Gunny - flag
& put on Lent.
If not Granted, I'll write.

Grant limited to Q2

See Ronald's memo

CA8 held the city liable in a §1983 suit where the jury found all individual Δs — a curious if not inconsistent verdict. But counsel failed to object to instructions.

Q2 is cert. worthy because CA8 ignored the "policy or practice" requirement of Monell

PRELIMINARY MEMORANDUM

January 9, 1987 Conference
List 5, Sheet 2

No. 86-772-CFX

CITY OF ST. LOUIS (former employer) — Cert to CA8 (Lay, Bright, Ross [diss.])

v.

PRAPROTNIK (§1983 plaintiff) — Federal/Civil — Timely

1. SUMMARY: Petr, a municipality, contends that the courts below erred in holding that it could be held liable in a §1983 action despite the fact that the officials who were individual defendants in the action were exonerated. Petr also contends that the CA8's view of municipal liability is inconsistent with the

Grant on qu. 2 (see memo) Ronald

decision in Pembaur v. Cincinnati, 106 S. Ct. 1292 (1986).

2. FACTS AND DECISION BELOW: Resp was an employee of the City of St. Louis, commencing in 1968 until he was laid off on December 30, 1983. In 1980, resp held a management position in the City's Community Development Agency (CDA) as an architect when he became embroiled in a dispute with his supervisors. Kindleberger, resp's immediate supervisor, suspended resp for a couple weeks. Resp, however, sought review by the City Civil Service Commission ("the Commission") which determined that the suspension was unreasonable and excessive and resp was reinstated with back pay.

Although Kindleberger had recommended resp for a significant grade increase just prior to the dispute and suspension, after the dispute Kindleberger rated resp lower and recommended a significant decrease in grade. In response to resp's inquiry as to the reasons for the salary decrease, Kindleberger explained that Donald Spaid, Kindleberger's supervisor and department director, was "down on" resp and thought he had not been fully honest during the Commission review proceedings. Resp again appealed and Kindleberger's recommendation was overturned and resp was awarded a grade increase. A year later, in October, 1981 resp again received ratings lower than he had ever received prior to his appeal of his suspension. Resp again appealed and his rating was raised.

In the spring of 1982, major staff and budget reductions were made in resp's agency. Frank Hamsher, the new director of CDA, made arrangements with Henry Jackson, the director of the City's Heritage and Urban Design Commission (H&UD), and Jackson's super-

visor, Thomas Nash, to create a position in H&UD at a grade equivalent to resp's and to transfer resp there. They consolidated a H&UD position of far lesser responsibility with some of resp's duties and informed resp of the transfer. Resp attempted to appeal the transfer, but the Commission declined to hear the appeal on the ground that resp lost nothing by the transfer. Resp did, however, forfeit his seniority for lay-off purposes due to the transfer because he was the only employee in his job classification at H&UD.

Resp was relieved of his architectural duties in his new position, was assigned clerical tasks, and was given low ratings in his review with recommendations by Jackson that resp's position be reclassified and his salary decreased. On appeal, the Commission once again raised resp's ratings and reversed the recommended pay reduction.

Meanwhile, resp's position had been reclassified to a lower grade and plans were being made to lay off resp. On December 23, 1980, resp received notice he would be laid off on December 30, which meant he lost his income, accumulated sick leave, pension and vacation benefits, and medical insurance. Resp had just been released the day before from the hospital following surgery. The reason given at the time for the lay-off was lack of funds. Resp appealed his lay-off but the Commission stayed the proceeding pending a decision in this court action.

Following a trial, the DC (ED Mo. Hungate, J.) entered judgment in accordance with two forms of special verdicts returned by the jury. Petr, City of St. Louis, was held liable to resp for

$15,000 on resp's claim that the transfer and lay-off were taken in retaliation for his exercise of his right to appeal his suspension, thereby penalizing him for activity protected under the First Amendment. Petr was also held liable to resp for another $15,000 on resp's claim that his lay-off violated due process because it was not justified by a reason stated in the city charter. The jury exonerated the three individual defendants sued by resp--his supervisors in CDA at the time of the transfer, Hamsher and Kindleberger, and the CDA director at the time of his lay-off, Deborah Patterson.

CA8 affirmed the DC judgment awarding $15,000 for violation of petr's First Amendment rights, but reversed and vacated the portion of the judgment awarding petr damages for a due process violation. Two of the CA8's rulings are challenged by petr. First, as a preliminary matter, CA8 concluded that the Court's decision in City of Los Angeles v. Heller, 106 S. Ct. 1571 (1986) did not preclude resp's recovery even though the jury had found the individual defendants not liable. In Heller, the Court affirmed the DC dismissal of a municipality as a defendant because the jury had concluded that the city's officer who had made an allegedly unlawful arrest had inflicted no constitutional harm. The city's liability was solely derivative of the conduct of the named individual defendant who was exonerated. In the instant case, however, persons other than the named defendants, such as Nash and Killen, effected city policy in laying off resp and thereby brought to fruition resp's ultimate injury. The named individual defendants were not involved in the actual lay-off

decision and an erroneous jury instruction which went unchallenged stated that liability could attach only if the individuals were personally involved in the lay off. Therefore, it is easy to understand the jury verdicts in favor of the individual defendants but against the city. Furthermore, in closing argument, resp's lawyer argued that Nash and Killen made the lay-off decision, that they were high government officials, and that the city was still responsible if high officials other than the named defendants were responsible.

Second, CA8 addressed the question of the validity of the jury's implicit finding that resp's injury was brought about by an unconstitutional city policy thereby allowing an action against the city under Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658, 691 (1978). CA8 applied the two-prong analysis from Williams v. Butler, 746 F.2d 431 (CA8 1984), which it noted was an approach viewed with approval in Pembaur v. City of Cincinnati, 106 S. Ct. 1291 (1986). The two relevant inquiries are: (1) whether the government official making the decision is delegated the authority, either directly or indirectly, according to a policy or custom established by a governing body, to act on behalf of the governing body; and (2) whether a decision made within the scope of that official's authority "ends the matter." If these two requirements are met, the official's acts constitute those of the local governing body.

The requirements are met in the instant case. The jury could reasonably have found that resp's supervisors were delegated the authority to act on behalf of the city in effecting resp's trans-

fer and lay-off because under the city charter and civil service rules, "appointing authorities" such as resp's supervisors, initiate lateral transfers and lay-offs. The requisite approval by the city's personnel director is conditioned only on formal compliance with the rules. The director does not assess the substantive propriety of the transfer or lay-off.

There was also adequate evidence to support the second prong of the Williams test because it can fairly be said that the final authority for the transfer and lay-off rests with the initiating supervisor. The transfer decision here was controlled by resp's supervisors and not by the Commission which refused to hear the appeal on the ground that resp lost nothing in the transfer. Although the lay-off decision could be appealed, the existence of an appellate process does not automatically divest a decisionmaker of final authority for purposes of attributing municipal liability. See Bowen v. Watkins, 669 F.2d 979, 989-990 (CA5 1982) (if appellate body "defers in substantial part to the judgment of the original decision-maker, the original decision may be viewed as the government's policy"). The Commission decides lay-off appeals solely on the basis of written submissions and appears to defer in substantial part to the judgment of the original decisionmaker. Therefore, the jury could reasonably have found sufficient evidence to subject the city to liability for the supervisors' acts.[1]

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[1]CA8 also sets forth its analysis and holdings as to the merits of the First Amendment and Due Process arguments, the damage awards, the jury instructions, and the attorney fees, none of which are challenged in the cert petition.

Judge Ross dissented. He concluded that the evidence was insufficient to support a finding of municipal liability. Under Pembaur, not every decision by municipal officers subjects the municipality to §1983 liability. "The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable." 106 S. Ct., at 1300. The employment example set forth in footnote 12 of Pembaur applies here. The city's civil service rules do not grant appointing authorities the power to set city personnel policy. That policy remains with the mayor, the aldermen, and the Commission. Therefore, decisions by appointing authorities cannot constitute a basis for city liability. Pembaur, 106 S. Ct., at 1299-1300 & n. 12. Also, appointing authorities do not have final authority to make employment decisions because the Commission is available to review their decisions. The Commission does not appear to rubberstamp decisions because it gave resp relief in five earlier appeals. Judge Ross also found that the evidence was insufficient as a matter of law to support a finding that resp's First Amendment rights had been violated.

3. CONTENTIONS: Petr contends that the CA8 decision below conflicts with this Court's decision in Heller, supra. In Heller, the Court held that the DC properly dismissed a §1983 action against a municipality because none of the Court's "cases authorize the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm." Heller, supra. The CA's basis for distinguishing Heller fails because

if the decision of Nash and Killen, or Jackson's decision to perform resp's duties, was a superseding cause such that Hamsher is not liable for the damages his decisions remotely caused, the City likewise cannot be held liable for injuries caused by the policy that the CA believed Hamsher's decision constituted. The City cannot be held to have caused an unconstitutional injury where the City employee who allegedly formulated and implemented the unconstitutional policy is exonerated. The CA8 decision is inconsistent with the opinion in Oklahoma City v. Tuttle, 471 U.S. 808 (1985), to the extent that Tuttle held that the same principles of proximate causation that are applicable to natural persons are equally applicable to municipal corporations in §1983 cases. Petr asserts that summary reversal is appropriate in this case because the inconsistencies are so blatant.

Petr contends that the CA8 erred in its analysis of the "official policy" issue as well. The CA8 and several other Courts of Appeals have held that in situations where an employee makes a decision that is not subject to review by other municipal officials, the local government is liable on the theory that such acts might be fairly said to represent official policy. Other Circuits have refused to hold a city liable in such a situation, even where the official was the final authority on the decision, if the local government had not appointed the official to act in its stead. See, e.g., Bennett v. Slidell, 728 F.2d 762 (CA5 1984)(en banc). The Court should grant cert to maintain conformity between this Court and the inferior federal courts on this issue.

The CA8 reasoning is inconsistent with the Court's holding in

Pembaur, supra, and with both of the views of "municipal policy" set forth by members of the Court. Under the view expressed in Part II-B of Justice Brennan's opinion, an individual employment decision constitutes government policy only where the government has "delegated its power to establish final employment policy" to the decision maker. The Williams test applied by the CA8 in the instant case is similar but provides that the official's decision can "end the matter" and constitute municipal policy when the City fails to provide an appellate process in which the appellate body does not defer in substantial part to the official's decision. The CA8 is incorrect because that situation does not constitute a delegation of authority to establish government policy in the area. Neither the City's Board of Alderman nor its Civil Service Commission had made a decision that all employees who filed appeals of employment actions should be disciplined, nor did they decide that petr alone should be disciplined for appealing, nor did they decide that Hamsher should establish the City's policy regarding whether employees would suffer retaliation for filing Civil Service appeals.

Under Justice Powell's dissent in Pembaur, which might be said to represent a view of the majority of the members of the Court, a municipal policy is identified as rules of general applicability established by official action, or decisions of specific application adopted as a result of a formal process. Here there was no evidence of a rule of general applicability of sanctions for appealing employment decisions, and the City did not transfer resp as a result of a formal decisionmaking process. Under the

CA8 reasoning, the overwhelming majority of decisions made by city employees would constitute city policy.

Resp contends that the CA8 decision does not conflict with Heller because in Heller the jury was not instructed on affirmative defenses, including good faith, whereas in the instant case the jury was so instructed and could have based its exoneration of the individual defendants on that ground. Also, the Heller jury returned a verdict in favor of the individual defendants who represented all of the persons alleged to have committed the constitutional violation. In the instant case, the jury was not presented with each of the individuals alleged to have participated in the systematic deprivation of resp's constitutional rights.

Resp contends that the CA8 holding as to the "official policy" issue is also correct. The refinement of Monell's definition of §1983 liability set forth in the Pembaur decision supports the CA8 reasoning below. The Pembaur Court explained:

> "If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of §1983." 106 S. Ct., at 1299.

4. DISCUSSION: (1) Petr's assertion that the CA8 decision directly conflicts with the Heller holding is inaccurate. The CA8 correctly concluded that the instant case differs from the Heller case in relevant respects. In Heller, the jury verdict necessarily indicated that the jury had concluded that the plaintiff had not suffered a constitutional violation because the jury exonerat-

ed all the government officials allegedly involved in the constitutional violation and because the jury was not instructed on affirmative defenses such as good faith which could have supported a finding of no individual liability despite the commission of a constitutional violation. In the instant case, the jury apparently was instructed on an affirmative good faith defense. Furthermore, the jury verdicts in favor of the individual defendants could have been based on the jury's acceptance of resp's argument that the City was liable based on the actions of the uncharged officials, Nash and Killen, rather than the actions of the named defendants. Therefore, the record does not support petr's contention that the verdicts demonstrate that it was held to a different standard of liability under §1983 than were the individual defendants.

(2) Petr's second argument is more substantial. Petr identifies the Court's recent decision in Pembaur as the controlling authority. The two-prong Williams inquiry applied by the CA8 below is not necessarily inconsistent with Pembaur on its face. It requires that in order for an official's decision to be treated as municipal policy for which the city can be held liable, the authority to make the policy must be delegated to the official and that official's decision must constitute the final decision on the policy. In my opinion, however, the CA8 majority's application of the standard to the facts of this case suggests that its interpretation of what constitutes a delegation of authority and what constitutes final authority on a policy conflicts with the views set forth by the Court in Pembaur. Judge Ross' analysis in dis-

sent below appears consistent with Pembaur. The history of this case suggests that petr's Civil Service Commission does not defer to the decisions of the appointing authorities such as resp's supervisors because the Commission had already reversed decisions by such authorities concerning resp on at least four occasions. Even in the lay-off situation, the Commission appears to retain the ultimate policymaking authority although it found in this case that the transfer had not harmed resp at the time of the appeal. Judge Ross points out that this situation is virtually identical to the employment example set forth in footnote 12 of the Pembaur opinion regarding the policymaking requirement.[2] Frankly, it seems that the real problem in this case is that the Commission stayed its consideration of petr's appeal of the lay-off decision

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[2]In footnote 12, the Court illustrated what it meant by the official being responsible for establishing final government policy before the municipality can be held liable:

> "Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff is the official policymaker, would give rise to municipal liability. Instead, if county employment policy was set by the board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board. However, if the Board delegated its power to establish final employment policy to the Sheriff's decision would represent county policy and could give rise to municipal liability."

pending the disposition of this court action. Therefore, the city officials with the authority to make the final employment policy have not addressed resp's claim.

Although I believe that the dissent's interpretation of the civil service rules and the city charter as they relate to the delegation of policymaking authority is more persuasive than the majority's interpretation, I hesitate to recommend a grant of cert on this issue because the Court so recently addressed it in Pembaur. It would probably be better to allow other Circuits to consider the issue post-Pembaur. Nevertheless, I do recommend a grant in this case because it appears that the issue is a recurring problem in the CA8 and the CA8 is maintaining its approach which conflicts with the Courts' views expressed in Pembaur. The CA8 Williams opinion upon which the CA8 opinion below relied is no longer of precedential value. That panel opinion was vacated and reconsidered en banc which resulted in an affirmance of the DC by an equally divided court without opinion. When the city petitioned for cert., the Court GVR'd in light of Pembaur. On remand, the CA8, en banc, affirmed the DC by a 7 to 5 vote with a majority opinion relying on reasoning similar to that in the majority opinion below and with Judge Ross writing the dissenting opinion which is very similar to his dissent below. According to the Clerk's office, there has not yet been a petition filed requesting review of that opinion which was issued on Sept. 26, 1986. In light of the fact that the city filed a petition last time, however, it seems likely that they will file one this time as well.

5. RECOMMENDATION: I recommend grant, limited to the second

question presented.

There is a response.

December 23, 1986 Brinkmann opn in petn