rjm 12/26/86

Helpful - I agree!

SUPPLEMENT TO POOL MEMORANDUM

To: Justice Powell December 26, 1986

From: Ronald

No. 86-772, St. Louis v. Praprotnik

This case presents a challenge by a public employee to his employer's decision to transfer him. CA8 affirmed a judgment against the municipality. St. Louis raises two claims in this Court.

1. St. Louis argues that the decision conflicts with Los Angeles v. Heller, 106 S. Ct. 1571 (1986), because it was held liable, although its individual officers were exonerated. CA8 noted Heller, but did not find it dispositive. Because the jury instructions were ineptly written (and not objected to by

the plaintiff), the jury's decision not to hold the individual officers liable may not have rested on a determination that the officers were innocent. Thus, the jury did not hold the city and the officers to different standards. I find CA8's analysis dubious; it seems unfair for the city to suffer from the plaintiff's failure to object to bad jury instructions. The jury acquitted the individuals; the city should not thereafter be held liable. Nevertheless, I agree with the memowriter that this question is not worthy of review. The problem with the jury instruction makes CA8's analysis devoid of general application. I recommend denial on this point.

2. Second, St. Louis argues that the decision conflicts with Pembaur v. Cincinnati, 106 S. Ct. 1292 (1986), by holding that the transfer rested on a policy or practice of St. Louis. In your view, CA8 was clearly wrong. As you wrote in Pembaur, a policy or practice entails rules of general applicability established by official action. There were no rules of general applicability applied to harm resp here; his supervisors disliked him and mistreated him. Moreover, even under JUSTICE BRENNAN's view (which gained a plurality of the Court), it is hard to find a policy here. In footnote 12, 106 S. Ct., at 1300, of his opinion, he described a situation remarkably like this, and noted that it would present no "policy" within the meaning of Monell. Considering the splintering of the Court in Pembaur (five opinions on this point), I hardly think much is to be gained by allowing the question to simmer in the lower courts. This case provides an opportunity for a majority of the Court to explain

what a policy is. Of course, I may be a bit overoptimistic, but I think it also is a good case for you to take, because a majority should agree that this is not a policy. Thus, there is a substantial chance that your Pembaur dissent could become Court law.

I recommend that you vote to grant the petition, limited to question 2.