HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 13, 1978

Memorandum re: Cases Held for No. 75-1914, Monell v. Department of Social Services

I have asked Mike Rodak to list the holds for Monell for the June 22 conference. Given the numbers involved, I am circulating the hold memo now to give everyone time to review the cases and to make sure I don't miss the ferry!

1. No. 75-1710, Rankin County Board of Ed. v. Adams

This litigation began in 1967 as a school desegregation suit with jurisdiction predicated on 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983. The United States became an amicus curiae with the status of a party and has appeared here as an amicus. During the course of this suit, the district court ordered petitioners to desegregate the faculty of their school system. Apparently petitioners did this in part by demoting all black principals and firing 28 black teachers. The district court determined that petitioners had been guilty of job discrimination with respect to most of the demoted and fired school employees. On April 12, 1974, the parties entered into a stipulation resolving the claims of 20 of the employees and filed it with the district court, which prohibited implementation of the stipulated agreement insofar as it allowed back pay until it could determine whether back pay awards could be made consistent with the Eleventh Amendment.

Notwithstanding the district court's reservation of the Eleventh Amendment issue, it filed its reports relating to job discrimination with CA5 as its "final judgment." Of course, such reports could not be a final judgment because they did not end the lawsuit, but merely determined liability and ordered prospective relief while refusing to set damages. CA5 did not notice this apparent jurisdictional defect and went on to hold that Mississippi school boards were local governments, not part of the

State, and hence not covered by the Eleventh Amendment. It then awarded respondents back pay.

According to the United States brief here, the only part of the district court's order that was ever appealable was that part ordering reinstatement of the 20 teachers. This order raises no Eleventh Amendment problem on any theory. As far as I can tell, there was no appellate jurisdiction to resolve the Eleventh Amendment claim unless that jurisdiction can be predicated on some form of mandamus, which the SG tells us would have been appropriate in the circumstances but which no one relied on below.

Whether or not there was jurisdiction below, I see no need for us to resolve the question whether Mississippi school boards are state or local bodies. Not only CA5 but two federal district courts sitting in Mississippi have concluded that Mississippi school boards are local bodies. In any case, this is scarcely a question of national importance. Nor so far as I can tell does this case properly involve issues resolved in Monell since, although petitioners now urge that they are not "persons" under § 1983, I see no indication that this ground was urged below. Moreover, and although the papers do not clearly reveal the circumstances surrounding the firing of the black employees, I would suppose that firings and demotions are official board actions within the scope of Monell.

I see little good that would be achieved by remanding this case, which is probably correct on the merits, to CA5 to allow it to consider its jurisdiction. Respondents have been waiting almost 8 years for relief -- for two of which this case has been on hold here, first for Mt. Healthy and then for Monell. Accordingly, I will vote to

DENY.

2. No. 75-1723, Musquiz v. City of San Antonio.

This is a class action brought under 42 U.S.C. §§ 1983 and 1985 and 28 U.S.C. §§ 1331, 1343(3)-1343(4) seeking an accounting, restitution, and injunctive and declaratory

relief on behalf of former policemen and firemen of the City of San Antonio against the City and the Firemen and Policemen's Pension Fund Board of Trustees. The class represents those who have contributed to the Fund and who subsequently left the employ of their respective departments and whose pension monies were not then refunded to them but retained in the Fund as authorized by Article 6243f, § 19, of the Texas Civil Statutes. On defendants' motion for summary judgment, the district court dismissed the City, citing Monroe v. Pape. It then determined that the Fund was not a municipal corporation under Texas law and held that the Fund Trustees were § 1983 "persons." Reaching the merits, the district court found no constitutional violation and entered judgment for the defendants.

On appeal, a panel of CA5 affirmed. With respect to § 1331, CA5 held that the $10,000 amount in controversy requirement was not satisfied. The panel went on to hold that the Fund Trustees, although exercising what might be called public powers, were nonetheless § 1983 persons. It then reviewed plaintiffs/petitioners constitutional claims and found them to be without merit. CA5 took the case en banc solely on the jurisdictional issue. With respect to that issue, it rendered an opinion which is on all-fours with CA2's opinion in Monell, which we reversed.

On this petition, petitioners seek review only of the en banc jurisdictional holdings and the § 1331 holding of the panel -- they claim that the amount in controversy requirement is unconstitutional. Given the unchallenged holdings on the merits of petitioners' suit, vacating CA5's en banc judgment borders on the useless. Nonetheless, since CA5 thought the jurisdictional issue important enough to consider it en banc although it had no practical effect on the lawsuit, I will vote to

GRANT, VACATE, AND REMAND.

3. No. 75-1797, Commissioners of Election v. Lytle

Respondent Lytle brought an action pursuant to § 1983 claiming that the system of ward representation in Union County, South Carolina diluted his vote and, therefore, violated the Fourteenth Amendment. On cross-motions for

summary judgment, the district court agreed with respondent. Petitioners appealed to CA4, which affirmed the liability holding, but reversed the relief given as too drastic. Thereafter, respondent moved the district court for attorneys' fees, which were awarded on a private attorney general theory. Petitioners again appealed. While that appeal was pending, a number of things happened:

1. This Court handed down Alyeska Pipe Line Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

2. Congress amended the Voting Rights Act of 1965 to include a provision, 42 U.S.C. § 1973(l)(e), allowing prevailing parties (other than the United States) "in any action or proceeding to enforce the voting guarantees of the Fourteenth or Fifteenth amendments" to be awarded attorneys' fees.

3. This court handed down Dallas County v. Reese, 421 U.S. 477 (1975), which petitioners say approved a voting scheme like that disapproved by the district court in this case.

CA4 affirmed the award of attorneys fees, citing only § 1973(l)(e). Among other things, it recognized that the private attorney general theory relied on by the district court could not sustain the fee award. It then refused to reexamine the merits of the case in light of Dallas County on the ground that its earlier, 1974 opinion had become the law of the case and that the fee question did not reopen this issue. It then held that § 1973(l)(e) should be applied to this case, citing Bradley v. Richmond School Board, 416 U.S. 696 (1974).

On this petition, three questions are raised: (1) whether § 1973(l)(e) applies to this case; (2) whether Union County and its commissioners were ever "persons" against whom relief could be had; and (3) whether the Eleventh Amendment bars the fee award because some of the petitioners are said to be state officers.

Monell obviously has relevance only to issue 2. The County and its commissioners are clearly § 1983 "persons" and the commissioners always were such "persons" for the purpose of injunctive relief. CA4 and the district court

found that all petitioners were local officials. This determination is not worthy of consideration here. Accordingly, claim 3 drops out.

This leaves only claim 1. I think the claim that § 1973(l)(e) does not apply to suits pending on its date of passage is not worthy of certiorari. In any case, subsequent to CA4's decision, the Civil Rights Attorneys' Fee Act was passed and largely overrules Alyeska, supra. Under that Act, there is no question that county officers can be subjected to fee awards and I would suppose that the Act would apply to this case. See Hutto. Accordingly, unless John thinks this case should be held for Hutto, I will vote to

DENY.

4. No. 77-532, Kornit v. Board of Education

Petitioner brought a § 1983 action against the Board of Education of Plainview-Old Bethpage, New York, seeking the return of some $400 deducted from his pay as a penalty for engaging in an illegal work stoppage. This amount represents three times petitioner's pay for the days he did not report to work. The underlying claim is one of lack of procedural due process. The district court ruled against petitioner on the merits; CA2 held that the district court had no jurisdiction, citing its Monell decision.

Since the case below was decided on the CA2's decision in Monell which we have reversed, I will vote to

77-555 GRANT, VACATE, AND REMAND.

5. Buck v. Board of Ed. of the City of New York

This is a pro se petition challenging under § 1983 petitioner's firing by respondent. Petitioner claims that she was ordered to undergo a psychiatric examination solely because (1) her principal sought to retaliate against her because she refused to join a teachers strike and (2) because she is a WASP in a school controlled by Jews. Ultimately, petitioner failed a number of times to report for such an examination and she was fired for insubordination.

The district court dismissed many of the original 50 defendants for want of any allegation that would sustain a claim against them. It then went held a trial at which the Board of Education, three former superintendents of schools, and various of petitioner's supervisors were defendants. The district court found that the medical examination was not ordered to retaliate against petitioner or to discriminate against her because of her religion. Pet. App. 142, 148. The court went on to find, however, that the procedures followed by the Board in firing petitioner deprived her of due process. It appears that petitioner appeared before an administrative law judge on a charge of insubordination. In the ALJ's report to the Board, he found that petitioner had been insubordinate, but recommended that petitioner have an opportunity to submit to a medical examination. This report was never shown to petitioner. Nor was petitioner ever given a meaningful opportunity to contest her case before the Board because the decision to fire her was made privately before a public board meeting where the official vote was taken. See id., at 164. Because the district court found a violation of Due Process, he ordered the Board to pay petitioner back pay and to hold a new hearing on the charges of insubordination. The district court did not award reinstatement.

CA2 reversed, holding that Due Process had been satisfied. In particular, it noted that petitioner had the opportunity to appear before the ALJ and contest the charges against her; that petitioner had never requested the ALJ's report; and that petitioner had appeared at the public Board hearing on her case 15 minutes late and that this tardiness had deprived her of a hearing. Judge Oakes dissented.

CA2 did not decide the question whether the Board is a § 1983 "person" and, accordingly, Monell has nothing to do with this case as it was decided. Monell does establish, however, that an award of backpay was not jurisdictionally barred. On the merits, I think (a) Due Process required that petitioner be given the trial examiner's report before she was required to rebut that report before the Board, and (b) that the CA2 majority ignored the trial court's finding of fact that the Board privately decided

petitioner's case before the public Board meeting at which the decision was announced. Accordingly, I think petitioner, a concededly tenured teacher, was not afforded a meaningful hearing before the Board, which is concededly the ultimate decisionmaker. Therefore, I will vote to

SUMMARILY REVERSE.

6. No. 77-688, Lowell School Dist. No. 71 v. Kerr

Respondent brought this § 1983 and § 1331 suit alleging that she was fired in retaliation against her exercise of First Amendment rights. The district court dismissed the School District on the authority of Monroe v. Pape, and entered a directed verdict in favor of various individual defendants. CA9 reversed, holding ambiguously that the District was a proper party under either § 1983 or under § 1331 and the Fourteenth Amendment. It also reversed the directed verdict because there was evidence from which a jury could infer that respondent's First Amendment rights were violated. It noted, however, that a new trial was necessary because the jury instructions were inconsistent with the subsequent ruling of this Court in Mt. Healthy v. Doyle.

There is no question that the firing of respondent was an official act of the school board and the district court so found. Therefore this case is squarely covered by Monell and is correctly decided with respect to the § 1983 issue. Accordingly, and in light of Mt. Healthy, no purpose would be served by reviewing the § 1331 issue. Finally, petitioners claim Eleventh Amendment immunity, but this seems to be a frivolous claim. Accordingly, I will vote to

DENY.

7. No. 77-731, City of Pittsburgh v. Mahone

Respondents, two black men, brought this suit under 42 U.S.C. §§ 1981, 1983, and 1985 against the City of Pittsburgh and two individual officers alleging that they had been stopped by the officers without probable cause, subjected to physical abuse, and later convicted on the strength of the officers' perjured testimony, all because

respondents were black. The district court dismissed the City and entered a certificate under Fed. R. Civ. P. 54(b), allowing an appeal to be taken. On appeal, CA3 held that there was a cause of action against the City under § 1981.

Petitioners major argument against § 1981 liability, and the argument that has caused a split in the circuits, is Monroe's holding that municipalities are immune from suit under § 1983. Our holding in Monell obviously defeats this argument in large part. Whether Monell actually covers this case is not so clear since all that may be involved here is a respondeat superior claim.

The further question raised in the petition -- whether averments of police brutality and false testimony state a cause of action under the "equal benefit" and "like punishment" clauses of § 1981 -- is arguably important, but all sides admit that it is novel. My guess is that our Monell holding will make CA3's holding that police brutality does deny "equal benefit" of the laws and impose unlike punishments a sport in the law. On that basis, and believing that our Monell ought to "percolate" in the lower courts for a while, I will vote to

DENY.

8. No. 77-914, City of Independence, Mo. v. Owen

Respondent is the former police chief of petitioner, the City of Independence, Mo. After an investigation of irregularities in the police property room, respondent was fired by petitioner's city manager. Under the city charter, the city manager has the sole authority to hire and fire the police chief, and respondent has no tenure that would give rise to a "property" interest protected by the Due Process Clause. The day before respondent was discharged, a member of the City Council, who had obtained a copy of the report of irregularities, discussed this report in an open City Council meeting. This discussion lead to a vote to turn the report over to prosecutorial authorities for possible criminal prosecution. All of the above occurred before our decisions in Perry v. Sinderman and Board of Regents v. Roth.

Respondent sued the City and its officers in their official capacity in a suit brought directly under § 1331 and the Fourteenth Amendment and also under § 1983. The district court denied all relief. CA8, however, held that § 1331 conferred subject matter jurisdiction and, further, held that respondent was entitled to compensation for the "stigma" suffered because of the publication of the report which was in fact false. CA8 awarded this relief solely against the City, holding that the good faith of the City did not constitute a defense.

After Monell, it is clear that a City Council resolution is sufficient "official action" to support a constitutional claim against the City itself. Here, however, at least part of the alleged stigma arose not from the resolution itself but from remarks made by a single councilman during debate. Doubtless though, the fact that the Council sufficiently agreed with the remarks to cause it officially to refer the matter for prosecution must have added to any stigma created. Accordingly, regardless of the § 1331 claim, there is likely a valid cause of action stated here against the City under § 1983. Whether respondent's "slander" claim is in fact a good Due Process claim is less clear. It would appear to survive Paul v. Davis since there was a loss of public employment in connection with the stigmatizing action.

The second question presented in the petition is whether the City should have been given some kind of immunity. We specifically reserved the immunity issue in Monell. Here, there are two not unreasonable claims for immunity: first, that put forward by Lewis in Monell (but not argued here by petitioner), that all of the events in suit occurred before the Due Process law was formulated upon which respondent bases his complaint; and, second, that there ought to be some sort of City immunity for remarks spoken during Council deliberations to ensure robust and hearty debate, etc. Therefore, we could take this case to consider the immunity issue. Notwithstanding this, I strongly feel that we should let the immunity issue "percolate" in the lower courts for awhile.

Although this case was decided on § 1331 grounds, I think it would not be inappropriate given our holding in Monell to grant, vacate, and remand this case to allow CA8

to consider whether any of the Monell limitations should be engrafted on the § 1331 cause of action and also to reconsider its immunity decision in light of our express invitation to the lower courts to do so. Accordingly, I will vote to

GRANT, VACATE, AND REMAND

9. No. 77-1032, City of Columbus, Ga. v. Leonard

Respondents are six black policemen fired by petitioner for taking part in a demonstration held to protest various instances of racial discrimination. They filed this § 1983 suit seeking reinstatement on a number of theories. The district court abstained in favor of state administrative remedies which has also been invoked by respondents. CA5, en banc, reversed. The question presented is whether there should have been abstention.

This case has nothing whatsoever to do with Monell. Monroe v. Pape still stands insofar as it holds that there is no need to exhaust state administrative remedies. I will vote to

DENY.

10. No. 77-1129, Wilson v. Dellums

This case involves part of the May 1971 demonstrations in the District of Columbia. At the end of May Week, demonstrators gathered at the Capitol and were arrested while sitting on the Capitol steps listening to speeches. Ultimately all charges against this group of arrestees was dropped after a test criminal case failed. Thereafter a class action was instituted by the arrestees claiming violations of various constitutional rights. After a jury trial, damages of up to $10,000 per person were awarded against D.C. Police Chief Wilson, the District, and Capitol Police Chief Powell. CADC affirmed some of the jury awards and reversed others.

This petition is filed only by Wilson and the District; Powell has filed No. 77-955. Petitioners claim (1) that no constitutional action against the District

should have been permitted; (2) that the federal government was in control at all times and therefore that the District should not be held in damages; and (3) that a D.C. statute requiring notice prior to suit was not complied with.

Point 2 was presented to the jury under proper instructions and was resolved against the District. The District attempts to reargue the facts here, but this is for the jury. Point 3 is not an issue of any national importance.

With respect to point 1, a number of points are not contested: First, our decision in District of Columbia v. Carter conclusively establishes that § 1983 does not apply to the District. Second, under District common law, the City is liable in respondeat superior for the false arrests of its police officers. Third, to sustain the award against the City, all we must find is a colorable jurisdictional basis under § 1331, as CADC held. See Mt. Healthy v. Doyle. Whether such a basis exists turns on whether a Bivens remedy against a city can be implied. This inquiry turns on the further question of whether there are any "factors counseling hesitation" in implying such an action. The District argues that Monroe v. Pape's conferral of municipal immunity is such a factor. After Monell it is not. Of course, Monell holds that § 1983 does not allow a respondeat action. But this holding is based purely on an analysis of legislative intent that was itself based on a mistaken understanding of the Constitution. I see no reason to take that mistaken intent and create it into a limitation on Bivens when (a) we have already held in Carter that Congress was not thinking about the District when it passed § 1983 and (b) when the reason for the respondeat limitation is the 1871 Congress' doubt about its power, a doubt bottomed on notions of federalism that simply cannot be apposite to the District of Columbia. See U.S. Const. Art. 1, § 8. Accordingly, I will vote to

DENY.

Note, however, that this case and its companion, No. 77-955, are also held for Butz. Frankly, I do not see a Butz issue in this case, since the only individual officer

involved is the D.C. Chief of Police whose qualified immunity claim was submitted to the jury and rejected -- certainly he doesn't get more immunity that a state officer whatever may be the case with Chief Powell of the Capitol Police. In any case, we may want to announce the result here and in 77-955 at the same time.

11. No. 77-1481, Weeks v. Simpson

In 1974, a civil action was filed against petitioner Weeks, then Chief of Police of Little Rock, Arkansas, alleging various violations of the constitutional rights of city prisoners. Weeks learned during trial that officers on the Little Rock force had been cooperating with the plaintiffs' attorney in that suit. One of the officers suspected of cooperating was respondent, Simpson, although Weeks later conceded that Simpson had not been involved. Nonetheless, immediately after growing suspicious of Simpson, Weeks transferred him to duty at the city jail and gave Simpson a string of very low performance ratings. Simpson instituted this suit claiming a violation of his First Amendment rights.

The trial court awarded $1 nominal damages against each of Weeks and two other officers alleged to be involved in the unconstitutional conduct. In addition, it awarded some $6,000 in punitive damages. CA8 affirmed with respect to two of the three defendants.

The petitioners argue (1) that respondent should have exhausted his administrative remedies; and (2) that there was no § 1983 violation because restrictions on respondents speech were "reasonable." But it is well settled that a § 1983 plaintiff is not required to exhaust his administrative remedies, and both courts below found that petitioners had intentionally "punished" respondent because he was thought to have spoken to the attorney in the pending civil rights suit. Thus, however reasonable a police department rule might be that prohibited officers' speaking with attorneys during pending investigations, no reasonable rule could sanction the personal harassment imposed by petitioners. Therefore, this petition not only has nothing to do with Monell, it is frivolous. I will vote to

DENY.

12. No. 77-6355, Vinson v. Richmond Police Department

This is a § 1983 action against the City of Richmond, Virginia, Police Department and the Richmond Commonwealth Attorney alleging that the Richmond Police unlawfully took some of petitioner's property. The district court dismissed on the ground that the statute of limitations had run. CA4 dismissed the Department on the authority of Monroe v. Pape and the Commonwealth Attorney on the ground that he was not alleged to be personally involved in the unlawful search that is the heart of the complaint. It did not reach the statute of limitations point.

The complaint alleges that the police broke into petitioner's private residence and took photographic equipment and supplies valued at over $1,500. The search warrant under which the seizure was made was subsequently held illegal by a judge of the Circuit Court of the City of Richmond. Nonetheless, the Police Department refuses to give the property back or to pay for it. Petitioner believes that the property was destroyed.

Whether the issuance of the warrant was itself official action within Monell is of little moment since the holding of the property, which is the gravamen of the complaint, can only be official action of the Department. Accordingly, I will vote to

GRANT, VACATE, AND REMAND.

Please note that Nos. 77-1203, 77-1221, and 77-1294 are marked as holds for this case. Each of those cases apparently involves the statute of limitations issue which CA4 did not in fact reach in 77-6355. I frankly do not see anything in the statute of limitations issue given Robertson v. Wegmann, but I will defer to Thurgood on this.

13. No. 77-657, Flint v. Gagliardi

Respondent brought this action under § 1983 and the Pennsylvania Survival and Wrongful Death Statute alleging that the shooting death of her son by petitioner Flint, a police officer of the City of Philadelphia, was both tortious and unconstitutional. The City was named as an

additional party defendant. This case went to trial solely on the state law claim and a jury entered a verdict in favor of respondent for $116,570. The City and Flint appealed.

On appeal, apparently for the first time, the City alleged want of jurisdiction over it. CA3, citing 28 U.S.C. § 1653 ("Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."), held that a § 1331-Bivens claim could be added to the complaint while the case was upon appeal. At all times the complaint alleged a Fourteenth Amendment violation and $10,000 in controversy. Citing Mt. Healthy, CA3 held that the Bivens claim was jurisdictionally sufficient and, citing Hagans v. Lavine, ruled that the trial court had properly considered and tried the state law claim first. It then ruled that other claims of error were insubstantial, a resolution that is not disputed here.

Petitioners raise two claims: that CA3 abused its discretion in allowing the § 1331 claim to be added while the case was on appeal; and that the § 1331-Bivens claim was jurisdictionally insufficient. The first issue is not meritorious since no amendment of the complaint was in fact necessary to establish a valid claim under § 1331 -- the absence of an express reference to § 1331 is not a jurisdictional defect in and of itself and jurisdiction will lie so long as facts are alleged that would support jurisdiction under § 1331. Andrus v. Charlestone Stone Products, Inc., 46 U.S.L.W. 4561, 4561 n. 6 (1978).

The second issue is more troublesome. The federal claim against Philadelphia apparently is bottomed on both respondeat superior and allegations that Flint's superiors knew of "the dangerous propensities of Officer Flint by virtue of numerous complaints made against him by civilians, who had received brutal and abusive treatment at this hands, prior to his killing of Gagliardi." Response 3. It apparently also alleges in essence that at the time of the shooting, Gagliardi was running away from Flint and, although Flint was apparently trying to arrest Gagliardi, Flint knew at the time that there was no probable cause for such an arrest. See App. to Pet. for Cert. A-5 (CA3 opinion). Since the federal claim has not been tried, we must assume that these allegations are true

for the purpose of considering jurisdiction. Under this standard, I conclude that the allegations were jurisdictionally sufficient. First, our discussion of respondeat superior in Monell makes it quite clear that § 1983 does not cover respondeat only because such a cause of action would be inconsistent with subsequently overruled doctrines of federalism that were embraced by the 1871 Congress. If a Bivens action under the Fourteenth Amendment was otherwise appropriate for the alleged Fourth Amendment violation by Flint -- and petitioner concedes that many courts have so held -- nothing in Monell would therefore make it inappropriate under the "special factors counseling hesitation" test of Bivens itself. Second, a direct action on an Estelle v. Gamble theory -- as I indicated in various drafts in Monell -- might lie against Philadelphia if it had in fact taken no steps to discipline an officer known to be dangerous to the public. Others apparently were not willing to swallow this theory in Monell, but I think it is certainly sufficiently supported by Gamble to support jurisdiction under either § 1331-Bivens or under § 1983 itself.

For the reasons stated above, I will vote to

DENY.

14. No. 76-5224, Thurston v. Deckle

Petitioner is the class representative of a class of civil servants of Jacksonville, Florida. He alleges that he and other members of the class, who may only be fired "for cause," were given inadequate procedures. The district court agreed and awarded both injunctive relief and backpay. CA5 upheld the prospective award, but ruled that the backpay would come from the City of Jacksonville, notwithstanding the presence in the lawsuit of individual defendants. Therefore on the basis of Musquiz v. City of San Antonio, which is discussed above at pp. 2-3, the claim for backpay was dismissed. Petitioner argues that this dismissal was erroneous.

There is no question in this case that the dismissal was pursuant to the rules and regulations of the Jacksonville Civil Service Board and therefore that

official action necessary to satisfy Monell is present. Musquiz, supra, as I have already indicated, is on all-fours with CA2's Monell, which we reversed. Accordingly, I will vote to

GRANT, VACATE, AND REMAND.

W.J.B., Jr.