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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 2, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Pembaur v. City of Cincinnati, No. 84-1160.

(1) No. 85-249, City of Little Rock v. Williams.

Williams was hired by Butler, a municipal judge, as a court clerk. Butler fired her for reporting to police that she had witnessed Butler deliberately destroy traffic tickets. Williams filed a §1983 action alleging that the dismissal violated her First Amendment rights. Her complaint charged Butler in his official capacity only, making it, in effect, an action against the City. Hutto v. Finney, 437 U.S. 678, 700 (1978); Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690, n. 55 (1978).

The jury returned a verdict in Williams' favor, awarding her $40,000 in compensatory damages and $60,000 in punitive damages. The District Court set aside the punitive damages award on the basis of Newport v. Facts Concert, Inc., 453 U.S. 247 (1981). However, the court upheld the award of compensatory damages, rejecting the City's argument that Butler's action did not constitute municipal "policy" within the meaning of Monell.

A split panel of the Eighth Circuit affirmed the District Court's decision. A petition for rehearing en banc was granted, and the panel decision was vacated. An equally divided court then affirmed the District Court without opinion.

This leaves the opinion of the District Court, which is somewhat difficult to decipher. Butler testified at trial that, when he was first appointed, he went to see the City's personnel director regarding the hiring of a staff and was told that "traditionally the courts had been responsible for hiring and firing their own employees." Pet. App. 13. The District Court found that "[t]he authority to make employment decisions was given to Butler by the City personnel office when Butler took office a number of years ago," ibid., and that consequently Butler's employment decisions constituted municipal policy.

Under the principal opinion in Pembaur,

> [t]he fact that a particular official--even a policymaking official--has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion.... The official must also be

> responsible for establishing final government policy respecting such activity before the municipality can be held liable." Pembaur, at 11-12 (citation and footnotes omitted).

Municipal liability therefore turns upon the nature of Butler's authority with respect to the hiring and firing of his staff. This, in turn, depends upon what exactly was delegated to Butler by the City personnel office. The District Court may have found that Butler was delegated final policymaking authority with respect to the hiring and firing of his staff. However, it is equally possible that the court found only that Butler had been left discretion to hire and fire and that the court thought that this was sufficient to establish municipal liability. The panel disagreed about precisely this issue--the majority concluded that Butler had been delegated final policymaking authority, while the dissent rejected this conclusion and argued that Butler had merely been left discretion to make his own decisions pursuant to policy made by the personnel office. The distinction is crucial, as the hypothetical in footnote 12 of Pembaur makes clear:

> "[T]he County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff is the official policymaker, would give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board. However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions would represent county policy and could give rise to municipal liability." (Emphasis in original).

In other words, the result below should be affirmed if Butler was delegated final policymaking authority, but should be reversed if Butler was merely permitted to exercise discretion in hiring and firing. Because the District Court failed to focus on this issue, and the panel opinion was vacated by the Court of Appeals sitting en banc, I will vote to GVR for the court below to consider the nature of Butler's delegated authority.

(2) No. 85-359, County of Wayne v. Marchese.

Marchese was pulled over by a Wayne County Deputy Sheriff for reasons that are not disclosed in the papers, but which have something to do with the fact that Marchese was a drug addict. When the Deputy Sheriff ordered Marchese out of the car, Marchese reached under his car seat and pointed a gun at the police officer. The Deputy Sheriff succeeded in wrestling the gun away from Marchese and placing him under arrest. On the ride back to the station Marchese was told that the police "had something waiting" for him. The something turned out to be a group of deputies who threatened Marchese. Marchese became frightened and attempted to flee. The police quickly apprehended him, dragged him back to the station, and beat him. Marchese was then booked and placed in a cell. Soon thereafter, Marchese was visited by a lawyer who interviewed him about what had happened and left. Later that night, after the shift change, someone was let into Marchese's cell, and Marchese was again beaten, more severely this time. At arraignment the next day, Marchese's lawyer protested, and the judge ordered the police to investigate; although several reports concerning the incident were filed, no investigation was ever undertaken.

Marchese subsequently filed this §1983 suit against several of the officers, the Sheriff (in both his personal and official capacities), and Wayne County. Marchese argued that the Sheriff, and through him, the County, were responsible on two alternative theories: (1) that the County had a "policy" of inadequate training of deputies in the handling of prisoners which caused the incident, and (2) that the Sheriff's failure to investigate the assault and discipline the responsible officers constituted a ratification of the unlawful beating. The case was tried to a jury, which returned a general verdict in favor of the individual police officers and the Sheriff in his personal capacity, but against the County and the Sheriff in his official capacity. Marchese was awarded $125,000.

The Sixth Circuit affirmed. It concluded that the record as a whole supported "a [finding of] failure to provide a trained and disciplined county law enforcement agency." Pet. App. 15a-16a. The County submitted a petition for rehearing after this Court decided Tuttle, arguing that the evidence was insufficient to establish a policy of inadequate training. The Court of Appeals denied rehearing, but amended its opinion to make specific note of the fact that three of the responsible County police officers testified that "at the time of the incidents in question, they had not received any training in the care, treatment, and handling of prisoners in their custody." Id., at 21a-22a.

Based on these facts, and after finding that the Sheriff was the offical law enforcement policymaker for Wayne County, the Court of Appeals upheld the damages award. The court found the evidence sufficient to support the jury's finding that the

Sheriff had adopted a "policy" of not training and disciplining officers. The court also found the evidence sufficient to support a finding that the Sheriff had adopted a "policy" of not investigating or disciplining officers who assaulted prisoners who had threatened a fellow officer. The court held that the implementation of this latter "policy" in this case constituted ratification of the assault on Marchese, establishing an independent basis for liability.

The County raises 3 issues in its petition: (1) that the Sheriff was not a policymaker under state law; (2) that, under Tuttle, a single incident cannot constitute adequate proof of a municipal "policy"; and (3) that the proof of ratification in this case was insufficient.

With respect to the first issue, the status of a particular official as a "policymaker" is a question of state law. Pembaur, at 13. After examining the state constitution and local law, the Court of Appeals concluded that the Sheriff was the duly authorized, final County policymaker with respect to law enforcement practices such as the handling of prisoners. As noted in Pembaur and numerous other cases, we do not ordinarily review a lower court's interpretation of state law. Here, moreover, there is no need for such review since the Court of Appeals was undoubtedly correct. See Pet. App. 16a-17a.

With respect to the issue of the adequacy of the proof of a policy of inadequate training, petitioners are simply mistaken in asserting that the Court of Appeals relied on a single incident to find that there was a "policy" of inadequate training. To be sure, the court did take note of the extreme nature of this incident and indicate that it "speaks ab initio of lack of training and discipline." Id., at 15a. However, the court also relied on further evidence in the record, in particular the testimony of several officers that they had received no training whatever. Id., at 21a-22a. Such evidence is more than adequate to support the conclusion that the County had a policy of inadequate training, especially since it apparently went unrebutted. And, although it appears that the trial court gave an instruction like the one disapproved of in Tuttle, the County never objected to this instruction and thus the issue of its validity has not been preserved for review. Fed. R. Civ. Proc. 51.

Finally, the issue whether there was sufficient evidence to support the conclusion that the County ratified the illegal conduct is factbound and not independently certworthy. Moreover, even if the lower court erred in this regard, the judgment would still stand on the inadequate training claim.

This case need not be held for City of Springfield v. Kibbe, No. 85-1217. The issue in that case is whether inadequate training of police officers is a viable theory for municipal liability. Here, the County never argued that it was not a valid

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theory for recovering, and indeed does not make this argument even now in its petition. Moreover, because the County made no objection below, it has waived the argument.

Accordingly, I will vote to deny.

(3) No. 85-6318, MacLean v. City of Bellingham.

This case, which was first considered at the March 21 conference, was not held for Pembaur; instead, it was relisted for me to circulate my views.

After citing petitioner twice for driving with a suspended license, a Bellingham police officer impounded MacLean's vehicle pursuant to Wash. Rev. Code §46.20.435, which provided at that time that "[u]pon determining that a person is operating a motor vehicle ... with a suspended or revoked license ... a law enforcement officer may impound the vehicle which the person is operating." The impoundment was effected without a hearing, and MacLean only regained possession after the license charges against him were dismissed.

Subsequently, MacLean filed a §1983 action in state court against the City. MacLean challenged the seizure, seeking a declaration that §46.20.435 was unconstitutional in addition to damages and attorney's fees. The trial court granted MacLean declaratory relief, finding the statute unconstitutional because it failed to provide for either a pre- or a post-deprivation hearing. However, the court granted summary judgment to the City on the damages and attorney's fees claims.

The state court of appeals affirmed. It noted that MacLean's argument turned on testimony given by the police officer who impounded the car at the hearing on the summary judgment motion:

> "'[Officer]: When the law first came out, there evidently was some question within our own ranks as to whether or not we would be using the law; we referred that question to [the Captain of Operations]. [The Captain] at first had a memo out stating that it was going to be researched as all new laws are before we act on the laws and to momentarily wait before using the law. Sometime later, it wasn't a very long period of time, within several weeks, we began using that, we began impounding vehicles under the specific law.
> '[Counsel]: I take it from what you said, [the Captain] let it be known through the department that he was giving his approval to enforcement of the law?

'[Officer]: That's correct.'" MacLean v. City of Bellingham, 41 Wash. App. 700, 705 (1985).

The court found this testimony inadequate to establish the existence of a municipal "policy" under Monell: "MacLean would have us hold that anytime a local law enforcement officer enforces a state statute, the local government which employs the officer, by implication, adopts an official policy with respect to that statute which would render it liable should the statute later be declared unconstitutional. We decline to so hold." Ibid. This result was based on the fact that the authorizing statute was enacted by the state legislature. The court thus concluded that "[t]he police captain and his officer, even if their conduct was wrongful, were not acting to implement a policy of the City of Bellingham, but rather were acting to implement state policy." Id., at 706.

The court below plainly erred in concluding that the unconstitutional action by the Bellingham police constituted implementation of state policy. The action challenged by MacLean was the impoundment of his vehicle without a hearing. However, the state statute authorizing such impoundment said nothing whatever about procedures. It merely granted authority to law enforcement officers (state and local) to impose the additional sanction of impoundment on individuals violating certain licensing laws. A municipality could choose not to impound at all; could choose to impound with pre- or post-deprivation hearings; or, like the City of Bellingham, could choose to permit the ticketing officer to impound. In other words, the state simply gave to municipalities discretion whether (and how) to impound. The testimony I have quoted plainly manifests the fact that the law was so understood.

In light of this, a GVR is in order. The captain of the Bellingham police made a decision to instruct his officers to begin impounding cars when they ticketed. As the testimony quoted above makes clear, that decision unquestionably constituted "a deliberate choice to follow a course of action ... made from among various alternatives ...." Pembaur, at 13. The only issue is whether the police captain who made this choice was "the official ... responsible for establishing final policy with respect to the subject matter in question." Ibid. Neither the opinion below nor the petition sheds any light on this question, and there is not yet any response. I will therefore vote to call for a response with an eye to GVR in light of Pemabur.

Cheers

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