No. 86-772

City of Saint Louis

v.

James H. Praprotnik

Cert to CA8 (Lay, Bright, Ross [diss.])

To be argued Wednesday, October 7, 1987

CONTENTS

September 29, 1987
Kappler

SUMMARY

Resp, an employee of petr City of St. Louis, alleged that he was transferred from his management position to a menial job and ultimately laid off in retaliation for the exercise of his First Amendment rights in asserting grievances against the city. He brought § 1983 suit against the city and three individual defts, municipal officials who he alleged were responsible for the adverse employment decisions. The jury exonerated the individual defts and found resp liable. The DC denied j.n.o.v. As relevant to this case, CA8 affirmed, holding that (1) resp is liable for the transfer and layoff because the decisions were made by municipal officers who had been delegated final authority to make the decisions; and (2) the jury's verdict against resp is not inconsistent with the jury's exoneration of the individual defendants.

Petr contends that CA8's test for municipal liability conflicts with this Court's precedents and effectively results in respondeat superior liability. Petr urges the Court to adopt a rule whereby a city policy is not made when an employee makes a decision that is contrary to orders or rules that are binding upon him. More than this, a city policy is only made when a decision is made by one in whom the ultimate authority to make such decisions is placed by the city's fundamental law. Applying this rule, petr argues that it cannot be held liable for resp's transfer and layoff. In addition, petr contends that principles of causation make it impossible for the jury to have exonerated the individual defts and at the same time found the city liable.

Resp argues that the jury was correctly instructed on munic-

ipal liability in that it was permitted to find that resp was liable if high municipal officials were responsible for the unconstitutionally motivated transfer and/or layoff. Resp contends that there was sufficient evidence to make this finding and that the jury verdicts were not inconsistent. Resp avers that petr's "ultimate authority" test conflicts with this Court's interpretation of § 1983 municipal liability.

In my view, due to the bungled jury verdicts and CA8's confused interpretation of the facts and law, the Court should seriously consider dismissing this case as improvidently granted. My best reading of the instructions is that they led to inconsistent verdicts. However, if the Court is not going to DIG the case, it should not address the verdicts issue and should proceed directly to municipal liability. I conclude that the application of CA8's "final authority" test in this case conflicts with this Court's opinion in Pembaur. Under any of the tests for "municipal policy" articulated by members of the Court to date, resp's transfer and layoff were not caused by petr's policy and petr cannot be held liable under § 1983. Accordingly, I recommend reversal.

I. BACKGROUND

Resp was employed as an architect by petr, commencing in 1968 until he was laid off on Dec. 30, 1983. In 1980, when resp became embroiled in a dispute with his supervisors, resp held a management position in petr's Community Development Agency (CDA) and had to that time enjoyed good to excellent job evaluations. Spaid, CDA Director, instituted a policy whereby any professional employee was required to obtain prior approval before engaging in outside employment. Resp and other CDA employees objected principally on the grounds that the requirement was an unwarranted intrusion on their privacy and personal conduct. On April 29, 1980, Kindleberger, resp's immediate supervisor (CDA Dir. of Urban Design), suspended resp for fifteen days for failing to cooperate with the new policy. Resp claimed he had complied and appealed to the City Civil Service Commission (Comm'n), which found the suspension excessive and unreasonable, reinstated resp, and awarded backpay.

Although Kindleberger had recommended resp for a significant grade increase several days before the dispute arose, after the dispute, in Oct. 1980, Spaid ordered that resp be given a new interim review, and Kindleberger rated resp "good" overall but recommended a two-step decrease in salary grade.[1] Petr says the downgrade resulted from a city-wide reevaluation process trig-

[1] The actual salary reduction directive was signed by Kindleberger. However, at trial, Kindleberger insisted that Spaid had personally ordered the reduction.

gered by the removal of the $25,000 limit on employees' salaries. However, in response to resp's inquiry, Kindleberger explained that Spaid was "down on" resp and thought he had not been honest during the Comm'n review proceedings. Resp appealed, and the Personnel Dir., Duffe, upgraded some of resp's ratings and ordered that resp be reduced in grade only one pay step.

In April 1981, the new city mayor appointed Hamsher to replace Spaid and ordered budget cuts and layoffs. Eventually, CDA was halved; two-thirds of the employees who resp supervised were either shifted, along with their jobs, to other units or were laid off. Resp complained about the reorganization of his responsibilities to Hamsher, who never responded. In Oct. 1981, resp was again reviewed by Kindleberger and another superior, Karetski, who gave him lower ratings than he had ever received before -- "adequate" in all but his "relationships," in which he was rated "inadequate."[2] Resp again appealed to the Comm'n which raised the "inadequate" to adequate and ordered a reevaluation (which CDA never performed).

In April 1982, major staff and budget reductions were made in CDA. At the time, resp was the senior employee in his job classification. Hamsher made arrangements with Jackson, the Dir. of resp's Heritage and Urban Design Division (H&UD), and Nash,

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[2] A memo from Karetski stated that the "inadequate" was due in part to the fact that resp did not relate well to Spaid, who expressed that resp should be fired, that resp was sabotagings the dept., and that he could not be trusted.

Dir. Dept. of Public Safety and Jackson's superior, to consolidate some of resp's duties with an H&UD position of much lesser responsibility to create a new position in H&UD at a grade equivalent to resp's to which resp would be transferred. Hamsher informed resp of the transfer.[3] Resp attempted to appeal, but the Comm'n declined to hear the appeal on the ground resp had lost nothing by the transfer. Resp did, however, forfeit his seniority for lay-off purposes because he was the only employee in his new job classification.

Although resp's architectural duties were supposed to have been transferred with him, Jackson took them over and assigned resp only the most menial tasks. In resp's Nov. 1982 annual review, Jackson gave him an overall "inadequate" rating, noted that he was "grossly overqualified," and recommended that his position be reclassified and his salary decreased by one step. Resp appealed to the Comm'n which raised his ratings to "adequate" and reversed the pay reduction recommendation. Meanwhile, resp's job was reclassified to a lower grade.

Meanwhile, plans were being made to lay off resp. In Feb.

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[3] According to resp, there was conflicting evidence as to who was responsible for the transfer decision. Hamsher announced the transfer but insisted that the Mayor had actually made the decision. A representative of the Mayor's office said that the Mayor merely accepted Hamsher's recommendation. Duffe testified that he, Hamsher, and Jackson had made the decision. In his deposition, Duffe suggested the decision would have been made by the Bd. of Estimate and Apportionment. Petr's Budget Dir. had approved the transfer. Petr contends that the evidence shows that only Hamsher was responsible for the decision.

1983, Killen, Jackson's replacement, proposed to H&UD Dir. Nash that resp's job be abolished. On July 1, Killen requested a budget change from the Mayor's office that would have eliminated resp's job. On Nov. 2, Killen submitted to Patterson (Hamsher's successor as CDA Dir.) an H&UD budget that excluded resp's job. On Dec. 23, resp received notice that he would be laid off effective Dec. 30, 1983. The notice indicated that the reason for the layoff was lack of funds.[4] Resp appealed to the Comm'n, but the Comm'n has not acted on the appeal to date.

II. DECISIONS BELOW

On Feb. 8, 1983, after the Comm'n declined to hear his appeal regarding his transfer to H&UD, resp filed the instant suit in E.D. Mo. against petr, Kindleberger, Hamsher, Jackson, and Patterson, alleging that the transfer was unconstitutional. In March 1984, resp amended his lawsuit to include a challenge to his layoff, claiming that both the transfer and layoff violated his First Amendment right to pursue his grievance from the suspension and his due process rights. Resp also deleted Jackson

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[4] According to resp, the record is unclear as to who decided to lay him off. Killen asserted that the decision was for Nash and Patterson to make. Nash insisted that Patterson made the decision because H&UD received all funds from CDA. Patterson testified that Nash made the initial recommendation, which was approved by the Bd. of Estimate and Apportionment, and that she had no veto authority. Duffe asserted that Nash and Killen made the decision.

At the time of the layoff, Hamsher was a member of the Mayor's staff, with responsibilities unrelated to supervision of resp or any other employee. He was not consulted regarding the layoff.

(who had moved outside the juris.) as a deft.

In his opening argument before the jury, resp argued: "If [the acts] were done by high-ranking City officials, then the responsibility lies with the City because we contend that this then constituted a custom or practice on the part of the City over a period of years to eliminate people for the exercise of their rights of appeal and for whatever other reasons that existed." Petr's Brief 7-8. The primary defense offered by the defts was that the allegedly unconstitutional treatment of which resp complained had been the work of high ranking officials other than the three named individual defts. Petr made motions for directed verdict at the close of resp's evidence and at the close of all the evidence, arguing that there was no evidence of a city policy that directly caused resp's injury. The DC (Hungate, J.) denied the motions.

The jury returned two forms of special verdict exonerating all of the individual defts and finding petr liable under both theories and assessing damages for $15,000 for each violation. Following the denial of its motion for j.n.o.v. or, in the alternative, for a new trial, petr appealed.

CA8 (Lay, Bright, Ross [diss.]) affirmed the First Amendment claim against petr, but reversed and vacated the judgment on the due process claim. Two of CA8's rulings are the subject of this review. First, as a preliminary matter, CA8 concluded that the Court's decision in City of Los Angeles v. Heller, 106 S.Ct. 1571 (1986), did not preclude resp's recovery even though the jury had found the individual defts not liable. In Heller, the Court af-

firmed the DC dismissal of a municipality as a deft because the jury had concluded that the city's officer who had made an allegedly unlawful arrest had inflicted no constitutional harm. The city's liability was solely derivative of the conduct of the named individual deft who was exonerated. In the instant case, however, persons other than the named defts, such as Nash and Killen, put into effect city policy in laying off resp and thereby brought to fruition resp's ultimate injury. The named individual defts were not the supervisors directly causing the layoff, and an erroneous jury instruction which went unchallenged stated that liability could attach only if the individuals were personally involved in the layoff. This instruction was erroneous because there was no evidence that the named defts were ever involved in the actual layoff decision. Under this instruction, though, it is easily understood why the jury returned verdicts for the named defts and yet found petr liable. Furthermore, evidence was offered to support resp's closing argument that Nash and Killen, high city officials, were responsible for the layoff.

Second, CA8 addressed the question of the validity of the jury's implicit finding that resp's injury was brought about by an unconstitutional city policy thereby allowing an action against petr under Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658, 691 (1978). CA8 applied the two-prong analysis from Williams v. Butler, 746 F.2d 431, 438 (CA8 1984), which it noted was an approach viewed with approval in Pembaur v. City of Cincinnati, 106 S.Ct. 1291 (1986): (1) whether, according to a policy or custom established by a governing body, an official is

delegated the authority, either directly or indirectly, to act on behalf of the government; and (2) whether a decision made within the scope of that official's authority "ends the matter." If both questions are answered affirmatively, then the official's acts constitute those of the governing body.

CA8 found that both requirements were met. First, the jury could reasonably have found that resp's supervisors were delegated the authority to act on behalf of petr in effecting resp's transfer and layoff because under the city charter and civil service rules, "appointing authorities" such as resp's supervisors, initiate lateral transfers and layoffs. The requisite approval by the city's Personnel Dir. is conditioned only on formal compliance with the rules. The Dir. does not assess the substantive propriety of the transfer or layoff.

There was also adequate evidence to support the second prong of the Williams test; the jury could have reasonably found that final authority for transfer and layoff rests with the initiating supervisor. The existence of an appellate process does not automatically divest a decisionmaker of final authority for purposes of attributing municipal liability. See Bowen v. Watkins, 669 F.2d 979 (CA2 1982) (Wisdom, J.). If the appellate body defers in substantial part to the judgment of the original decisionmaker, the original decision may be viewed as the government's policy. Id., at 990. The decision to transfer resp was controlled by his supervisor not by the Comm'n which declined to hear resp's appeal, an action which suggests that lateral transfers are insulated from review. The Comm'n decides layoff ap-

peals solely on the basis of written submissions and appears to defer in substantial part to the judgment of the "appointing authority." Thus, the jury had sufficient evidence from which to conclude that resp may be subject to liablity for the supervisor's acts.

Judge Ross dissented. He concluded that the evidence was insufficient to support a finding of municipal liability. Under Pembaur, not every decision by municipal officers subjects the municipality to § 1983 liability. "The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable." 106 S.Ct., at 1300. The employment example set forth in footnote 12 of Pembaur applies here. Resp's civil service rules do not grant appointing authorities the power to set city personnel policy. That policy remains with the mayor, the aldermen, and the Comm'n. Therefore, decisions by appointing authorities cannot constitute a basis for city liability. Pembaur, 106 S.Ct., at 1299-1300 & n. 12. Also, appointing authorities do not have final authority to make employment decisions because the Comm'n is available to review their decisions. The Comm'n does not appear to rubberstamp decisions because it gave resp relief in five earlier appeals. Judge Ross also found that the evidence was insufficient as a matter of law to support a finding that resp's First Amendment rights had been violated.

III. CONTENTIONS

A. Petitioner

1. Municipal Policy. Petr rejects the CA8 Williams approach

to § 1983 municipal liability for constitutional injuries inflicted pursuant to a city's policies. Petr concludes that the vesting of authority in a city employee to make decisions, even when not reviewable, does not by itself transmute all of the employee's decisions into municipal policy. The CA8 approach is inconsistent with the results in Polk County v. Dodson, 454 U.S. 312 (1981), and City of Oklahoma City v. Tuttle, 471 U.S. 806 (1985), where the city employees were delegated the authority to act on behalf of the local government and their decisions were final, but the Court found their actions did not confer liability on the cities. The decision is also inconsistent with various Justices pronouncements in this area, because Hamsher was not delegated the authority to make city employment policy and in making an individual transfer decision, Hamsher did not make a rule of general applicability. See Pembaur (BRENNAN, J.); id. (Powell, J., dissenting); Tuttle (REHNQUIST, J.); id. (BRENNAN, J., concurring). Further, the opn is at odds with congressional policy and with common sense. In Monell, 436 U.S., at 692, the Court concluded that a Congress that repudiated respondeat superior could not have meant for § 1983 liability to attach where the city has not caused its employee to subject plaintiff to a tort; nothing that petr did caused Hamsher to inflict retribution upon resp. CA8's theory would render Congress' act in rejecting respondeatsuperior close to meaningless because almost all acts of municipal employees are not reviewable by a process that does not defer in substantial part to the original actor's decision.

Petr suggests the appropriate approach to ascertaining mu-

nicipal policy. A decision cannot be policy where it is contrary to an established policy (law or order) made by one in a position superior to that of the decisionmaker. In the absence of a law or controlling order, if the decision causing constitutional injury is made by one who is not subject to the direction and control of any other city official, then the local government would be liable because the decision was made by a person with the ultimate authority to make such decisions on behalf of the local government. This approach is flexible, accommodating vast differences in local governmental structures, and is fair, requiring taxpayers to pay for the illegal acts of persons only in whom they have vested ultimate authority to decide on a course of action. The municipality cannot avoid liability simply because there is no evidence of a written policy; if a persistent unconstitutional practice is tolerated, the custom is the municipality's policy for which it might properly be held liable.

Applying these principles, petr concludes that the decision below must be reversed. There is no evidence that resp had a rule that employees appealing to the Comm'n should be punished. The civil service system, established pursuant to the city's charter, mandates that employee status changes must be made on the basis of merit and fitness, and employees cannot be transferred, except where the transfer is for the benefit of the service. Nothing explicitly precludes transfer because of recourse to the appeal process, but it would not comply with the above standards. Also, the Dir. Personnel has the authority to prevent retaliatory transfers. Thus, petr's policy forbids the kind of

act Hamsher is supposed to have committed. Accordingly, petr cannot be held liable.

2. The Two Verdicts. Petr contends that Heller dictates that the verdict against petr and in favor of the individual defts are incompatable and cannot stand. The most plausible interpretation of the jury verdict is that the jury did not believe either that Hamsher was improperly motivated in transferring resp or that his improper motivation was the factual cause of either the transfer or layoff.[5] Petr argues that § 1983 requires factual "but for" causation as well as proximate causation in a § 1983 case against individuals. See Marinez v. California, 444 U.S. 277, 285 (1980). The rule should be the same for cities. See Tuttle, supra; see also City of Springfield v. Kibbe, 55 U.S.L.W. 4239, 4242 (1987) (O'CONNOR, J., dissenting). Thus, the

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[5] In reaching this conclusion, petr focuses on Instruction No. 22, resp's verdict director on the First Amendment claim, which instructed the jury that it might find for resp and against the individual defts if the defts "were personally involved in causing plaintiff's transfer and/or layoff. Petr rejects CA8's conclusion that the jury exonerated Hamsher because it believed that he could not be held liable because he was not personally involved in the layoff. He could have been held liable, under the instruction, for the transfer. Petr suggests that CA8 should have deemed the instruction plain error, and reversed, rather than to reach as far as it did to impose a semblance of logic on the case.

Petr suggests that CA8 may have incorrectly relied upon Instruction No. 16 in looking to Hamsher's involvement in only the layoff. Although No. 16 instructed that an individual cannot be held liable under § 1983 unless "he was personally involved in causing the deprivation of a constitutional right or he either has or is charged with actual knowledge that his subordinates are causing deprivations of constitutional rights," Instruction No. 29, which required a finding that Hamsher was personally involved in the layoff, was the verdict director on the due process claim.

principles of causation applicable to officals and to local governments pursuant to § 1983 do not differ such that a judgment may be rendered against a local government despite the return of the verdict exonerating the individual employee who was alleged to have promulgated the unconstitutional policy and acted pursuant to the policy. Logically, the jury could not have exonerated Hamsher and found petr liable, because the consequences of resp's transfer were equally foreseeable (or unforeseeable) to Hamsher, city policymaker, as to Hamsher, individual actor.

B. Respondent

1. Municipal Policy. Resp begins by asserting that neither Monell nor the Seventh Amendment permits an appellate court to disregard the jury verdict and reconsider de novo whether a constitutional violation was caused by an official policy or action; those questions of causation and foreseeability are factual matters which are consigned to the jury. As evidenced in Tuttle and Kibbe, an appellate court can evaluate legal issues preserved by timely objections to jury instructions, and can inquire into the sufficiency of the evidence to satisfy the standard set forth in the instructions. But if an appellate court determines that the instructions were either proper or unchallenged, and that the evidence was sufficient to support a verdict under those instructions, the role of the court is at an end. The court may not substitute its view of the evidence for that of the jury.

Resp contends that the DC properly instructed the jury regarding the scope of § 1983 municipal liability. Liability under Monell is not limited to systematic practices, but encompasses

even discrete actions taken by "those whose edicts or acts may fairly be said to represent official policy." Monell, 439 U.S., at 694; see also Pembaur. Resp's claim against petr was clearly based on an allegation that the retaliatory measures were directed by city officials of such high rank that their conduct in even a single case was sufficient to impose liability on petr. Instruction 15, drafted by petr's counsel, sufficiently set out this principle.[6] Contrary to petr's intimation, Monell does not suggest that the courts must or should undertake the Sisyphean task of attempting to frame instructions so "precise" that they specify exactly which officials under which circumstances can fairly be said to speak for a city.

Resp argues that CA8's standard is not as broad as petr contends. CA8's holding is not that the absence of an appeal process creates policymaking authority, but that the availability of such an appeal process does not necessarily insulate a city from liability for actions that would otherwise constitute official policy. The "ultimate authority" doctrine proposed by petr, which means that a city could never be held liable for a practice, policy, or action adopted by an official exercising dele-

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[6] That instruction explained: "As a general principle a municipality is not liable under 42 U.S.C.§ 1983 for the actions of its employees. However, a municipality may be held liable under 42 U.S.C. § 1983 if the allegedly unconstitutional act was committed by an official high enough in the government so that his or her actions can be said to represent a government decision." Petr did not object to this instruction in DC, in CA8, or in its cert petn.

gated authority, is inconsistent with Monell and Pembaur. The effect of petr's proposed doctrine would be to eviscerate Monell because most municipal policies are set by agencies who technically are controlled by the mayor. Moreover, the actual distribution of direction and control within a government body is often far from apparent.

In addition, resp disagrees with petr's suggestion that a city can never be held liable under Monell if the municipality had in effect a rule prohibiting the constitutional violation at issue, a rule which resp contends petr never suggested to the DC or jury. Such a prohibition should not be given conclusive weight in determining municipal liability; the appropriate weight to be given is a factual matter to be addressed in the first instance by the jury and the trial court. Resp notes that a prohibition would do little good if it is routinely ignored or infractions were systematically not redressed, that those who "violated" the prohibition might be as fairly regarded as municipal policymakers as are those who adopted the rule, and that the legislative history of the statute argues against petr's approach.

Finally, resp argues that the evidence was sufficient to support the jury verdict. The central issue on an appeal from the denial of a motion for directed verdict or j.n.o.v. should be the sufficiency of the evidence bearing on the factual disputes actually presented to the jury. In her closing argument, resp's counsel did not raise any of the arguments presented here; instead, she argued that the jury should regard the municipal Comm'n and the Dept. of Personnel, rather than the mayor and his

Cabinet and staff, as acting on behalf of the city. The directed verdict motion was limited to the same factual issue. There was ample basis on which the jury could have concluded otherwise. The city charter provisions establishing the Comm'n make clear that the Comm'n has no general authority or capaciy to regulate personnel matters. The Personnel Dir. testified that he had no control over the substance of personnel practices or decision, but was empowered only to asertain whether policies and actions adopted by others were correct as to "form." A number of events disclosed at trial substantially undercut petr's characterization of the role of the Comm'n and Dir. Finally, it was not certain that the agencies mentioned were untainted by the alleged retaliation.

2. The Two Verdicts. The jury's verdicts are both consistent and entirely comprehensible. Both of the underlying premises of petr's argument to the contrary are clearly incorrect. First, an illicit purpose in transferring resp to HU&D was not the only possible constitutional violation that the jury could have based its verdict. The evidence heard by the jury presented at least two distinct theories on which the jury might have imposed liability. The jury could have concluded that the transfer itself was legitimate and the unconstitutional motivated act was assigning resp such menial duties that a layoff was inevitable. Hamsher insisted (and in her closing argument, petr's counsel argued) that Hamsher had no control over those assignments, arguing that the responsibility for such matters lay with Jackson. Alternatively, the jury could have concluded that the transfer

and HU&D job assignments were legitimate and that only the layoff itself was the result of a retaliatory motive. There was conflicting testimony as to whether the layoff decision was in the hands of the Bd. of Estimate and Appeal, the Mayor, the Mayor's staff, Commissioner Killen, Dir. Nash, or one of the three named defts. The jury could have exonerated Hamsher and the other named defts if it believed another official had in reality made the improperly motivated layoff decision.

Second, the sole person responsible for that transfer was not Hamsher. This was a matter of factual dispute during the trial. Hamsher refused to take responsibility for either making or even aggressively advocating the decision to transfer resp, insisting that he had recommended the transfer but that the real decision was the Mayor's alone. At another point, Hamsher insisted that Dir. Nash had played a major role in initiating the transfer. Thus, the jury could have concluded that the Mayor or Dir. Nash, rather than Hamsher, was responsible for the transfer and had acted for illicit retaliatory purposes. The substantial evidence of culpability by the Mayor and other nondeft officials, while strengthening the case against petr, tended to undercut resp's claim that the three named defts were the particular officials responsible for the retaliatory dismissal. A reasonable jury might also have believed that resp's dismissal was the result of a retaliatory motive on the part of one or more of the high officials involved, but have concluded that resp simply failed to meet his burden of proving that the three named officials were the culpable parties.

C. Amicus in Support of Respondent

The American Fed. of Labor and Congress of Indus. Organs. and the Public Employee Dept., AFL-CIO (collectively, AFL-CIO) argue that CA8's decision should be affirmed. AFL-CIO succinctly outlines the division of decisionmaking authority with respect to employment matters in St. Louis. (Brief 3-5) It then argues that applying the Pembaur test for municipal liablity to the case -- whether the transfer decision was made by the persons responsible for establishing final city policy respecting such employment matters -- shows that resp is liable. However, AFL-CIO urges that the Court adopt a different test in a case, such as this, involving institutional, rather than individual, acts. In cases involving the denial of benefits or privileges that belong to the municipality and that only the municipality can award (e.g., city employment), regardless of whether the municipal action is a "final decisionmaker," the act inescapably is an act "of the municipality." While the municipality acts through its agents, the acts of the agents in these contexts inflict harm only because of the agents' official status, viz., only because the agents are acting for the entity and because the decisions made by the agents are implemented through the municipality's official processes. Because resp's transfer was an official act of resp, and was implemented accordingly, resp "officially sanctioned" the decision irrespective of the status of those who decided upon the transfer and thus is responsible for it.

In addition, AFL-CIO contends that CA8 correctly applied Heller to the unique facts of this case -- where not all who par-

ticipated in the decisionmaking had been sued, and jury instructions unchallenged by resp had been confused -- in concluding that the jury could consistently find municipal liability albeit exonerating the particular individuals sued. Were the Court to conclude that the verdicts were inconsistent, a new trial would be required, for there is no way of knowing which way the jury would have ruled if forced to resolve the inconsistency. Heller, 106 S.Ct., at 1577 & n. 15 (STEVENS, J., dissenting).

D. Petitioner's Reply

Petr argues that resp and its amicus are not defending CA8's opn and its "final authority" theory, but rather CA8's judgment: resp seeks to vindicate the jury's verdict on the theory as to which he claims the jury was instructed; AFL-CIO urges respondeat superior liability.

Petr asks the Court to exercise great caution in considering resp's statement of facts. Resp misstates and misrepresents the record in many specific instances, especially as to the testimony regarding who was responsible for his transfer decision.

Petr then makes five points in response to resp's brief. First, petr contends that the policy issue is preserved, independent of whether the instructions are plain error. The view petr urges now -- that the judgment against it is was improper because there is no evidence of a city policy causing injury -- was raised in attacking resp's pleadings. In addition, petr raised this issue before the DC in its motion for directed verdict, its closing argument, and its motion j.n.o.v. At any rate, petr did complain of the instructions; resp offered the instructions used

only as a package, to be used together with another instruction that was rejected and would have instructed the jury that an official is high enough to be a policymaker only when he has the authority to make rules of general applicability.

Second, petr argues that Instruction 22 is the crucial one, and it was illogical and inconsistent, delegated to the jury the right to decide questions of law, and omitted essential elements of a § 1983 claim against municipalities. The instructions were plain error.

Third, petr asserts that the ultimate authority theory it proposes is not inconsistent with Monell.

Fourth, petr contends that there is no evidence that a city policymaker caused an injury to resp's constitutional rights. Petr argues that resp has misrepresented the evidence as to the function of the Comm'n; as a quasi-legislative body the Comm'n establishes the rules, and as a quasi-judicial body it determines whether the rules have been violated. There was no evidence that Hamsher, or any other city official that resp claimed participated in the transfer or layoff decisions, and who was impermissibly motivated, was delegated the power to make final employment policy on behalf of the city.

Five, petr reiterates at length that the verdicts are inconsistent under the Heller reasoning and challenges resp's argument as to the theories under which the jury could have found liability. Resp's theory of the case, as espoused in his closing argument, was fully consistent with the instructions given the jury -- liability was to be imposed upon the city for a decision made

by three persons: Hamsher, Patterson, and Kindleberger. As to remedy, since the liability of petr necessarily depends upon the culpability of its policymakers, and since the policymakers have been exonerated by final judgments in their favor, that judgment bars resp from litigating his claim against petr in a new trial. See Heller.

E. Amicus in Support of Petitioner

The City of Little Rock, Arkansas[7] avers that municipalities should not be subjected to liablity under § 1983 for the discretionary decisions of policymakers. Further, an official's decision should not be deemed municipal policy for § 1983 purposes unless that decision can reasonably be deemed to implement policy for the entire municipality as opposed to setting policy for a single department of the municipality. Little Rock urges the Court to adopt the view espoused by CA5 in Jetts v. Dallas Independent School District, 798 F.2d 748, 760 (CA5 1986).

International City Management Assn, et al., urges the Court to reject CA8's formulation for ascertaining municipal "policy" for purposes of leveling § 1983 municipal liability. Amici contend that CA8's "final authority" approach is nothing more than respondeat superior.

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[7] Little Rock is the petr in Little Rock v. Williams, No. 86-1049, which has been held pending decision in this case. The original CA8 panel opn in Williams was GVR'd on Pembaur. On remand, the en banc CA8, by a 7-5 vote, held that a single decision by a municipal judge who had been delegated final authority over municipal personnel decisions in his court could trigger municipal liability for § 1983 purposes.

IV. DISCUSSION

A. The Two Verdicts: The Jury Instructions

Presumably the Court granted cert in this case to clarify further Monell's "municipal policy" doctrine and to address the question of whether a municipal deft may be held liable under § 1983 when the individual defts are exonerated. Unfortunately, the factual setting of this case is very messy, and the Court's consideration of this case may very well end up advancing the law in neither regard. Below, I will outline some of the problems, which have particular relevance to the issue of whether the two jury verdicts are inconsistent.

The jury instructions in this case are a hopeless mess. On the one hand the jury was instructed generally that municipal liability is limited to constitutional violations "visited pursuant to an unconstitutional governmental custom, usage, or policy knowingly followed by the municipality," Instruction 17, JA 115, and further that a municipality may be held liable "if the allegedly unconstitutional act was committed by an official high enough in the government so that his or her actions can be said to represent a government decision," Instruction 15, JA 113. CA8 appeared to be reviewing these two instructions when addressing petr's challenge to the jury's implicit finding that resp's injury was brought about by an unconstitutional city policy. Also in a general sense, the jury was instructed that an individual could not be held liable "unless he was personally involved in causing the deprivation of a constitutional right or he either has or is charged with having actual knowledge that his subordi-

nates are causing deprivations of constitutional rights." Instruction 16, JA 114. If these were the only instructions, the Court might address the "municipal policy" issue posed by Instructions 15 and 17 and CA8's analysis.

But the jury was also instructed specifically as to resp's First Amendment claim:

> In regard to pltf's claim that defts retaliated against him because of his exercise of his right to free speech and his right to petn for redress of grievances:
>
> Your verdict must be for the [plft] and against the defts .. if you find by a preponderance of the evidence:
>
> 1. That pltf's action in appealing his suspension involved the exercise of free speech and the right to petn for redress of grievances; and
>
> 2. That a substantial or motivating factor in the decision to transfer and lay pltf off was his exercise of his right of appeal to the [Comm'n], and that pltf would not have been transferred or laid off but for his appeal to the [Comm'n]; and
>
> 3. That defts Hamsher, Patterson and Kindleberger are high government officials of the City of St. Louis with the right to make policy decision and to speak for the deft City of St. Louis.
>
> 4. That defts Hamsher and Kindleberger were personally involved in causing pltf's transfer and/or layoff; and
>
> 5. That deft Patterson was personally involved or knew of the participation of her subordinates in causing deprivation of pltf's constitutional rights, and
>
> 6. That pltf was damaged thereby.

Instruction 22, JA 118.

In Cabana v. Bullock, 106 S.Ct. 689 (1986), the Court observed that it is to be presumed that the jury heeds the instruction which is "more comprehensive and more specifically tied to the facts presented to the jury." Instruction 22 clearly qualifies in this regard. But if the jury followed Instruction 22, then it is difficult to avoid concluding that its verdicts are inconsistent. According to the instruction, the verdict in favor

of resp and against petr necessarily means that the jury believed each of the six propositions was true. Yet, the verdicts against resp and in favor of each of the individual defts necessarily mean that the jury believed that at least one of the six propositions was not true. Moreover, in point no. 3, the instruction appears to identify the named defts as the relevant municipal "policymakers"; that is, petr's liability was solely derivative of the conduct of these named defts. If this instruction is controlling, then the two verdicts cannot square with Heller: in the absence of an individual immunity defense (which was not presented here), the jury cannot exonerate the policymaker and find the municipality liable. CA8 distinguished Heller by finding that the jury could have found that some unnamed deft was the relevant policymaker and person responsible for resp's injury (i.e., Dirs. Nash or Killen). I think there is a serious question as to whether Instruction 22 permitted the jury to draw this conclusion.

This instruction highlights another problem with the case -- identifying the constitutional violation. The instruction defines it as the "transfer and/or layoff." CA8 was definately disturbed by this contruction, and found it necessary to hinge the injury finding on resp's layoff. This undermines the jury's verdict and the sufficiency of the evidence regarding retaliatory motivation. CA8 found that a jury could have reasonably concluded that resp's transfer was substantially motivated by his exercise of his appeal rights. CA8 reached this conclusion by focusing on Hamsher's motivation in "orchestrat[ing]" the transfer.

The court then implied that the transfer to menial tasks was a "constructive discharge," but did not go so far as declaring that the jury could have reached this conclusion.[8] Instead, CA8 focused on resp's layoff, noting that the damages resp seeks did not accrue at the time of his transfer, but only upon Nash and Killen's decision to lay him off. "Nash and Killen were thus necessary but not sufficient actors in the ultimate injury." Petn A-15 n. 8. But CA8 did not find that the jury could conclude that Nash and Killen were unconstitutionally motivated, and the court did not explain how any of Hamsher's motivation could have carried over into the other individuals' layoff decision (esp. since Hamsher at the time had nothing to do with personnel decisions and was not consulted as to the layoff decision). Moreover, CA8's findings as to Hamsher are contradicted by the jury's verdict. The jury found Hamsher not liable; therefore, they must have decided either that he was not unconstitutionally motivated in transferring resp or that he was not personally involved in the decision to transfer, both of which possibilities are contrary to CA8's reasoning regarding unconstitutional motivation. I come then to the conclusion that either the jury ver-

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[8] First, the jury was not instructed in this regard, and it does not appear that resp argued this theory to the jury. Second, as the dissent argues, if resp is seeking to recover on the basis that he was constructively discharged by the duty assignment problem, he would have to show that Jackson (his supervisor at H&UD who was solely responsible for the problem) was motivated by resp's suspension appeal when Jackson made the duty assignments. Resp did not even attempt to make that showing.

dicts were inconsistent or the evidence does not support a finding that resp's First Amendment rights were violated when he was transferred and laid off from city employment. Either of these conclusions would mandate reversal without retrial.[9]

CA8's reliance on petr's layoff as the ultimate injury surfaces another lurking problem. Because the layoff decision was appealable to the Comm'n and the Comm'n has not yet resolved the issue, there is a question as to whether petr's "policy" decision is "final" (and thus a proper predicate for municipal liability) where resp is afforded an appeal, after the injury has begun to be inflicted, to a "quasi-judicial" tribunal of the municipality which does not make a de novo decision but instead accords substantial deference to the executive decisionmaker. This might not be as serious a question as it seems, however, since the Court has held that exhaustion of admin. remedies is not required before instituting suit against a governmental entity for damages under § 1983. See Patsy v. Board of Regents, 457 U.S. 496 (1982).

All these problems are complicated by the fact that petr did not object to the instructions below; in fact, it drafted at least some of the instructions. It thus seems unfair to permit the city to attack the instructions now, although I am not ad-

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[9] If the verdicts are inconsistent, the Court cannot remand for retrial. Since resp did not appeal the exoneration of the individual defts, that verdict is final. If the evidence is insufficient to support the verdict, reversal is obviously necessary.

verse to concluding that the instructions constitute plain error.

I do not profess to understand the circumstances under which the Court will dismiss a case as improvidently granted, but I do suggest that you consider that approach in this case in light of the problems outlined above. In addition, there are serious disputes as to the evidentiary record (i.e., who was or was not responsible for the transfer and/or layoff). If the Court is concerned about reaching the "municipal policy" issue, it could do so in Little Rock v. Williams, No. 86-1049, which presents CA8's "final authority" theory much more cleanly.

Assuming you may not feel comfortable pursuing DIG (or that a majority of the Court may not wish to take this course), I strongly recommend that, in the alternative, the Court proceed directly to the "municipal policy" issue presented by CA8's reliance on its precedent in Williams, supra, 746 F.2d 431, and not couch its analysis in terms of the jury instructions.[10]

B. Municipal Liability for "Official Policy"

The Court established the basic outlines of municipal liability under § 1983 in Monell v. New York City Dept. of Social Services, 436 U.S. 658, 681 n. 40 (1978) where it held that municipalities cannot be subject to liability "without regard to whether a local government was in any way at fault for the breach

[10] This approach implicitly accepts petr's argument that the issue of the city's § 1983 liability has been preserved and presented to the Court independent of the jury instructions. CA8, at least, seemed to agree.

of the peace for which it was to be held for damages." As a result, the Court concluded that Congress did not intend for a municipality to be held liable under a vicarious liability or respondeat superior theory. See id., at 691-694. However, a pltf could hold a city liable if an "official municipal policy" or custom[11] "subjected" him, or "caused him to be subjected" to the deprivation of constitutional rights. Id., at 690-691.

Since Monell, the Court has struggled with giving meaning to the "official policy" requirement. In Oklahoma v. Tuttle, 471 U.S. 808 (1985), the Court held that proof of a single incident of unconstitutional activity by a police officer could not suffice to establish municipal liability. As expressed in JUSTICE BRENNAN's concurrence, in which you joined, liability could not hinge on a low-level (i.e., not authorized to make city policy) employee's single act without some evidence of municipal policy or custom independent of the employee's conduct. See id., at 831. JUSTICE BRENNAN observed, however, that "[s]ome officials, of course, may occupy sufficiently high policymaking roles that any action they take under color of state law will be deemed official policy."[12] Id., at 830 n. 5, citing Monell, 471 U.S., at 694 (officials "whose acts or edicts may fairly be siad to represent official policy"). The Court had occasion to flesh out this

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[11] The "custom" or practice aspect of this showing is not at issue in this case.

[12] This statement clearly formed the basis of the jury instructions int this case.

possibility in Pembuar v. City of Cincinnati, 106 S.Ct. 1292 (1986), the case which forms the framework for the Court's analysis here.

In Pembaur, a majority of the Court (six Justices) held that

> If the decision to adopt [a] particular course of action [as opposed to adoption of a written rule] is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly.

106 S.Ct., at 1299. The problem posed here is identifying the "authorized decisionmakers," "those who establish governmental policy." In Pembaur, you and JUSTICE MARSHALL joined in JUSTICE BRENNAN's adoption of the following test: "municipal liability under § 1983 attaches where -- and only where -- a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." Id., at 1300.[13]

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[13] CHIEF JUSTICE REHNQUIST preferred a test focusing not on the individual who acts (and whether he has final authority to make policy), but on two factors: "(i) the nature of the decision reached or the action taken, and (ii) the process by which the decision was reached or the action was taken." Id., at 1308-1309. Under this test, petr clearly cannot be held liable in this case. Resp's transfer and layoff was an ad hoc decision, not a "rule of general applicability," and the decisions were not reached through formal procedures.

JUSTICE STEVENS takes the position that § 1983 establishes respondeat superior liability for municipalities.

JUSTICES WHITE and O'CONNOR's positions are less clear. Both declined to join in JUSTICE BRENNAN's articulated test in Pembaur, yet both would focus on whether the actor was acting as a "policymaker." JUSTICE WHITE explicitly stated that he agreed

(Footnote continued)

This statement appears to endorse CA8's "final authority" rule, at least as the rule appears on its face. The two-prong CA8 Williams inquiry requires that in order for an official's decision to be treated as municipal policy for which the city may be held liable, city policy must delegate the official the authority to act and that official's decision must be final. But there is a huge problem with CA8's interpretation of its test in this case -- footnote 12 to JUSTICE BRENNAN's opn (in which you joined). After explaining that "[t]he fact that a particular official -- even a policymaking official -- has discretion in the exercise of a particular function does not, without more, give rise to municipal liability based on an exercise of that discretion," and that "[t]he official must be responsible for establishing final government policy respecting such activity before the municipality can be held liable," JUSTICE BRENNAN provided an example:

> Thus, for example, the 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

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(Footnote 13 continued from previous page)
with the test. See id., at 1302. I suspect, however, that neither Justice will think that CA8's "final authority" test adequately captures their notion of a "policymaker."
JUSTICE SCALIA did not participate.

> 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.

This footnote appears to capture this case and lend conclusive support to petr's position. The individual defts who made the decisions to transfer and lay off resp were exercising discretion they had received from (been delegated by) the city to hire and fire employees.[14] Under the above analysis, the city legislators and Comm'n are the "official policymakers." They constituted the city charter and civil service rules which establish employment policy: the laws delegate authority to "appointing authorities" to make layoff and transfer decisions but confine the conditions and, to some extent, the criteria. For example, a permanent civil service employee may be laid off only for lack of work and/or lack of funds. The city cannot be charged with having a policy of transferring or laying off employees who exercise their First Amendment right to pursue grievances. At most, resp seems to have had the policy of placing decisionmaking

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[14] Resp implies that there was sufficient evidence for the jury to conclude that the Mayor himself was responsible for the decisions to transfer him and lay him off. Obviously, the Mayor is the sort of municipal official whose decisions, even one-time decisions, are of such a nature that they might easily constitute municipal policy for purposes of § 1983. But there does not appear to be any such evidence here; CA8 certainly never alluded to any. Moreover, it is close to incredible that a new administration would maintain animosity toward resp based on his grievances against the prior administration.

discretion in the hands of officials without sufficiently policing the officials' decisions to be sure they did not run awry of the Constitution. Footnote 12 specifies, however, that the unconstitutional exercise of constitutionally delegated power does not give rise to municipal liability.[15] Further, this lax supervision, if it is such, cannot be viewed as proximately causing resp's unconstitutionally motivated transfer.

AFL-CIO acknowledges that footnote 12 appears to control this case, but argues that the Court can disavow it as dicta, since the particular facts were not before the Court. See AFL-CIO Brief 13 n. 5.[16] I don't agree that the conclusion drawn from the footnote can be so easily avoided. The footnote only provides a specific example; the opn itself seems to be attempting to draw a distinction between delegated decisionmaking authority (e.g., to hire or fire an employee) and delegated policymaking authority (setting up the framework for the decisionmaking). This is in essence Justice Powell's "nature of the decision" criteria -- is it ad hoc or is it "policy." In this re-

[15] Presumably, if the unconstitutional exercises became prevalent or were endorsed or tolerated by the actual policymakers, then the unconstitutional acts would become the city's custom or practice and render it liable under § 1983.

[16] AFL-CIO's presents an intellectually attractive alternative to the Pembaur approach. It supplies a bright line and is doctrinally consistent. However, I don't think that anyone will adopt it, at least not in this case. Essentially, the test would create respondeat superior liability for municipalities in a narrow range of cases -- those involving grants or denial of benefits or privileges that belong to the municipality and only the municipality can award.

gard, CA8's "final authority" rule conflicts with Pembaur.[17] The approach permits ad hoc decisions to form the foundation of municipal liability if the decisions are final; the analysis focuses on decisions, not policy. Moreover, the duly-delegated-final-decisionmaking-authority test of the Williams approach sounds much like respondeat superior and may embrace many more employees than simply "high officials," especially since "decisions" can be defined narrowly such that even the lowest level employee makes some final decisions pursuant to his/her delegated municipal authority. The Court has continually indicated that respondeat superior is an improper basis for municipal liability under § 1983.

I think there is one way to view footnote 12 as not controlling this case. The footnote does not speak to the situation where the employment policy is not comprehensive or speaks extremely broadly, and the policymakers delegate decisionmaking authority to other municipal officials. If the decisionmaking

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[17] You should be aware that prior to Pembaur, several CAs adopted similar final authority-type tests. See, e.g., Rookard v. Health & Hosps. Corp., 710 F.2d 41, 45 (CA2 1983); Black v. Stephens, 662 F.2d 181, 191 (CA3 1981); Wellington v. Daniels, 717 F.2d 932, 936, 937 & n. 6 (CA4 1983); McKinley v. Elroy, 705 F.2d 1110, 1116-1117 (CA9 1983); Berdin v. Duggan, 701 F.2d 909, 914 (CA11), cert. denied, 464 U.S. 893 (1983). Some of the applications in these cases were consistent with footnote 12; some appear to conflict. Since Pembaur, in addition to CA8, CA1 has determined that the final authority test is not contradicted by Pembaur. See Small v. Inhabitants of City of Belfast, 796 F.2d 544, 553 (CA1 1986) (explicitly adopting the Williams approach). CA5, on the other hand, has opined (without deciding) that Pembaur seems to invalidate such tests. See Jett v. Dallas Independent School Dist., 798 F.2d 748 (CA5 1986).

officials are permitted to fill in the gaps in the policy, should they be considered "policymakers" for § 1983 purposes? For example, if the policy states that employees may be discharged only for just cause or in the public's interest and states that hiring decisions may not be unlawfully motivated, and the officials who were delegated hiring and firing authority are giving meaning to those criteria, should their decisions be deemed "policy," if they are final? (Resp essentially argues that the civil service rules fit into this category.) I argue no for two reasons. First, the exception would swallow the rule; decisionmakers are always to some degree giving meaning to the policy they follow. Second, such an exception would encourage municipalities to establish Napoleonic codes and hamper the flexibility which allows institutions to operate effectively.

In sum, I think CA5 was correct in speculating that Pembaur "indicate[s] that the mere fact that an official has discretionary, and inferentially final, authority to make particular concrete decisions in a given area does not necessarily mean that the official is a policymaker with respect to that area or those decisions." Jett, 798 F.2d, at 760. A municipal official's final exclusive authority to make discrete individual transfer or layoff decisions would not subject the municipality to responsibility for his actions in the case of an individual transfer or layoff decision unless the official also had final authority with respect to general transfer and layoff policy. Since CA8's final authority test permitted an officer who did not have such policymaking authority (delegated or not) to render the munici-

pality liable, its application in this case, at the very least, is incorrect.

Because the case is controlled by footnote 12 in Pembaur, there seems little need to adopt a new test for "official policy" that will render the municipality liable for purposes of § 1983.[18] In fact, since the Court has had so much difficulty reaching a consensus and most attempts seem to confuse the lower courts, it would be more helpful for the Court to simply address whether the "final authority" tests satisfy Pembaur's articulation of municipal liablity.

V. RECOMMENDATION

I suggest that the Court seriously consider dismissing this case as improvidently granted and take up the municipal liability issue presented here in Little Rock v. Williams, the CA8 case being held for this case. In the alternative, I recommend that the Court examine the question of whether resp may be held liable pursuant to CA8's "final authority" test without addressing the jury instructions used in this case. On the merits, I conclude that CA8's final authority test is insufficient because it permits the decisions of municipal officials who have not been delegated policymaking authority to render the municipality liable

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[18] If the Court were to adopt a new test, the "ultimate authority" test proffered by petr is in appropriate. As resp explains, the test, at least as petr explains it, runs counter to the Court's § 1983 municipal liability jurisprudence and would sharply constrict those instances in which a municipality could be found liable.

for the officials' violations of constitutional rights. The Court made clear in Pembaur that the city may be held liable under § 1983 for a single action of a municipal employee only if that employee has been authorized to establish municipal policy as to the subject matter of his action. From the facts articulated by CA8, it appears that application of Pembaur counsels reversal, rather than remand for further analysis, in this case. Those officials responsible for resp's transfer and layoff were not authorized to establish policy regarding the transfer and layoff of city, or even department, personnel; they were simply delegated authority to make individual personnel decisions pursuant to policy established by the city charter and Comm'n. Thus, resp could not be held liable for the alleged unlawfully motivated decision to transfer resp.