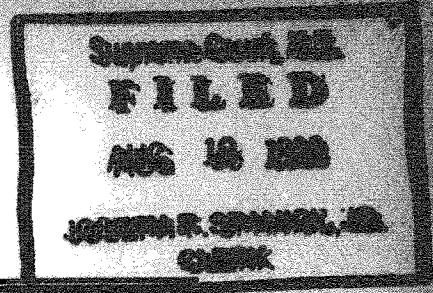


87-2084

NO. A-802



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

---

NORMAN JETT,  
Petitioner,

V.

DALLAS INDEPENDENT SCHOOL DISTRICT,  
Respondent.

---

**REPLY TO PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

---

David W. Townend  
Brown, Brown,  
Chandler & Townend  
1302 West Miller Road  
P. O. Box 472286  
Garland, Texas 75047  
(214) 271-4561

*Counsel For Respondent*

---

## REPLY POINTS

1. The Fifth Circuit decision conflicts with decisions from the First and Sixth Circuits. Were this Court to grant a writ of certiorari it should affirm the Fifth Circuit's extension of the requirements set forth in Monell to impose municipal liability for damages under 42 U.S.C.A. §1981, however, the case is not ripe.

2. Proof that the final decision maker in personnel matters was authorized to take action, is insufficient to impose municipal liability under 42 U.S.C.A. §1981 or §1983 unless the discrimination resulted from actions of a policymaker or from official "policy or custom".

3. The Fifth Circuit correctly held a teacher/coach does not have a sufficient property interest in his written contract to entitle him to procedural and substantive due process in a reassignment decision.

4. The Fifth Circuit correctly held that a reasonable person in Petitioner's circumstances would not have been compelled to resign when transferred to a new position as teacher/coach and correctly set aside the jury's finding of constructive termination.

## TABLE OF CONTENTS

|  |     |
|--|-----|
| REPLY POINTS . . . . .                                   | i   |
| TABLE OF AUTHORITIES . . . . .                           | iii |
| OPINIONS BELOW . . . . .                                 | 1   |
| JURISDICTION . . . . .                                   | 1   |
| CONSTITUTIONAL PROVISIONS<br>AND STATUTES . . . . .      | 2   |
| STATEMENT OF THE CASE . . . . .                          | 3   |
| THE PROCEEDINGS BELOW . . . . .                          | 4   |
| REPLY TO THE PETITION FOR<br>GRANTING THE WRIT . . . . . | 4   |
| CONCLUSION AND PRAYER . . . . .                          | 8   |

## TABLE OF AUTHORITIES

| Cases:  | Page  |
|---|-------|
| <u>Brotherhood of Locomotive Firemen and<br/>Engineermen and Bangor v. A. R. Co.</u> , 389,<br>88 S.Ct. 437 19 L.Ed.2d 560 (1967) . . . . .               | 7     |
| <u>City of St. Louis v. Praprotnik</u> , ____ U.S. ____<br>108 S.Ct. 915, 99 L.Ed.2d 107 (1988) . . . . .   | 6     |
| <u>FTC v. Flotill Products, Inc.</u> , 389 U.S.C. 179<br>88 S.Ct. 401, 19 L.Ed.2d 398 (1967) . . . . .  | 7     |
| <u>Franchise Tax Port of California v. United<br/>States Postal Service</u> , 467 U.S. 512, 520, 104<br>S.Ct. 2549, 2554, 81 L.Ed.2d 446 (1984) . . . . . | 5     |
| <u>Greenwood v. Ross</u> , 778 F.2d 448, 456<br>(8th Cir. 1985) . . . . .   | 5     |
| <u>Jett v. Dallas Independent School District</u> ,<br>798 F.2d 748 (5th Cir. 1986), affirmed on<br>rehearing, 837 F.2d 1244 (5th Cir. 1988) . . . . .    | 1     |
| <u>Leonard v. City of Frankfort Electric and<br/>Water Plant Board</u> , 752 F.2d 189, 194 n.9<br>(6th Cir. 1985) . . . . .                               | 5     |
| <u>Loeffler v. Frank</u> , ____ U.S. ____<br>56 L.W. 4554 (Slip Op. 61388) . . . . .  | 5     |
| <u>Monell v. Department of Social Services of<br/>the City of New York</u> , 436 U.S. 658, 98 S.Ct.<br>2018, 56 L.Ed.2d (1978) . . . . .                  | i,5,6 |

|   |   |
|---|---|
| <u>Patterson v. McClain Credit Union</u> , 108 S.Ct.<br>1419 (1988) . . . . .   | 6 |
| <u>Springer v. Seamen</u> , 821 F.2d 871<br>(1st Cir. 1987) . . . . .   | 4 |
| <u>Taylor v. Jones</u> , 653 F.2d 1193, 1200<br>(8th Cir. 1981) . . . . .   | 5 |
| <u>Thorpe v. Housing Authority of the City of<br/>Durham, North Carolina</u> , 393 U.S. 268, 89<br>S.Ct. 518, 21 L.Ed.2d 474 (1969) . . . . . | 7 |
| <u>U.S. v. R.J. Reynolds Tobacco Company</u> ,<br>416 F.Supp. 316 (D.N.J. 1976) . . . . .   | 7 |

## CONSTITUTIONAL PROVISIONS

|                                      |   |
|--------------------------------------|---|
| U. S. CONST. Amend. I . . . . .      | 2 |
| U. S. CONST. Amend. V . . . . .      | 2 |
| U. S. CONST. Amend. XIV §1 . . . . . | 2 |

## STATUTES

|                              |       |
|------------------------------|-------|
| 28 U.S.C. §1254(1) . . . . . | 1     |
| 42 U.S.C.A. §1981 . . . . .  | i,2,5 |
| 42 U.S.C.A. §1983 . . . . .  | i,2   |

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

NO. A-802

NORMAN JETT,  
Petitioner,

V.

DALLAS INDEPENDENT SCHOOL DISTRICT,  
Respondent.

**REPLY TO PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

Respondent prays that the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in Jett v. Dallas Independent School District, 798 F.2d 748 (5th Cir. 1986), affirmed on rehearing, 837 F.2d 1244 (5th Cir. 1988), be denied.

**OPINIONS BELOW**

The opinions below have been accurately reproduced in Petitioner's Petition for Writ of Certiorari.

**JURISDICTION**

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides in pertinent part as follows:

Congress shall make no law . . . abridging the Freedom of speech . . .

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1981 provides that:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.



42 U.S.C. §1983 provides in pertinent part as follows:

Every person who, under color or any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suite in equity, or other proper proceeding for redress.

### STATEMENT OF THE CASE

#### 1. Reply to Factual Summary.

Although Respondent does not agree with Petitioner's version of the facts as they pertain to Dr. Todd, since the jury found Dr. Todd acted with racial animus in recommending Petitioner's reassignment, and since this finding was affirmed on appeal, Respondent does not address it. It further needs to be pointed out that Petitioner has since entered into a Settlement Agreement with Dr. Todd and released him from all liability.

The pertinent facts which the Respondent wishes to address pertain more to the structure of the Dallas Independent School District. The Dallas Independent School District is governed by its elected Board of Trustees who have the sole authority to issue policies. The position of superintendent is recognized under Texas statutes and the Board of Trustees employ the superintendent pursuant to a written contract. The superintendent is not authorized to establish policies pertaining to the hiring and termination of Dallas Independent School District employees. Superintendent Linus Wright in the instant case had the



authority to transfer personnel such as Mr. Jett, and although these decisions were not reviewable by the Board of Trustees, Superintendent Wright had no authority to establish policy that was binding upon the Dallas Independent School District in regard to discrimination in the work place.

In its current posture, Petitioner will seek to recover damages against the Dallas Independent School District because of the actions of Dr. Todd using respondeat superior or of Superintendent Wright, who was not sued, based on dictum in the Fifth Circuit opinion.

## 2. The Proceedings Below.

The Petitioner's account is substantially correct. The additional procedural factor pertains to an intervening settlement with Dr. Todd that resulted in his dismissal. The effect of this settlement is unclear. Petitioner will argue he can still recover damages against Respondent because of Dr. Todd's actions using respondeat superior. Respondent believes the settlement will render these damage claims moot.

# REPLY TO THE PETITION FOR GRANTING THE WRIT

## I. THE FIFTH CIRCUIT CORRECTLY EXTENDED THE "MONELL" REQUIREMENTS IN A DISCRIMINATION CASE BROUGHT UNDER 42 U.S.C.A. §1981.

The Fifth Circuit decision is particularly correct where, as here, the Petition seeks to impose municipal liability for damages as opposed to equitable relief. The Respondent concedes that the Fifth Circuit decision is in direct conflict with Springer v. Seaman, 821 F.2d 871 (1st Cir. 1987), which was a wrongful termination case under 42 U.S.C.A. §1981

brought against the postal service. Although Springer could arguable be distinguished since it is an action against the postal service which is to be treated as any other commercial venture. Id. at 881, Franchise Tax Board of California v. United States Postal Service, 467 U.S. 512, 520, 104 S.Ct. 2549, 2554, 81 L.Ed.2d 446 (1984); Loeffler v. Frank, \_\_\_\_ U.S. \_\_\_\_, 56 L.W. 4554 (Slip Op. 61388) (holding the postal service waived immunity and was to be treated like any other private commercial enterprise. Id. at 4556), nevertheless the importance of this unanswered federal question would probably not justify this Court in denying the writ because of this distinction in Springer. Springer clearly held that the rationale of Monell was not applicable to cases brought under 42 U.S.C.A. §1981 and ruled that the postal service could be liable for discriminatory actions in violation of 42 U.S.C.A. §1981 provided the postal worker was acting in the scope of his authority when they caused a racially motivated investigation to be commenced. 821 F.2d at 881. The Fifth Circuit also appears to be in conflict with the Sixth Circuit in Leonard v. City of Frankfort Electric and Water Plant Board, 752 F.2d 189, 194 n. 9 (6th Cir.1985), where the court reversed a summary judgment and disapproved of the trial court's sole reliance upon Monell in rejecting the respondeat superior doctrine in actions under 42 U.S.C.A. §1981. The Respondent does not concur that the Fifth Circuit decision is in conflict with the Eighth Circuit, since the cited cases of Greenwood v. Ross, 778 F.2d 448, 456 (8th Cir. 1985) and Taylor v. Jones, 653 F.2d 1193, 1200 (8th Cir.1981), do not appear to pass upon the issue.

The Fifth Circuit appears to be in conflict with the First and Sixth Circuits on this most important unanswered question. The Fifth Circuit has correctly decided that municipal liability for damages may not be visited upon the Dallas Independent School District in the absence of proof that the discriminatory actions were due to the actions of the official policymakers (i.e., the elected Trustees or persons to

whom they delegated policymaking authority) or were due to an official policy or custom adopted or sanctioned by the Board of Trustees. Petitioner incorrectly argues the Fifth Circuit ignored the Monell approach in reviewing both the legislative history and language of the statute to determine whether or not respondeat superior will be applicable to actions under 42 U.S.C.A. §1981. The Fifth Circuit reviewed the legislative history of 42 U.S.C.A. §1981 and concluded "... [W]e are aware of no specific legislative history of §1 of the 1866 act, comparable to that of the 1871 act, indicating an intent to impose municipal liability." The Fifth Circuit reviewed the language of 42 U.S.C.A. §1981 and concluded "... [S]ection 1 of the 1866 act contains no language which can be construed as covering municipalities, and it does not purport to create a cause of action or to assign or impose liability or responsibility on anyone."

The "contours" of municipal liability under 42 U.S.C.A. §1983 have been continually defined in the last ten years since Monell was decided. Monell was recently reaffirmed in St. Louis v. Praprotnik, \_\_\_\_\_ U.S. \_\_\_\_\_, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) where the court made it clear that municipal liability for a denial of civil rights (free speech) under 42 U.S.C.A. §1983 will not be visited merely because an official was authorized to take action, unless he is also the policymaker or was acting pursuant to an official policy or custom. The contours of municipal liability under 42 U.S.C.A. §1981 have yet to be articulated as clearly, indeed this Court has raised speculation about the continued viability of the use of 42 U.S.C.A. §1981 as a vehicle to recover damages based upon racial harassment in Patterson v. McClain Credit Union, 108 S.Ct. 1419 (1988).

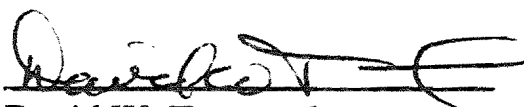
There is a conflict among the circuits regarding a major unanswered question of federal law, i.e., whether or not the requirements of Monell will be extended to actions for damages brought under 42 U.S.C.A. §1981 against a

municipality. As a general rule, a conflict of the circuit courts requires this Court to grant certification, FTC v. Flotill Products, Inc., 389 U.S.C. 179, 88 S.Ct. 401, 19 L.Ed.2d 398 (1967), in order to assure uniformity of federal law. U.S. v. R.J. Reynolds Tobacco Company, 416 F.Supp. 316 (D.N.J.1976). Respondent further acknowledges the need for the further definition of the "contours" of municipal liability under 42 U.S.C. §1981, however, this Court must determine whether or not these important questions are sufficiently ripe for determination because the Court will not answer hypothetical questions. Thorpe v. Housing Authority of the City of Durham, North Carolina, 393 U.S. 268, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969). The Court may not review a case which may not be sufficiently ripe as where the Court of Appeals remands for further proceedings. Brotherhood of Locomotive Firemen and Engineermen and Bangor v. A. R. Co., 389 U.S. 327, 88 S.Ct. 437, 19 L.Ed.2d 560 (1967). The damage case against Dr. Todd has been disposed of by a settlement. Since the Trial Court has yet to determine whether or not the Petitioner is entitled to recover any damages, this case may not be ripe for a review and the Petition for Writ of Certiorari should be denied. Respondent has not briefed the remaining points in the Petition as Petitioner has not briefed them.

WHEREFORE, PREMISES CONSIDERED, the Respondent prays that the Petition for Writ of Certiorari be denied and for such other and further relief, general and special, at law or in equity, to which it may show itself to be justly entitled.

Respectfully submitted,

BROWN, BROWN,  
CHANDLER & TOWNEND



David W. Townend

P.O. Box 472286

Garland, Texas 75047

(214) 271-4561

*Attorney For Respondent*

#### CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing Respondent's Reply to Petitioner's Petition for Writ of Certiorari has been mailed to the attorneys for the Petitioner, Mr. Frank Gilstrap, Mr. Frank Hill and Mr. Shane Goetz, 1400 West Abram Street, Arlington, Texas 76013 on this 18 day of August, 1988.



David W. Townend