JAN 25 CERT GRANTED limited to question 2
OCT 4 1976 REDISTRIBUTED
JAN 10 1977 RELISTED

75-1914 CERT TIMELY SL..13, p.44

MONELL v. DEP'Tof Social SERVICES

CA 2: Gurfein, Havs, Timbers

Plaintiffs in this action filed suit in ~~XXXX~~ 1971 against the NY Bd. of education and New York City, challenging on constitutional grounds the policy of defendants requiring pregnant employees to take unpaid leaves of absences. (That policy presumably was unconstitutional under LaFleur). In 1972, they moved to add a Title VII claim under the 1972 amendments ~~XXX~~ extending Title VII to state and local employers. Defendants later abandoned their policy, thus ~~XXXXXXX~~ mooting the claim for injunctive and declaratory relief: a damage claim remained. As to that claim, the CA 2 held (1) plaintiffs could not rely on Title ~~VVI~~ to challenge activity that took place before the effective date of the statute even though the suit was pending on that date, and (2) that under § 1983 no damages were available because the city and board or education were not "persons" and because no damages could be collected from individuals sued in their official capacity.

The second issue may be presented in No 75-1278, Mt. Healthy City School Dist. v. Doyle, to

be argued this term. I would recommend a hold for Mt Healthy as to the second issue.

As to the first issue, the CA 2 distinguished Brown v. GSA. There the CA 2 had held that because federal employees had had a right, under various executive orders and the civil service statute, to be free from employment discrimination, the extension of Title VII was merely providing an additional remedy: hence it could be retroactively applied to cases pending on its effective date; the Supreme Court, in affirming, merely noted that the govt. had acquiesced in that ruling. In the instant case, the CA 2 argued that the extension of Title VII in 1972 created entirely new substantive rights. That may be true in some cases, but where the challenged practice, as in this case, would have been independently prohibited by the Constitution and the subject of a § 1983 suit, the CA 2's reasoning is not wholly sound. However, in the instant case the policy has been changed. Whether or not the CA 2 is right, there is no circuit conflict. Finally, there can't be too many cases left which were pending as of the effective date of Title VII and are still bouncing around in the courts; hence, resolution of the retroactivity question at this point may not be

that important. Thus, I would not bother with the retroactivity question, but as to the second issue I would

HOLD for Mt Healthy City School Dist, v. Doyle, NO. 75-1278

djm OPN: otn at A28

There is no response

(Perhaps if we are going to hold, we might CFR to enable us to promptly dispose of the case when Mt Healthy is decided)