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

This proposed opinion has a number of problems, which I have set out below. Although I think the judgment is correct, I recommend against your joining the opinion in its current form.

1. The decision's approach to identifying the policymaker is inadequate. The decision criticizes leaving the decision to the jury on the premise that the identification of the policymaker will be possible solely based on ordinances and written regulations. Op. 11-12. This will not be true when there is an allegation that the policymaker on paper has in reality transferred his or her policymaking responsibility in an area to another official. If this transfer is not by written regulation or ordinance then whether it in fact happened would seem to be a jury question.

2. The decision of who is a policymaker should also depend on the action that is challenged. The opinion identifies the mayor and alderman and the Civil Service Commission (the "Commission") as the relevant policymakers in this case. Op. 12, 15-16. It is unclear if the Commission is a policymaker for purposes of this case because its function with regards to Praprotnik was merely to review decisions made by other city actors. Although in some contexts the Commission could set policy, e.g., art. XVIII, §§7(a) (prescribe rules to enforce art. XVIII), 7(b) (recommend ordinances on pay scales, retirement,

hours of duty, holidays, ect.) (J.A. 62-63), the Commission's role in this case appears to be that of merely a review board. As such, appeal to it is needed for a "final" administrative action by the city, see Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 192-194 (1985) (variance procedure must be followed to obtain "final" municipal decision on land use), but it is not a "policymaker" for the decision here to harass and fire Praprotnik.

Given that the Commission is not a policymaker in regards to the complained of acts, the fact that Praprotnik's supervisors' actions are not "final" in that they are subject to review by the Commission is irrelevant. It seems that there is an underlying tension between Williamson and footnote 12 of Pembaur; this opinion should address it. The high officials' actions, once finalized, represent city policy and, if the city's variance-type procedures necessary for a "final" city action fail for whatever reason to provide relief, then a remedy should be available under §1983. Here the layoff could be a final city action because Praprotnik attempted to bring it to the Commission's attention; the other actions were certainly final, for the Commission considered them.

It is also seem irrelevant that there are city ordinances on the books forbidding discriminatory discharges, e.g., art XVIII, §16 (J.A. 73), for the fact that the municipality has enacted laws instructing high municipal officials to "Be constitutional" seems inconclusive. That was precisely the situation Congress faced when it enacted §1983 and it intended to create a remedy

for the failure of states and localities to enforce these precatory laws. Monroe v. Pape, 365 U.S. 167, 176-178 (1961).

The proper inquiry would seem to be whether the wrongdoers were (1) given sufficient discretion to make policy decisions in this area, subject at most to review by a nonpolicymaker, and (2) were high enough municipal officials such that holding the municipality liable for their unconstitutional torts would not be unfair, employing a concept of alter ego liability. In this case, the Director of the Community Development Agency might be such a high official, however, the jury cleared Directors Hamsher and Patterson and thus Praprotnik cannot prevail on this point. The mayor would fall in this category of policymaker, yet Praprotnik has failed to adduce significant evidence showing his approving action against Praprotnik for unconstitutional motivations. See Petr Br 107-108. Praprotnik argues that Heritage and Urban Design Commissioners Jackson and Killen could have been found responsible by the jury, Petr Br 105-106, but it is not clear from the briefs that they are high enough city officials to be policymakers.

3. The opinion asserts that an "unconstitutional municipal policy" must be shown for municipal liability under §1983. Op. 14. The plurality in Tuttle, 471 U.S., at 824, and n. 7, left open the question of whether a city could be liable for a constitutional-yet-tortious policy that results in an unconstitutional shooting but stated that in such cases proof of a single incident would not be sufficient. The dissent in Kibbe also did not require that the municipal policy be

unconstitutional. 107 S. Ct., at 1121-1122. In the police-shooting cases, the municipality's reckless failure to provide any guidelines on the use of deadly force may not in itself be unconstitutional but it could well be found to have been a cause of the unconstitutional seizure. In that case the municipality would be held liable not under the respondeat superior doctrine but for its own tort that contributed to the constitutional violation.

Whether municipal liability is proper, despite the policy's constitutionality, is a difficult question that should be addressed in a case that squarely presents the issue. The present opinion seems to decide this issue with no analysis and no indication of how this question is even presented by this case. Here there is no claim by Praprotnik that a constitutional-yet-tortious municipal policy was a contributing cause to the unconstitutional harassment and firing. This sentence should not be in the draft and the entire second paragraph on page 14 seems irrelevant. The theory of this case does not seem to have ever been that an unconstitutional ordinance of general application caused or enabled Praprotnik's supervisors to retaliate against him; rather, those who unconstitutionally acted against him were so high in city government that their actions, even if intended for a single application, could be said to represent a city "policy." The case should be viewed under the alter ego theory.