamsher, Patterson, and Kindleberger) who have been exonerated, while in *Heller* it was the actor who was exonerated. In both cases, a final judgment exonerating the individuals upon whom the liability of the city depends was entered before the issue of the liability of the city was finally considered. In both cases, the rule that "if the defendant's responsibility is necessarily dependent upon the culpability of another, who was the immediate actor, and who, in an action against him by the same plaintiff for the same act, has been adjudged not culpable, the defendant may have the benefit of that judgment as an estoppel..." is dispositive. See *Portland Gold Mining Co. v. Stratton's Independence*, 158 F.63, 68-69 (8th Cir. 1907) (Van Devanter, J.), cited with approval in *Bigelow v. Old Dominion Copper Mining & Smelting Company*, 225 U.S. 111, 127-128 (1912); and *Buckeye Powder Co. v. Dupont DeNemours Powder Co.*, 248 U.S. 55, 62 (1918).[4] Since the liability of the city necessarily depends upon the culpability of its policymakers, and since the policymakers have been exonerated by final judgments in their favor, that judgment bars plaintiff from litigating his claim against the City in a new trial.

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[4] See also *New Orleans & Northeastern R.R. Co. v. Jopes*, 142 U.S. 18, 24, 27 (1891); *Carroll v. Hubay*, 272 F.2d 767, 769 (2nd Cir. 1959) (Hand, L., J.); and *Jordan v. Medley*, 711 F.2d 211, 217 (D.C. Cir. 1983) (Scalia, J.).

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