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Now Grant B.th GRANT & CAR w/view to Grant EL

Resp to cross-petn rec'd 10/14. Petr agrees that the case raises the dispute over final policymaking left hanging in Pembaur.

Comment: The resp confirms the view I took in the memo.

GRANT Petn + Cross-Petn ERE 10/30

PRELIMINARY MEMORANDUM

Nov 4th

~~September 26~~, 1988 Conference
List ~~23~~, Sheet 1

No. 87-2084

JETT (challenges §§ 1981 & 1983 holdings)	Cert to CA5 (Gee, Randall, Garwood)	
v.		
DALLAS IND. SCH. DIST.	Federal/Civil	Timely

List 23, Sheet 1

No. 88-214

DALLAS IND. SCH. DIST. (challenges § 1983 dictum)	Cert to CA5 (Gee, Randall, Garwood)	
v.		
JETT	Federal/Civil	Timely

1. SUMMARY: Petr challenges the CA5's holding that municipalities cannot be held liable on a theory of respondeat superior in an action under § 1981. Petr also challenges the CA5's holding that petr failed to prove as a matter of law that the deprivation of his rights occurred pursuant to an official policy of custom. Cross-petn argues that dictum in the CA5's opinion conflicts with this Court's decision in City of St. Louis v. Propratnik.

2. FACTS AND PROCEEDINGS BELOW: These facts are taken from the CA5 opinion which appears to be somewhat unsympathetic to petr's claims. Beginning in 1970, petr, a white, was athletic director and football coach at football powerhouse South Oak Cliff High School in Dallas. After his appointment, the racial composition of South Oak changed from predominantly white to predominantly black. In 1975 Frederick Todd, a defendant below, but not a resp here, was assigned to be principal at South Oak. Some tension developed between the two men over several issues pertaining to petr's diligence in the fulfillment of his teaching/coaching duties. Significant problems arose from events surrounding a 1982 statewide playoff game between South Oak and rival "white" powerhouse Plano High. Todd, for example, objected to certain bragging statements that petr made prior to the game which South Oak lost. After the game petr entered the official's locker room in violation of league rules. He complained about the officiating of two blacks, although, over Plano protests, petr had requested black officials. Other controversies arose including media allegations that petr was

bribed. Todd also objected to petr's statements in the media to the effect that only two South Oak players could meet proposed NCAA academic eligibility standards.

On March 15, 1983 (beware the Ides), Todd informed petr that he intended to recommend that petr be relieved of his AD and coaching duties. Todd sent a letter to this effect to John Kincaide, white, director of athletics for resp school district. Todd listed poor job performance and the events surrounding the Plano game as his reasons for recommending petr's removal.

After meeting with Petr on the 15th, Todd made arrangements for petr and Kincaide to meet. Kincaide suggested that petr sit tight until he heard something in writing. John Santillo, resp's personnel director, recommended that petr transfer. Finally, petr met with Linus Wright, resp's white superintendent. During this meeting, petr claimed that the recommendation of dismissal was unfounded and was motivated by Todd's desire to secure a black coach. Wright suggested that petr consider changing jobs and assured him that another position would be found.

On March 25 Wright, Kincaide, Santillo, and Todd met without petr to determine whether he should stay at South Oak. After the meeting, Wright officially affirmed Todd's recommendation to remove petr from his duties. Wright explained at trial that he was compelled to side with the principal given the irreconcilable conflict between Todd and petr.

Resp, through Santillo, reassigned petr as a teacher at the Business Magnate School. Santillo said that it was the only

position available. Petr started in the new job, grew increasingly despondent, and began not to show up for work. Petr met again with Santillo and then with Wright who told him that he would be considered for any coaching jobs that became available without even applying.

Santillo wrote to petr informing him of a new assignment to the security department, but that he could not expect to remain there for the next school year. Upon receiving the letter, petr filed suit against Todd in his personal and official capacities, against resp, and resp's Board of Directors in their official capacities under §§ 1981 & 1983. After the suit was filed, petr received notice that he had been assigned to Jefferson High as a history teacher/freshman football coach/freshman track coach. Although a head coaching job was available at Madison High, petr was not assigned there. On August 19, 1983, petr tendered his resignation.

At trial, the jury determined that petr had been deprived of his AD and coaching job (a property interest) based on his race and on the exercise of his protected First Amendment rights and in violation of procedural due process. The jury also found that petr was constructively terminated from employment with resp in August 1983. The jury awarded a total of $850,000 in damages including $50,000 in punitives.

On motion for JNOV, the DC (N.D. Tx.; Sanders, J.) affirmed except with respect to damages. The DC set aside the punitive damages and ordered a remittitur which petr accepted. The ultimate judgment against resp was $450,000 plus $112,000 in

attorney's fees. Todd was made jointly and severally liable on the fees and $50,000 of the damages.

On appeal, the CA5 held that petr was not deprived of a property interest in his AD and coaching position. Petr was employed under a 5-year teacher contract "subject to assignment." The contract specifically authorized the superintendent to assign or reassign petr. The DC found in ruling on the JNOV that petr's property interest arose from his oral contract for petr to serve as AD and head coach through the 1982-83 academic year and from the more than $4,000 in supplementary pay which petr received for his coaching duties. It is undisputed, however, that petr received the extra pay during the 1982-83 year and would have continued to receive this pay had he stayed at Jefferson High.

Since petr did not lose any economic entitlement, we must assess whether the oral contract created an interest throughout the year in his particular duties and responsibilities. We find that it did not create a property interest in the intangible non-economic benefits of assignment as a coach. Although petr's oral contract concerned his assignment as a "coach," it did not address his specific duties and responsibilities and did not give petr a property interest in them. Therefore, although petr had a property interest in his salary (which he received), he had no such interest in his coaching duties or responsibilities.

Petr also was not subject to constructive discharge. The jury erred as a matter of law in finding that such a discharge occurred. Constructive discharge occurs when the employer makes

conditions so intolerable that a reasonable person would feel compelled to resign. No reasonable person in petr's position would have felt compelled to resign. Petr's subjective preference for one position over another simply does not give rise to the sort of conditions that precipitate a constructive discharge. Nor does the embarrassment that petr suffered support such a discharge. Petr showed no violation of his constitutional rights after March 1983, when he was reassigned, that would constitute intolerable working conditions.

The DC held that the evidence was sufficient to sustain the jury's finding that Todd's recommendation that petr be removed from his AD and coaching positions was based on race and that petr's exercise of his First Amendment rights was also a substantial motivating factor in Todd's decision. The DC also imposed liability against resp based on the jury's finding that resp had delegated to Superintendent Wright sole and unreviewable authority to reassign members of the coaching staff, that Wright had approved Todd's recommendation without independent investigation, and that petr was reassigned according to resp's customary way of handling such matters.

(I have omitted the CA's discussion of Todd's liability. He settled.)

We find that the finding of § 1983 liability against resp must be reversed and remanded for a new trial. The DC's jury instructions concerning municipal liability was deficient because it did not state that the city could be bound by the principal or superintendent only if he was delegated policy

making authority or if he participated in a well settled custom that fairly represented official policy. The DC found nonetheless that these requirements were satisfied as a matter of law because resp had delegated to Superintendent Wright sole and unreviewable authority to reassign members of the coaching staff and that petr was reassigned in the customary manner. We disagree.

The evidence is undisputed that although the DISD board retained authority to terminate teachers, including members of the coaching staff, Wright had the sole and unreviewable authority to reassign teachers and coaches. In Pembaur v. City of Cincinnati, 475 U.S. 469 (1986), the Supreme Court affirmed that, under appropriate circumstances, municipal liability may be imposed for a single decision by municipal policymakers. Whether, under Pembaur, Wright enjoyed the requisite policymaking authority for imposition of municipal liability is doubtful. But even assuming that Wright did possess such authority, the finding of liability here must be reversed because the jury instructions were insufficient.

The DC instructed the jury that it could find municipal liability if the decision to remove petr was based solely on Todd's recommendation without any independent investigation. The jury's finding on this point, however, was not sufficient to impose municipal liability because the jury was not asked to, and did not, make a finding that Wright's decision (the policymaker's decision) was improperly motivated or that he knew or was consciously indifferent to the fact that Todd's

recommendation was so motivated. If resp is to be held liable because of Wright's actions, then Wright's actions must themselves have been motivated by the desire or intention to curtail or retaliate for employee activity which the Constitution protects. That his decision may have been unreasonable is not sufficient. The evidence does not clearly establish improper motivation on Wright's part. Todd's recommendation included numerous facially neutral reasons for relieving petr of his duties. That petr told Wright that he considered Todd's actions to be racially motivated, it is unclear whether Wright in any way credited these allegations. The evidence simply did not establish that Wright acted in anything other than good faith. Thus, the finding of § 1983 liability is vacated and the issue is remanded for a new trial.

We also reverse the DC's ruling that § 1981 liability can be imposed against resp solely on the basis of respondeat superior. The DC relied on our decision in Garner v. Giarrusso, 571 F.2d 1330 (5th Cir. 1978) in which we found that § 1981 does not provide immunity for municipalities such as that which exists under the Supreme Court's interpretation of § 1983 in Monroe v. Pape, 365 U.S. 167 (1961). Of course, Garner was decided prior to Monell v. Department of Social Services for the City of New York, 436 U.S. 658 (1978), in which the Court held that municipalities were liable under § 1983, although not on the basis of respondeat superior. We therefore must decide whether respondeat superior may support municipal liability under § 1981 in light of Monell and its progeny.

We believe that to impose respondeat superior liability under § 1981 would be inconsistent with the Supreme Court's reasoning in Pembaur and Monell. To permit municipal liability based on respondeat superior under § 1981 would impose liability on a city for only a few types of constitutional violations which might be committed by its employees. The Supreme Court's interpretation of § 1983 and its legislative history indicates that Congress did not intend to impose different types of liability on a municipality based on the particular federal wrong asserted. In 1871, when Congress enacted § 1983, it decided that it did not want to impose liability on municipalities for the constitutional torts of its employees. To impose such liability under § 1981 would contravene that Congressional intent. The cases upon which petr relies are inopposite. See EEOC v. Gaddis, 773 F.2d 1373 (10th Cir. 1984); Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979). These are § 1981 cases finding liability on the basis of respondeat superior in the private sector. Remaining true to Congress' intent in enacting § 1983 provides a compelling reason for distinguishing between the private and public sectors with respect to permissible theories of liability under § 1981. Finally, we note that past decisions of this court have, albeit without discussion, denied respondeat superior liability under § 1981.

On Petition for Rehearing, the CA5 denied rehearing, but further explained its holding with respect to § 1981 liability. After a lengthy discussion further distinguishing its own

precedent case, Garner, the CA5 addressed petr's argument that the reasons that the Monell Court rejected respondeat superior under § 1983 do not apply to § 1981. In fact, many of the concerns that motivated the 1871 Congress to reject respondeat superior liability are equally applicable to § 1981. First, the constitutional problems attendant to a federal law of respondeat superior in the context of § 1983 would also be applicable to § 1981. As the Court in Monell noted, these potential constitutional infirmities influenced the 1871 Congress to reject respondeat superior liability. Second, just as the Court in Monell relied on the absence of statutory language creating respondeat superior liability under § 1983, so too no language in § 1981 authorizes such liability. Indeed, § 1981, unlike § 1983, contains no language which can be construed as covering municipalities, and it does not purport to impose liability or assign liability to anyone. (Section 1983 holds "persons" liable for constitutional deprivations. Section 1981 contains no equivalent language.) Thus, guided by general considerations of likely legislative intent or judge-made law, we conclude that there is no reason to assume that Congress intended to impose vicarious liability by section one of the 1866 Act though not so intending by section one of the 1871 Act. The First Circuit's decision in Springer v. Seaman, 821 F.2d 871, 880-881 (1st Cir. 1987) does not convince us to the contrary.

3. CONTENTIONS: Petr contends that the CA5's policy decision to graft § 1983's custom or policy requirement onto § 1981 creates a clear circuit split on an important issue of

federal law. As the CA5 itself noted, the decision in this case squarely conflicts with the CA1's decision in Springer. Moreover, Springer simply followed the lead of other circuits. See Leonard v. City of Frankfurt Electric and Water Plant Board, 752 F.2d 189, 194 n.4 (6th Cir. 1985); Glenwood v. Ross, 778 F.2d 448, 456 (8th Cir. 1985); Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1981).

The CA5 eschewed this Court's historical approach to the civil rights statutes established in Monroe, Monell, and other cases. Although at first the CA5 claimed to adhere to this historical approach, it could not justify imposing a Monell requirement in § 1981 cases through legislative history because the legislative history underlying the Court's holding in Monell occurred five years after the enactment of § 1981. Abandoning the historical approach in its supplemental opinion upon Petition for Rehearing, the CA5 next tried to justify its holding by reference to the statutory language. It noted that the language of § 1981, unlike the language of § 1983, imposes no liability on anyone at all. Imposing liability under the statute was simply a judge-made rule. The CA5 therefore decided to rely on "general considerations of likely legislative intent and on judge made law" in interpreting the statute. Freed from the strictures of history and language, it decided, following Owen v. City of Independence, 445 U.S. 622 (1981), that protecting the municipal fisc required the imposition of the Monell requirement on § 1981 actions. Notably, Monell itself rejected this rationale.

Historical analysis reveals that Congress did intend to allow liability on the basis of respondeat superior under § 1981. Although the congressional debates shed little light on the issue, the statutory language, when viewed in historical perspective, gives rise to a strong inference that the 1866 Congress intended to impose a "policy or custom" requirement with respect to criminal liability only. See section two of the 1866 Act. Such a construction is, moreover, consistent with then-existing common law principles.

In any case, it is not necessary to adopt an absolutist approach to vicarious liability in § 1981 actions. We recognize that some members of the Court are concerned that government liability under § 1981 not be limitless. See General Building Contractor v. Pennsylvania, 458 U.S. 375 (1982) (no governmental liability for discriminatory actions of private group absent showing of agency or employment relationship). Along these lines, we suggest that the Court might adopt the CA5 approach in Garner, supra, which distinguished between liability based on the acts of supervisors and liability based on the acts of "mere servants." This solution has proved workable under Title VII.

The CA5 also erred in reversing the DC's ruling that petr had proven the existence of a "policy or custom" as a matter of law, even though the jury was not instructed on the issue. It is undisputed that resp had delegated Superintendent Wright final and unreviewable authority over reassignments and that Wright had promulgated his own policy to deal with reassignment cases: Wright always "went with the principal." Although this policy

was not itself unconstitutional, it caused a constitutional violation in this case. Here, the policy caused Wright to be consciously indifferent to petr's claim that Todd's recommendation was racially motivated. Wright did nothing to investigate petr's charges, but rather followed his go-with-the-principal policy. Whether these facts satisfy Monell is a question left open in City of Springfield v Kibbe, 107 S. Ct. 1114 (1987). We submit, however, that the policy of always going with the principal, even when that policy poses a known risk of constitutional violation, amounts to an official policy of conscious indifference.

Resp agrees that the CA5 opinion conflicts on the respondeat superior question with the CA1 opinion in Springer, supra, and the CA6 opinion in Leonard, supra, and agrees that this is an important issue of federal law. Resp notes, however, that the issue may not be ripe for decision because the CA5 remanded, Todd settled, and the DC has yet to determine whether petr is entitled to any damages.

Dallas Ind. Sch. Dist. cross petitions for cert arguing that the CA5's "dictum" that municipal liability for damages may be imposed under §§ 1981 & 1983 because of non-reviewable employment decisions made by a non-policymaking official who is not following policy or custom is contrary to City of St. Louis v. Praprotnik, 108 S. Ct. 915 (1988). In Praprotnik, this Court held that whether an official is a policymaker should be determined as a matter of law. As a matter of law, Wright was not invested with policymaking authority. He is an employee of

the DISD board which had not delegated to him any authority to make policies regarding discrimination, free speech, due process, or other rights involved in this case. Thus, the CA5 erred in holding that, upon retrial, DISD could be held liable if Wright's actions were improperly motivated.

4. DISCUSSION: Cert should be granted. As resp admits, the circuit split here is unmistakable. The CA1, finding that the language and legislative history of §§ 1981 & 1983 were meaningfully different, squarely held that "respondeat superior is applicable to claims brought under § 1981." Springer, 821 F.2d, at 881. The CA1, moreover, noted many district court opinion which reached the same conclusion. See, e.g., Dickerson v. City Bank & Trust Co., 590 F. Supp. 714 (D. Kan. 1984); Haugabrook v. City of Chicago, 545 F. Supp. 276 (N.D.Ill. 1982). In Leonard, supra, the CA6 also noted that respondeat superior would support municipal liability under § 1981. In that case, the CA reversed a DC grant of summary judgment that rejected plaintiff's § 1981 claim on the ground that plaintiff did not sufficiently allege discriminatory intent on the part of the defendant municipal board. The CA reversed, holding that plaintiff had sufficiently alleged discriminatory intent, but went on to note that the DC also erred in relying on Monell for the proposition that discrimination by the board itself was required and that the board could not be held liable for the actions of its agents. 752 F.2d, at 194 n.9. The two other circuit cases that petr cites as in conflict with the CA5 do not discuss the respondeat superior issue, but appear to assume this

theory of liability. Greenwood v. Ross, supra; Taylor v. Jones, supra. Thus, this case presents a live circuit split on a pure legal issue of great import. Although perhaps this Court might wait for more circuits to address the issue, the CA5 opinion, whatever the merits of its analysis, thoroughly considers the difficult problems of statutory interpretation and legislative history. The CA1 opinion, though less thorough, relies on a very comprehensive dct. discussion in Haugabrook. In short, I think the issue is well posed and worthy of review. I see no ripeness problem stemming from the CA's remand for a new trial. If petr prevails, his § 1981 claim would, without further litigation, sustain the judgment against resp.

The petn and cross-petn each raise a question pertaining to the CA5's § 1983 ruling. Petr complains that the CA5 erred in remanding for a determination whether Wright, as opposed to Todd, had acted with improper motivation. Petr argues that Wright's policy of always going with the principle was itself a policy of conscious indifference supplying the policy or custom required by Monell for § 1983 liability. Resp's cross-petn argues the flip side of this issue. Resp claims that, as a matter of law, Wright did not have policymaking authority and that therefore the municipality cannot be held liable regardless of his intent. This is quite a can of worms.

With respect to the cross-petn, although I am not certain that this issue is independently certworthy, it appears worthy of consideration in conjunction with the § 1981 issue if the Court decides to grant cert. The claim raised by the cross-

petition is a substantial one, even if it arises from dictum only. In particular, this case appears to fall precisely into the area of dispute between the plurality and concurrence in Propratnik -- decided shortly after the CA5 filed its opinion. First, cross-petr argues that the CA5 should have decided whether Wright was a policymaker as a matter of state law rather than leaving this question unresolved. The plurality in Propratnik, which emphasized that the inquiry into final policymaking authority is not a question of fact, but rather a question of state law, appears to agree. 108 S. Ct., at 924. The plurality, on the other hand, argued that it is for the jury to find the predicate facts necessary to a determination of who possessed final policymaking authority. Thus, this case raises the conflict between the plurality and concurring opinions.

Second, petr argues that Superintendent Wright is indistinguishable from the subordinates found not to be policymakers in Propratnik. In my view, however, the officials in Propratnik would appear to be distinguishable from Wright because their decisions, although accorded great deference, were appealable to the Civil Service Commission, while Wright's decisions here were found to be unreviewable. Thus, I am unpersuaded by cross-petr's argument that Propratnik necessarily requires reversal. Instead, this case seems to pose the fact situation feared by the concurring Justices in Propratnik: a municipality has adopted a practice of delegating final decisionmaking authority to a mid-level official, but that practice is not codified as a matter of state law. See 108 S.

Ct., at 934-935. In this case, under the plurality's view as characterized by the concurrence, because the state statutory law would not identify the municipal actor as a policymaking official, a single constitutional deprivation by that actor would fall through "the gaping hole" left by the plurality in § 1983 jurisprudence. In sum, this case may be an appropriate vehicle for resolving the tension between the plurality and concurring opinions in Propratnik. Accordingly, I recommend CFR with a view to grant on this issue.

If the Court grants the cross-petn -- opening up the § 1983 issues in the case -- it might consider petr's second claim as well, although in my view it is not certworthy. Contrary to petr's assertion, this case does not present the issue left open in Kibbe, supra. That case, which the Court opted not to decide on the merits, involved the issue of negligent training of employees. Moreover, petr's claim that Wright's policy of "going with the principal" amounted to a policy of conscious indifference is factbound and somewhat implausible. As the CA5 noted, Wright testified that he had to side with the principal unless he found the principal "to be in error himself." Thus, it seems unlikely that the Court would ever reach the legal question whether a policy of conscious indifference will support a claim under § 1983. Petr cites not circuit split, or even any circuit authority, on this question. I therefore recommend against granting cert on this issue even if the Court grants the cross-petn, and especially if the Court grants only on the § 1981 issue.

I note that petr "reserves the right" to raise his property interest claim and his constructive termination claim before this Court if cert is granted. The Court should not review the CA5's resolution of these issues. They are factbound and do not appear to involve a split among the lower courts.

5. RECOMMENDATION: I recommend a grant on petr's § 1981 claim (Issue 1) and a denial on petr's § 1983 claim (Issue 2). I recommend CFR with a view to grant on the cross petn.

There is a response.

September 16, 1988 Lazarus opn in petn

I apologize about the length of this memo. As Justice Holmes once said about a rambling letter, I did not have time to write a shorter one. One point worth noting: This Court will revisit Praprotnik in City of Canton, No. 86-1088, although not with respect to the precise issue raised here. Arguably, the § 1983 issues should be held for City of Canton which may clarify the Court's views about when a delegated authority to make discretionary decisions gives rise to municipal liability. I do not believe a hold is appropriate because the question in City of Canton is whether a city's failure to train a discretionary decisionmaker may constitute a policy or custom, whereas the question here is whether a city's practice of delegating authority, not codified in state law, may convert a mid-level decisionmaker into a "policy maker."

Grant on Issue 1
CFR w/ view to Grant cross-petn LFL 9/19/88