ORIGINAL

In the

Supreme Court of the United States

GEORGE D. OWEN,

Petitioner,

--vs--

CITY OF INDEPENDENCE, MISSOURI, et al.,

Respondent.

No. 78-1779

Washington, D. C.
January 8, 1980

Pages 1 thru 50

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

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GEORGE D. OWEN, Petitioner v. CITY OF INDEPENDENCE, MISSOURI, ET AL.	No. 78-1779

Washington, D. C.

Thursday, January 8, 1980

The above-entitled matter came on for oral argument at 10:41 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

IRVING ACHTENBERG, ESQ., Suite 700, Ozark National Life Building, 906 Grand Avenue, Kansas City, Missouri 64106; on behalf of the Petitioner

RICHARD G. CARLISLE, ESQ., 103 North Main, Independence, Missouri 64050; on behalf of the Respondents

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Owen v. City of Independence, Missouri.

Mr. Achtenberg, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF IRVING ACHTENBERG, ESQ.,

ON BEHALF OF THE PETITIONER

MR. ACHTENBERG: Mr. Chief Justice, and may it please the Court:

This is an action which arose out of the termination of the employment of the chief of police of Independence, Missouri in the year 1972 by his employer, the City of Independence. The petitioner, the chief of police, believing that his termination was under circumstances which gave rise to a denial of procedural due process brought an action in the Federal District Court in which he sought appropriate relief under the Fourteenth Amendment and 42 U.S.C. 1983. He was denied relief by the District Court and took an appeal to the Eighth Circuit Court of Appeals.

The Eighth Circuit, reversing the trial court, found that he had in fact suffered a stigma arising in the course of the termination of his employment occasioned by the acts of the highest officials of the city which gave rise to a right of procedural due process and reversed the trial court, ordering declaratory relief as well as damages.

The court bottomed its denial of recovery against the individual officials of the city in their individual capacities on this Court's decision in Wood v. Strickland. It said however that the decision in Wood did not prevent it from finding entity liability against the city.

Based upon that decision unfavorable against the city, the city sought and filed a petition for certiorari before this Court.

QUESTION: Was the trial before or after our decision in the Monell case?

MR. ACHTENBERG: The trial was prior to Monell.

The petition for certiorari before this Court was handed down its decision in Monell. While the petition was pending before this Court Monell was handed down and this Court --

QUESTION: Remanded.

MR. ACHTENBERG: Remanded, vacating the decision in light of Monell to the Eighth Circuit. The Eighth Circuit then proceeded, without changing any of its prior findings, without contradicting its prior findings as to stigma denied all relief, taking the position which we think was totally unjustified, from Wood v. Strickland to Monell, that now in light of Monell the city as an entity had the same good faith immunity as it had previously given the individual council members under the theory of Wood v. Strickland.

QUESTION: Just so I can get this in mind, and I think I have it, the trial was before Monell.

MR. ACHTENBERG: Pardon me, sir?

QUESTION: The trial was before the Monell case and the trial court judgment was before the Monell case. And that judgment exonerated the individuals based on Wood v. Strickland.

MR. ACHTENBERG: No, sir, the trial court denied relief.

QUESTION: Denied relief entirely.

MR. ACHTENBERG: The reverse of the trial court was still prior to Monell.

QUESTION: Right.

And with respect to the individual defendants the Court of Appeals relied on Wood v. Strickland; and with respect to the city, the first time around what did the Court of Appeals do?

MR. ACHTENBERG: With regard to the city?

QUESTION: Yes.

MR. ACHTENBERG: It granted relief.

QUESTION: Right. I see.

MR. ACHTENBERG: Both declaratory and equitable relief.

QUESTION: And that also was of course before the Monell decision here.

MR. ACHTENBERG: Correct.

QUESTION: And then your brother on the other side I suppose petitioned for certiorari?

MR. ACHTENBERG: That is correct.

QUESTION: And you had won.

MR. ACHTENBERG: Sir?

QUESTION: You had prevailed in the court.

MR. ACHTENBERG: That is correct; yes, sir.

QUESTION: And it was --

MR. ACHTENBERG: And in fact Monell had not still been decided and it was while this Court was considering the petition for certiorari that it handed down Monell.

QUESTION: And then this Court remanded -- vacated the judgment and remanded it to the Court of Appeals for the Eighth Circuit to reconsider it in the light of Monell.

MR. ACHTENBERG: Correct.

QUESTION: And it was then that the Court of Appeals for the Eighth Circuit found that the city was not liable because the city too had an equivalent immunity to that of the individual defendants; is that it?

MR. ACHTENBERG: Correct; yes, sir.

QUESTION: Thank you.

QUESTION: Why do you think the Eighth Circuit panel completely reversed itself? It was the same panel, wasn't it?

MR. ACHTENBERG: I can only say with the -- quoting

banc of the Tenth Circuit in its rehearing on Bertot, that the court simply made an inexplicable flip-flop. It took a leaf from Wood v. Strickland, passed Monell without explanation. If the Court will read the opinion you will find that there is no justification except that the court simply says that in light of Monell we believe that the city has the same rights -- same immunities and amenity that the individual councilmen and the city magistrate have. We find no rationale, no change of facts, no findings different than in the prior decision.

Court, clearly we thought [illegible] we [illegible] fact had decided.

QUESTION: Certainly they must have seen something in Monell and in the vacate and remand action by this Court that persuaded them to jump the other way.

MR. ACHTENBERG: Well, I certainly can't speak for the Eighth Circuit but I can speak for myself. I do not see anything in their opinion which gives any explanation for making that judgment based on Monell.

And if I may be so presumptive, in reading Monell I find nothing in Monell.

QUESTION: And that is why you are here.

MR. ACHTENBERG: Exactly.

I think the issue is fairly framed before this Court and that is the good faith immunity which was granted to

individual city officials in their individual capacity under this Court's decision in Wood v. Strickland is apt to be extended in this case and future cases to the local governmental entity as an entity, our answer to that question is a strong "No."

QUESTION: Before you get to the immunity question, counsel, what do you have here by way of liability against the city other than a respondeat superior theory? As I understood Monell -- I was in dissent -- but as I understand the Court's opinion you had to have either a policy or a custom.

MR. ACHTENBERG: Well, as the Eighth Circuit remand now is considering the point raised in Monell that it must not be respondeat superior and that it must be official action, the Court had no difficulty, nor do I, in finding that the conduct of which petitioner complained was official action of the city.

QUESTION: Well --

MR. ACHTENBERG: It was based upon the denial of a hearing upon his termination which was a part of the charter provisions of the city. It was based on a city ordinance and the action of the highest officials, the city manager and the city counsel, in proceeding under that ordinance.

QUESTION: A municipal corporation can proceed only through individuals. It is simply an abstraction in the law. If this were simply an isolated instance of a city official

refusing to give a hearing, do you think you would have anything other than respondeat superior?

MR. ACHTENBERG: Well, if we are speaking of the action of the city council in light of a city ordinance denying such hearing -- well, first of all I think I have endured the circumstances of the termination which involve the entire action of the council, the entire action of the city manager, great publicity; and we have of course the liberty issue of stigma which gave rise to the procedure of due process res rite.

We are not dealing with a question of whether or not an inferior employee had simply taken some action under which it would not be liable for respondeat superior.

QUESTION: Do you think the doctrine of respondeat superior applies only to low-level employees, that it cannot be used to impose liability on the highest official of the municipal corporation?

MR. ACHTENBERG: Well, certainly as an inanimate person the city cannot act except through its officials. And if it is to have action, subject to the provisions of 1983 that action must he by some officials. And in this case we are talking about the highest officials of the city.

QUESTION: And it is imputed to the city by reason of respondeat superior.

MR. ACHTENBERG: Well, I do not see so. As I see it the city acts per se through its highest officials and it can

act no other way.

The acts of lower officials in routine duty clearly might involve a question of respondeat superior. I do not say that perhaps a higher level official might have an element of respondeat superior. I simply say in this case we have the official conduct of the city, we have official policy based on an ordinance acted upon by the highest officials of the city, and we see no higher level of functioning in which a city can perform.

QUESTION: Well, let's assume --

MR. ACHTENBERG: But the issue, it had no trouble and we have no trouble in saying this was official policy, this was an implementation of official policy.

QUESTION: That is what I was trying to get at: What in addition to respondeat superior you say it was official policy.

MR. ACHTENBERG: We say so and the Eighth Circuit despite holding against us in its remand said this is now under -- because of Monell is under 1983 and it clearly is official policy of the city. It was the implementation of official policy.

QUESTION: Do you think the official policy referred to in Monell would require an affirmative policy protecting constitutional rights or simply would require a policy which contravened constitutional rights?

MR. ACHTENBERG: Well, I suppose it to be either. In this case we believe it contravened a constitutional right. Under 1983 it says no person shall deprive any person of privilege and immunities or who shall provide shall be liable. I think this certainly fits that direct statement of the statute. Whether it may apply in another situation is irrelevant to this case, as I see it.

QUESTION: Do you think there is a difference between a city ordinance passed by the city council that says the city manager shall do the following and orders him to do it, orders Him to take some action and he does it and the city is sued. And the other case is the city council authorizes him to do it, doesn't order him to, just authorizes him. It would be consistent with their policy if he did it, it doesn't order him to, and he does it and the city gets sued.

Do you think there is any difference between those two cases for the purposes of a Monell liability?

MR. ACHTENBERG: As I understand the question I think not. It goes back to the fundamental function -- fundamental concept that they are acting in the only way that a city can act.

QUESTION: Well, you have got something like that here, haven't you? At least you had an ordinance that you say authorizes what was done.

MR. ACHTENBERG: Well, the ordinance denies the right

to a hearing.

QUESTION: Right.

MR. ACHTENBERG: On termination.

QUESTION: Right.

MR. ACHTENBERG: And so the ordinance -- whoever went ahead and denied the hearing, it was in accordance with the ordinance; that is correct, sir.

QUESTION: Now, take the third case. Let us assume there was no ordinance here at all one way or another about a hearing, but the executive officers of the city just deny a hearing.

MR. ACHTENBERG: We would see no problem with that.

QUESTION: And then the city is sued.

MR. ACHTENBERG: We think it would still be a denial of the Fourteenth Amendment and 1983.

QUESTION: Well, how would you know that it is a city policy? What if the charter says the charter reserves the city council a policy-making authority in the city and the city manager has neglected it; it just executes?

MR. ACHTENBERG: Well, I think the question projects beyond the facts of this case. We are talking about the interlinking action of the city council and the city manager.

QUESTION: You don't need to go any farther than to say that whether the city manager could do it on his own or not, here it is an ordinance.

MR. ACHTENBERG: Well not only there was an ordinance, there was action by the city council the night before which inexplicably was inter-linked with his action the following morning.

QUESTION: All right.

QUESTION: I am not sure I now, after these several colloquies, distinguish between what you have described as policy and what was implementation or execution of the policy. Was the declaration in the council meeting the policy and the action next morning by the city manager the action; is that the dichotomy?

MR. ACHTENBERG: Well, we don't see it as a dichotomy. I think the policy was the city ordinance which did not grant a hearing. The implementation of that policy was not only the action of the city council at its formal council meeting directing the city manager.

QUESTION: Well, the dividing line --

MR. ACHTENBERG: But that inter-linked with the action of the city manager the next morning.

QUESTION: Well, the dividing line that you draw is between the ordinance and the action taken pursuant to it by the council.

MR. ACHTENBERG: Well, we consider them both under the concept of official policy or implementation of official policy, which we think this Court viewed in Monell as offidial

action or as not subject to an immunity.

In reaching our conclusion we have attempted to follow the analogy which this Court has followed in all its decisions in which it has considered the individual immunity of various local governmental officials when the question has arisen, beginning with what we view as a similar case of Tenney v. Brandhove. Now, we think that analysis which we have tried to follow was applied by the Court. It begins first with the premise that this is the interpretation of a statute, the Civil Rights Act of 1871. It is a construction of a statute, and in so doing the Court in each case has said first of all this is a remedial statute which must be broadly construed. It is mandatory in its language. To find any exceptions or immunities thereunder, we must look to the history, to the common law and to the legislative history of the Act to determine whether or not there are any well-established common law exceptions which we can properly feel were incorporated sub silentio, without comment, in the statute. Because of their very nature they must have been known and implicitly incorporated by the 42nd Congress. I think the Court commented many of whose members were lawyers themselves and well aware of the common law.

Now, that analysis is logical and reasonable, the Congress is not true. In other words, it is not logical and it is not reasonable to import an immunity, to create an immunity

for cities which did not exist in common law, which was not well established and which was not a matter of history.

And we therefore researched that point extensively and we were greatly assisted by the brief of the NEA and we reached the conclusion that we could not find a case in which where a city was sueable it had any immunity.

Now, we cannot say that there is not some case which neither the NEA nor we could discover but we certainly can say that we have sufficiently researched the extensive cases of the 19th century State courts of this country. And if we were unable to find any, then they certainly could not have reached the level of a well-established common law immunity.

QUESTION: Your opponent would disagree with you on that. Did he find any cases that you know of?

MR. ACHTENBERG: We do not recall that he cited any cases in the 19th century in which there was a -- if a city was sueable that it had any immunity.

QUESTION: That is tautological.

QUESTION: That is the problem. There was sovereign immunity for municipalities with respect to part of their functions.

MR. ACHTENBERG: Well, where there was -- the question of sovereign immunity of course was answered by this Court in Monell. The sovereign immunity doctrine, which was a constantly shifting doctrine, did not apply where a statute had subjected

a city to suit. Here is a statute, not just a State statute. Of course if there had been a State statute the State had relinquished sovereign immunity in that case. Here is a Federal statute which certainly subjected a city regardless of sovereign immunity to suit.

QUESTION: But as the question of our brother White suggests, in the era in which this Federal statute was enacted the general doctrine was that a city had sovereign immunity for any liability of its governmental activities and it was liable only for its so-called proprietary activities.

Wasn't that the generally accepted law of municipal corporations in those days?

MR. ACHTENBERG: Well, the problem was not with the words "governmental proprietary" but with the definition of those words.

QUESTION: I understand that. But wasn't that the generally accepted law in that era?

MR. ACHTENBERG: Well, to --

QUESTION: Regardless of definitional problems.

MR. ACHTENBERG: That is correct.

QUESTION: As they existed then. The law was that a municipality was sovereign immune -- because of its sovereign capacity was immune from liability for any of its governmental activities but was liable for its so-called proprietary activities only.

MR. ACHTENBERG: Well --

QUESTION: Wasn't that the general --

MR. ACHTENBERG: Well, our problem, sir, is that --

QUESTION: That question can be answered yes or no.

MR. ACHTENBERG: The answer is "Yes" as to the wording of that concept. The concept was a fuzzy one.

QUESTION: And now Monell came along and held that as a matter of Federal law under 1983 a city is no longer immune for its governmental activities.

MR. ACHTENBERG: Under 1983.

QUESTION: Under 1983.

MR. ACHTENBERG: Or any --

QUESTION: Or any of its activities under 1983.

MR. ACHTENBERG: That is true; yes, sir.

QUESTION: But the point is that it was the historic state of the law at the time of the enactment of 1983, it was that a city was immune, completely immune for its governmental activities, whatever those might be; wasn't it?

MR. ACHTENBERG: Well, it was immune when it could not be sued.

UESTION: Right, that is what immunity means.

MR. ACHTENBERG: Well, not so, sir. I think in all our discussions we talk about immunities when sometimes we are talking about defenses.

QUESTION: Well --

MR. ACHTENBERG: Immunity is not the subject --

QUESTION: Well, anybody can sue anybody, but a defendant can immediately say, "Look, I am a municipality and my alleged wrongdoing was a matter of my governmental activities, and that is a complete defense -- or used to be, at least.

MR. ACHTENBERG: Well, that is correct. Once the -- first of all, if there was no statute taking -- granting a right of suit or creating a liability, which of course we feel has been created by 1983.

QUESTION: But the United States of America has sovereign immunity and it is nonetheless sueable if it comes in and raises a defense of sovereign immunity. And then the question is: Has Congress waived that defense.

QUESTION: Right.

QUESTION: It is sueable. Anybody can sue anybody.

QUESTION: Justice Stwart says anybody can sue anybody. The question is: Will the suit be allowed to proceed to the merits or is there some form of immunity that will prevent it from doing so.

MR. ACHTENBERG: I think this Court's answer in Monell was that it was sueable.

QUESTION: That is right.

MR. ACHTENBERG: I think we also have the problem that -- we are talking again about what did the 42nd Congress

intend in 1871 -- and we will get the prior to 1871 cases -- and in our brief we start with what we consider the significance there of Thayer v. the City of Boston. Now, that was the case of a city which was sued, which did make a good faith defense, the Court said there was no good faith defense and the city was liable. And the case is particularly significant because it was discussed in the debates by Senator Stevenson in the debates on the Civil Rights Act. And so the Congress was clearly aware that the cities could be sued. And nevertheless it had the opportunity, the Congress had the opportunity and it still came out with a very explicit and a very broad statute which in it states clearly includes cities. And that was its intention and we think this Court is governed by its intention. It is not a contentional matter. It is not a matter for this Court to weigh on policy, what is right or wrong; it is what did the 42nd Congress intend.

Going back to the question of governmental proprietary distinction, perhaps an illustration might make our position at least clear.

Let us say for example that a city had adopted an ordinance which said that blacks could not be within the city after 6:00 o'clock at night. Now, that would be clearly in performance of its governmental activities but we certainly do not concede that that ordinance, or the enforcement of that ordinance would stand up under the dictates of section 1983 of

the Civil Rights Act.

QUESTION: What if the City of Independence simply had an individual police officer who felt that blacks should not be in the city after a certain time, the city had no ordinance, no policy, nothing like it, it never approved it. But this individual officer simply took it on himself to try to see that what he believed to be the proper policy was enforced.

Would you have anything more there than respondeat superior?

MR. ACHTENBERG: No, sir.

I think I should make it clear, having answered clearly "No," that we are not suggesting there are no limitations there are no immunities, if you will, no defenses created by Monell or defined by Monell. Certainly there was respondeat superior and certainly there was perhaps the opposite of that concept, official action. And we say that is not a small deterrent, that is not a small limitation. These two requirements do not leave us with a broad, unlimited scope of attack upon cities.

QUESTION: And by "official action," you mean an ordinance?

MR. ACHTENBERG: Well, it would not necessarily need be an ordinance. In this case we think it was both. It was an ordinance -- more than both. We should have followed all the language of Monell. The official action constituted an ordinance

the implementation of an ordinance, and the official action of the highest authorities of the city, the city council and the city manager.

QUESTION: May I ask you a question about the facts.

The city charter explicitly authorizes a city manager, as I understand it, to discharge any position the manager has authority to fill.

Is that correct?

MR. ACHTENBERG: Yes, sir.

QUESTION: Is it your position that that --

MR. ACHTENBERG: Well, pardon me, sir.

With one limitation, and that was when necessary for the good of the service, the was the language of the --

QUESTION: Who makes that judgment? The city manager has the sole discretion to make that judgment.

MR. ACHTENBERG: In this case we say that judgment was the combined judgment initiated with the action of the city council and implemented by the city manager.

QUESTION: Didn't this --

MR. ACHTENBERG: There might be a case where he acted without the character of this case, solely without consultation with the council, wholly on his own.

QUESTION: May I ask this question.

My recollection is that the District Court found that the city manager already had decided to discharge the

police chief prior to the action of the council.

Is that correct?

MR. ACHTENBERG: That was the District Court's finding. We frankly think it is not exactly vacant.

QUESTION: Did the --

MR. ACHTENBERG: Because if he had --

QUESTION: Did the Court of --

MR. ACHTENBERG: It was certainly given strong consideration and --

QUESTION: Did the Court of Appeals, sir, disapprove of that finding?

MR. ACHTENBERG: The Court on appeal found no difficulty.

QUESTION: Did it disapprove of it? Did it accept it? If the city manager had agreed, had decided to discharge your client prior to the action of the council, where does that leave your case?

MR. ACHTENBERG: I -- well --

QUESTION: With respect to the --

MR. ACHTENBERG: Well, I can't recall whether they specifically directed to that but the Eighth Circuit clearly linked the action of the city council with the action of the city manager. And so regardless of what he had intended or what he might have done, which in fact of course nobody really knows because it didn't happen that way, the Eighth Circuit

had no problem with finding that the action of the city council was inextricably connected with the action the following morning in which the city manager not only followed the direction of the council but publicly announced that he was referring the matter to the grand jury and was taking appropriate action, which was the direction and the motion of the council.

QUESTION: Did the city manager ever endorse the statement by Roberts?

MR. ACHTENBERG: Sir?

QUESTION: Did the city manager ever endorse Roberts' statement?

MR. ACHTENBERG: Well, I think ---

QUESTION: Roberts was a member of the council.

MR. ACHTENBERG: Well, he was a member of the council who was -- that was his last council meeting and why he is not a party --

QUESTION: Your case depends on Roberts' statement, doesn't it?

MR. ACHTENBERG: No, sir.

QUESTION: Or doesn't it?

MR. ACHTENBERG: Read it -- well,

QUESTION: Suppose Roberts --

MR. ACHTENBERG: It is a part of our case.

QUESTION: Suppose Roberts hadn't made any statement. What would your case be? The city council merely refers a

report to the city attorney for investigation. Is that improper?

MR. ACHTENBERG: No, sir.

QUESTION: So your case --

MR. ACHTENBERG: Our case is obviously bottomed on --

QUESTION: On Roberts.

MR. ACHTENBERG: It is -- no, sir. It is under stigma.

First of all, the statement was not simply a statement, it was a serious charge, perhaps the most serious charge of any of the stigma cases that I have read, Roberts' statement.

QUESTION: Now, whose statement?

MR. ACHTENBERG: Roberts' statement. And Roberts' statement, which was a printed statement -- rather a typed statement, fully prepared, included a formal councilman's motion. That statement and motion which was -- you might say that the allegations were the whereas of the resolution. The motion was made that they referred the statement, the investigative statement to the prosecuting attorney for action by the grand jury -- or rather that the city manager be directed to do so, that he take appropriate action against those persons who were found to have acted improperly. And that, even further, that the statements themselves be released to the press. Now, this was not the action of a single councilman in any sense of

the word. It simply began with a statement, then a motion, then formal action by the council, then the following morning the compliance with the direction of that resolution by the city manager.

QUESTION: Your opponent makes great -- places great weight on a distinction between a policy case and a conduct case throughout his brief.

Which do you say this was?

MR. ACHTENBERG: Both. We do not see that Monell made any distinction between conduct.

QUESTION: Well, you --

MR. ACHTENBERG: Monell speaks of a policy or the implementation of policy by the highest authorities of the city and we view this as involving elements of both. You can't act without conduct. We frankly do not follow the reasoning of that brief in that respect.

QUESTION: Maybe he will clarify that for us.

MR. ACHTENBERG: Sir?

QUESTION: Maybe he will clarify that for us now.

Mr. Carlisle.

ORAL ARGUMENT OF RICHARD G. CARLISLE, ESQ.,

ON BEHALF OF RESPONDENTS

MR. CARLISLE: Thank you, Mr. Chief Justice, and may it please the Court:

My name is Richard Carlisle and I am Associate City

Counselor for the City of Independence, Missouri which is a respondent in this case.

First of all, I would like to clarify that the Eighth Circuit did indeed adopt verbatim the findings of fact of the District Court and repeated them verbatim in its brief. And that included all of the findings as to whether or not the city manager based his discharge of Owen upon the stigmatizing statements of Paul Roberts. And clearly he did not and that is not an issue this afternoon.

QUESTION: This is the first go round or the second?

MR. CARLISLE: First and second. There was never any issue that was made as to the fact that the city manager had decided to discharge the police chief at some time prior to April 17, which was when Paul Roberts made his statement. Indeed -- I may be wrong about the date but it was along about April 10 or April 13, somewhere in there, that he had already chosen the chief's replacement.

QUESTION: Are you relying on page A3 of the petition for certiorari where in Judge Bright's opinion after the remand of this Court he says the pertinent facts are set forth in our prior opinion?

MR. CARLISLE: Yes, and also on the fact that the Court of Appeals explicitly found at several points that Owne's discharge was not for reasons that related to his honesty and integrity. That is a direct quote from the Court of Appeals'

decision and also the Court of Appeals made an expressed finding that Owen, the police chief, would have been denied his position as police chief even had a name-clearing hearing been held, simply because the reasons for discharge did not relate to or adopt or the discharge was not based upon Paul Roberts' statement.

At the outset I would like to clarify a few more matters.

This is I think a difficult case and it is important to recognize the distinctions between policy and conduct. It is very important to realize I think in the context --

QUESTION: In conduct alone.

MR. CARLISLE: In conduct alone, yes. I do see the possibility --

QUESTION: You don't make a distinction between policy and policy implemented by conduct?

MR. CARLISLE: Not really.

QUESTION: You never have any problem unless it is implemented.

MR. CARLISLE: Right. I can see for example policy which is implemented merely once, the first time you have execution. Let's say this is the only department head that was ever discharged by the City of Independence. That is not true in our city but let's assume that for purposes of argument. The city charter, which is clearly policy, states that depart-

ment heads are non-tenured and can be dismissed only by the city manager and really in the city manager's unfettered discretion.

So merely, again for purposes of argument, if this was the only department head that had ever been discharged we would still be looking to the charter itself as policy.

And I would like to also clarify right away that counsel several times stated that the denial of a name-clearing hearing was based on ordinance. That is totally unwarranted to say that. The city charter itself, which of course is not an ordinance, contains explicit provisions about denial of an appeal to a department head where there is a discharge. Actually, it is almost silent about that but it -- the appeal rights that are contained in the charter, section 3.28 of the charter which is set forth in my statutory provisions involved, relates to members of the classified service, department heads or members of the unclassified service. Opposing counsel has tried to leverage I suppose this provision, 3.28, as into some sort of not silent but actually -- control actually exercised charter provision that denied a name-clearing hearing. That is simply not the case.

The charter is really I suppose silent on name-clearing hearings. 2.11 of the charter has been cited by counsel, belatedly, I might add, as to some sort of policy which would deny a name-clearing hearing. But that section is simply the

section that is contained in all council manager charters which prohibits exactly the type of thing that Paul Roberts did in this case, that is interfering in the discharge process, in the event that is the decision of this Court that he did that.

QUESTION: Mr. Owen was the chief of police.

MR. CARLISLE: Mr. Owen was the chief of police.

QUESTION: And as such was he in Independence under the charter a department head?

MR. CARLISLE: Yes, he was, Your Honor.

QUESTION: And there was nobody between him and the city manager, there was no safety director or anybody like that?

MR. CARLISLE: No, sir. He was directly answerable to the city manager.

QUESTION: And he was a department head --

MR. CARLISLE: Yes, sir.

QUESTION: -- directly under the city manager.

MR. CARLISLE: Yes. They had an extremely, or should have had an extremely close working relationship and I think that is the explanation for the unfettered discretion.

QUESTION: But he could only be dismissed for cause in the sense that it was defined, that is for the good of the service.

MR. CARLISLE: In a sense it was defined, Mr. Chief Justice, but I think a point on the property issue which is not

before this Court -- it was an issue below -- in essence in the sense that for cause has been used in the Supreme Court's cases, it was not a discharge for cause. It was a discharge totally in the discretion of the city manager for any cause the city manager deems sufficient. But --

QUESTION: So is that why you say there would be no point or purpose to a hearing?

MR. CARLISLE: Well, there would be no point or purpose whatsoever to an appeal of the city manager's decision. It is not provided for in the charter, the city manager's decisions for discharge did not relate or were not based upon the Paul Roberts statement. Any name-clearing hearing that may have been implied by Board of Regents v. Roth or at one time, though not presently, by the Court of Appeals and never by the District Court, in other words the right to a name-clearing hearing is obviously why we are here today. But the right to a name-clearing hearing in the event that there was stigma in connection with discharge would I think be something that I could conceptualize as some meaning to. The point is that it is not in connection with the discharge, that the name-clearing hearing was not really denied as such but there was an act of omission, let us say, in a failure to affirmatively offer the police chief a name-clearing hearing. The charter was silent as to name-clearing hearings. But 2.11 of the charter, which no allegation, incidentally, is in plain-

tiff's complaint about 2.11, merely would have prohibited the city council or Paul Roberts from participating in the discharge process or something in connection with the discharge process and holding some type of hearing.

Had the city council not been involved in the discharge process, perhaps some other type of name-clearing hearing could have been held by the city council.

And 3.28, again, of the charger was the section which pertained to property rights and not liberty rights.

The point I would like to make this morning is that the charter was silent as to name-clearing hearings and, indeed, no ordinance, no charter provision, nothing pertained to the precise type of name-clearing hearing that we are talking here -- about here today. And that is not unusual, because procedural due process is a broad and changing concept. It is one that many times --

QUESTION: I take it this is an argument then that you are disagreeing with the Court of Appeals.

MR. CARLISLE: I reserve in my last section --

QUESTION: You are saying you disagree that there was a policy.

MR. CARLISLE: I see your point, Your Honor.

QUESTION: The Court of Appeals thought there was a policy --

MR. CARLISLE: Yes.

QUESTION: -- but thought there was immunity.

MR. CARLISLE: The right that the Court of Appeals --

QUESTION: You are not arguing no immunity, you are arguing no policy.

MR. CARLISLE: I am actually arguing both.

QUESTION: But right now you are arguing no policy.

MR. CARLISLE: Yes, sir.

The Court of Appeals found that the conduct which coincided in time of Paul Roberts, the city council motion and the Lyle Alberg discharge of the police chief, that that conduct -- and I am quoting from the Court of Appeals opinion -- "could fairly be said to be official policy."

I do not agree with that statement.

QUESTION: Well, what if you did?

MR. CARLISLE: I have not made that really an issue.

QUESTION: What if we agreed with the Court of Appeals?

MR. CARLISLE: Then I think you still have to decide whether or not on that basis what type of cause of action we are dealing with here.

I think that the opposing counsel in this case --

QUESTION: You are saying that even if it was policy there would still be immunity?

MR. CARLISLE: No, Your Honor, in the true policy case, say for example one of plaintiff's allegations in his

complaint, sir, was that -- I believe it was 3.3 of our charter -- it was over-broad on its face. It was vague. Good faith is no defense to this Court's analysis of whether a charter provision is over-broad on its face.

But where you are talking about conduct, the Paul Roberts statement, the city manager's act of omission in failing to affirmatively offer a name-clearing hearing, policy in the sense that I use the word --

QUESTION: Well, what if the city council had specifically ordered that no hearing be granted?

MR. CARLISLE: The city council, school boards, any type of public governmental body can act in a legislative capacity. They can also act in a quasi-judicial capacity. They can have conduct. And to illustrate the point we were talking about, an ordinance that prohibited blacks in the city at night, good faith is no defense to an analysis of that ordinance. If however Paul Roberts personally felt that blacks should not be in the city at night, then obviously you are talking about conduct and not policy; I would think bad faith conduct, but not policy.

QUESTION: The city would not be liable?

MR. CARLISLE: That is another difficult point. So holds Monell, Your Honor --

QUESTION: Isn't that what we are talking about here?

MR. CARLISLE: Yes, but as a practical matter the reasons behind the good faith defense as cited in the two reasons cited in Scheuer v. Rhodes have always recognized the fact that cities indemnify their employees. And as Jaffe, who is the author of those two rationales recognized, it is basically the -- and I think as the Court did in Scheuer -- it is basically the same concepts behind sovereign immunity that are the concepts behind the two rationale in Scheuer.

QUESTION: When would -- if there is any rule that a city should not be liable on a respondeat superior basis, when would that ever apply if it didn't apply when an employee contrary to policy, acting on his own, in bad faith, hurt somebody?

MR. CARLISLE: I think the respondeat superior rule should apply in full force when an employee acting in bad faith and, as in this case, with Paul Roberts in violation of official policy, again 2.11 prohibited the type of statement that Roberts made, I can't see that the city should ever be liable for that conduct.

QUESTION: Well, then you ought to -- that isn't the ground the Court of Appeals used.

MR. CARLISLE: No, the Court of Appeals quite simply and without much analysis held that that conduct could fairly be said to be official policy.

QUESTION: Yes. And you say it wasn't. As a matter

of fact it contravened policy.

MR. CARLISLE: Yes, as far as the Paul Roberts statement was concerned.

QUESTION: For you to win, do we have to overturn the Court of Appeals?

MR. CARLISLE: No.

QUESTION: Well, we have to disagree with them.

MR. CARLISLE: No. I am saying that it is either one case or the other, Your Honor, that treat it as conduct or treat it as policy, don't find some critical gap in between the two where I have no policy which is given deference which I think this Court would give under the separation of powers doctrine. And I have no conduct which has given a good faith defense. Quite literally, under plaintiff's defense, I do not know of any defense, any argument that I could make to this Court. I couldn't argue good faith immunity and I couldn't argue deference. He has it both ways. In other words, when we are talking about policy he says that I have no deference. And when we are talking about conduct, he says I have no --

QUESTION: Well, let us suppose that there was a city ordinance or a provision in the charter that says that whenever any department heads are discharged no hearings shall be -- the city manager has complete discretion and when he discharges them no hearings shall be ever given. That is just what the charter says. I suppose you would say that is policy.

MR. CARLISLE: I would definitely say that is policy, I would say --

QUESTION: And let us say the city manager discharges somebody, a hearing is demanded and he denied it, saying, "I can't grant one."

MR. CARLISLE: Right.

QUESTION: Now, you wouldn't say that the city has qualified immunity there?

MR. CARLISLE: I would not. I would say you would be looking at the charter so --

QUESTION: The question in the case is whether there is policy or not, not whether there is immunity.

MR. CARLISLE: I agree that there is no qualified immunity to true policy. I agree in my brief and I say that where conduct is treated as policy, if you are truly talking about conduct, as I think --

QUESTION: So you do want to see -- you do want to say that the Court of Appeals is clearly wrong on saying there was policy --

MR. CARLISLE: No, because I think what the Court of Appeals did in this case, they said under the particular circumstances of this case that qualified immunity could be granted, and I think that is right. I will agree with counsel that there was not extensive amount of discussion, though if you look at the files of this case you will realize that this

was not the first time the case had been before the Court of Appeals, and that many words had been written about this case. And the District Court had analyzed --

QUESTION: I thought you would surely argue that there was not policy, there wasn't any liability at all, qualified or not, that otherwise it is just liability on an respondeat superior basis.

MR. CARLISLE: I was tempted to make that argument, Your Honor, and basically because of the indemnity provisions in some State laws and the informal indemnity that is given as a matter of course at any rate, it would be simplistic for me to argue that the city will never be liable for the conduct of its employees.

In a --

QUESTION: Counsel, supposing that you have an ordinance that is exactly the converse of what my brother White has suggested that says that in every case the firing of a department head there shall be the opportunity for a hearing conducted by the city manager. The city manager flatly, contrary to that ordinance, refuses to conduct such a hearing and discharges him anyway. He is an employee of the city, he is presumably liable under a respondeat superior theory but you have nothing else.

Now, under Monell you don't have any liability there, do you?

MR. CARLISLE: I agree completely. Never, never. I agree.

I am trying to be practical, in recognizing the fact that there are going to be instances coming before this Court -- and certainly coming before the Circuits -- where a city is asked to be liable for conduct. And I think this is such a case, where you make the distinction, and it is a difficult distinction between conduct and policy. I have defined policy for example as something of continuing effect, something of future effect, and general application.

QUESTION: Well, I still don't know what you do with the Court of Appeals conclusion that there was policy here.

MR. CARLISLE: I accept it, because it is not a question presented in this case.

And then --

QUESTION: I suppose you as respondent could probably say it wasn't policy.

MR. CARLISLE: Well, --

QUESTION: And that he didn't cross petition --

MR. CARLISLE: My last point relied on, in essence raised certain elements of that argument.

But what I am saying in this --

QUESTION: But if it is policy and there is just implementation of the city policy involved here, I don't know how you --

MR. CARLISLE: I don't see -- what we have here really I think is respondeat superior, as was recognized in the discussion before. And I am willing to accept that as favorable to my case.

But, I am saying it is not despositive of my case. I am saying that as a practical matter there are going to be situations where there are close questions as to whether something is conduct or policy. And, if it is policy, I think this Court has to give deference to that policy. If it is conduct, then I think we get qualified immunity.

QUESTION: Now, if you agree that pure implementation of a policy, an admitted policy, would not -- that there would be no immunity then. And if you agree in this case that there was a policy involved, that the city manager was implementing, you would say no immunity.

MR. CARLISLE: I do not believe that there was a policy -- I know --

QUESTION: I know you don't, but suppose you did.

MR. CARLISLE: If in the example I believe that you gave, Your Honor, that there was a charter provision saying no hearings whatsoever, we would be here, we would be reviewing that charter provision, we would be talking about such things as legislative intent, we would be talking about the separation of powers doctrine --

QUESTION: What if the charter said the city manager

has broad executive powers and he has powers to issue regulations to carry out the provisions of this charter. He issues a set of regulations that says the furtherance of my power is discharged, here is the procedure. There isn't any, there is no procedure, and he fires the man and there is no hearing.

Is that city policy?

MR. CARLISLE: I do believe that it is possible for a city manager to create city policy, although I must agree that in a councilmen form of government historically the council creates policy and the city manager executes it. But I think that policy of general applicability in future effect can be made by an executive. And I think that it is in essence to have an administrative rule that we would be --

QUESTION: In that event there would be no qualified immunity.

MR. CARLISLE: That is exactly right, Your Honor.

Again, I am comfortable with that argument, based upon my facts. I would hasten to add that in Footnote 23 of my brief there are considerations similar, though not coterminous, with qualified good faith immunity of the individual which do pertain as to whether or not there should be retroactive monetary relief in a policy case.

This Court is quite often struggling with that idea of whether policy is voidable or void ab initio, whether some sort of presumption of validity of policy such as we

should have on our charter would continue that policy in effect until it is ultimately deemed to be unconstitutional.

QUESTION: Mr. Carlisle, may I ask you a question about the basic claim in the case to get all these arguments, because I understand the good faith defense rests largely on the fact that the state of the law was uncertain or hadn't developed at the time of the events in question.

MR. CARLISLE: In large, Your Honor.

QUESTION: Now, assume that the same events took place today and everybody knew the law, so you wouldn't have this kind of a good faith argument.

Would you agree that the facts would support recovery by the plaintiff under 1983 against somebody?

MR. CARLISLE: Yes, Your Honor.

QUESTION: O.K., I just wanted to be sure of that.

MR. CARLISLE: The actual good faith in this case of course was not limited solely to the nonexitenstence of subtle law and, indeed, the existence of good faith is not a question presented on appeal. But in that regard we also were talking about no malice, which was established below; we are talking about job offers that were made, we were talking about informal -

QUESTION: That would have to do with the extent of damages perhaps, wouldn't it?

MR. CARLISLE: I believe it has much to do with qualified good faith immunity, which would defeat --

QUESTION: Well, now, I am talking about the job offers that were made.

MR. CARLISLE: Yes, that would be mitigation as well but it is the type of suggestive factor that I think the Court took into consideration when talking about no malice.

QUESTION: Well, have in this case, don't you, as in so many cases of this kind different elements that are very easily kind of interchangeable and not easy to separate. First the constitutional violation which could occur, any employee could violate the plaintiff's constitutional rights. And then you have the respondeat superior plus requirement of Monell which says that even if an individual employee has violated a constitutional right, the city can't be held liable unless you show somethig more than respondeat superior. And then you have elements of damages and mitigation and that sort of thing.

MR. CARLISLE: Yes, sir. This is an extremely complex case to analyze, in my opinion, because of the interplay of all of those and other issues in here in this case. It is a lot easier I think to maybe look at some other allegation in plaintiff's complaint that aren't here tl kind of define what I mean about when qualified immunity is not available. He made allegations for example as to -- as I mentioned -- section of our charter being over-broad. I think this Court can look at the language. I think it can look at arguments of counsel, but things like whether the council maliciously passed

that is not going to stop this Court from reviewing some language of my charter. By the same token, if the city council conspired to fraudulently pass a policy you would be talking about conduct, wouldn't you.

In the making of that policy you can have fraud. There are many, many cases involving fraud by policy-making bodies but that is conduct. That is a tort.

But then, really, something comes into existence that is called policy. There is --

QUESTION: What has fraud got to do with a constitutional violation of 1983?

MR. CARLISLE: I think you could have fraudulent conspiracy to deprive someone of a constitutional right and that conspiracy could be either in the making of policy or in the execution of policy. But then when the policy itself would come into existence there is really something there to review, for example section 3.3 of our charter. It has language; it exists; you can sit down and you can look at it. You can talk about legislative intent. You can talk about rational basis. This Court does it all the time and it has done it all the time in 1983 cases. Monell is basically such a case, where you are talking about a leave of absence policy. That is something that you can review as policy. Craig v. Bourne was a 1983 case where you were talking I believe about age discrimination, when you could buy beer.

Case after case after case you are looking at a regulation and this Court is not going to concern itself with the objective and subjective parts of qualified good faith immunity when you are reviewing policy itself.

QUESTION: Now, let me carry the question I asked you before one step further. I think I understand the answer but I want to be sure.

Would you agree that if the facts that have been found here occurred today that the city would be liable under 1983?

MR. CARLISLE: If we do accept, as I have only for the purposes of argument, that in some of that conduct can bind the city. And I think basically it can.

In other context, getting away from this case because I think the Court of Appeals was wrong when pressed to admit that, and although it is not salient to my theory as a whole, but I think that you can have situations possibly which may create a 1983 case for violation of Federal laws where employee conduct notwithstanding the non-application of the respondeat superior theory could conceivably create entity liability.

QUESTION: Well, then specifically, this is such a case unless we hold that there is good faith immunity for the municipality?

MR. CARLISLE: I am afraid I don't understand the

question, Your Honor.

QUESTION: I think I understand you to be arguing, and in part admitting, that if the facts we have before us occurred today so there was no good faith immunity defense available, the city would be liable; the converse of which is that you are saying in essence that you are relying squarely on good faith immunity as the reason the city is not liable.

MR. CARLISLE: I am, Your Honor, because I see absolutely no policy that I can rely on one way or the other. Our charter is silent as to policy. We are looking only only at conduct, conduct which merely because of the rank of Paul Roberts was policy.

QUESTION: If that is true, may I ask you, because I really didn't find you addressing this very much: Why should -- what is there in the law to support the notion that in a situation which a city would otherwise be liable it should be immune from liability because of the good faith of its officials?

MR. CARLISLE: Simply because you look at the nature of the cause of action. I agree with opposing counsel that the qualified good faith immunity may be an ill-chosen term, because I think it relates to the cause of action.

If you are talking about a Federal tort, opposing counsel designates this case today, then you are looking at a background of tort liability that includes concepts such as

state of mind, approximate cause, cause in fact and duty. I believe that the good faith immunity -- if we can call it an immunity, which is really I think a defense on the merits -- relates directly back to plaintiff's prima facie case on this Federal tort and what if the -- merely --

QUESTION: It is rather unusual to have an affirmative defense relate back to the prima facie case.

MR.CARLISLE: Not at all, Your Honor. Whether or not something is an affirmative defense is, as I understand civil procedure, made on a determination of whether or not it would be a permitted but disfavored defense, which this may well be, the convenience to the parties, accessibility to evidence, quite often we have a defense on the merits that is made an affirmative defense.

And, incidentally, I do not know of this Court ever having held, and I think Wood v. Strickland can be held to the contrary or seen to the contrary, that the good faith defense as we know it is indeed an affirmative defense. It is just kind of accepted as such, but I do not know that to be the case.

QUESTION: Procunier v. Navarette tends to support you on that.

MR. CARLISLE: Yes, sir.

QUESTION: Yes.

QUESTION: Mr. Carlisle, the only injury alleged in

this case, as I understand it, is stigma.

Is that correct?

MR. CARLISLE: As I understand it, Your Honor.

QUESTION: The District Court found also, as I understand it, that there was no stigma; is that correct?

MR. CARLISLE: Yes, Your Honor, --

QUESTION: Well, why do you give your case away, then?

MR. CARLISLE: Again, it is not the question presented on appeal. I do reserve parts of that, Your Honor, and my last point relied on when I talk about the threshold question being a deprivation. I do not believe a deprivation of liberty occurred in this case.

QUESTION: Well, why don't you stand on that?

MR. CARLISLE: Well, it was back a little bit further in my argument -- my last point relied on, Your Honor --

QUESTION: In responding to my brother Justice Stevens I have understood you to concede that --

MR. CARLISLE: I do not concede that stigma is present in this case.

QUESTION: All right.

We didn't limit it, did we?

QUESTION: Well, the Court of Appeals felt there was.

MR. CARLISLE: The Court of Appeals found that there was a deprivation of liberty.

QUESTION: And that there was stigma.

MR. CARLISLE: There must be --

QUESTION: So to the extent that as a respondent you rely on the contrary you are going contrary to the Court of Appeals, which is your privilege.

MR. CARLISLE: Yes. And my last point relied on Your Honor I claim that there was no deprivation of liberty.

QUESTION: Well, in fairness to you then, Mr. Carlisle, you really want to withdraw your answer to one of my questions. You don't really accept for purposes of decision the proposition that if this conduct referred today there would be liability against anybody.

MR. CARLISLE: If it occurred today, Your Honor, -- I understand what you are saying -- there are two different ways of looking at it. I feel that your question in the abstrac as to the availability of a qualified immunity defense which I believe is lost if you are acting in the face of subtle law.

QUESTION: Yes.

MR. CARLISLE: That was the answer --

QUESTION: I meant to ask you because there are so so many issues that cross-cross in the case is: Assuming you didn't have a qualified immunity defense at all because of the fact it occurred today and there is no matter of unsettled law or anything else. Just on the basic facts of the case I was asking you whether or not you were contending that there would

be no liability anyway.

MR. CARLISLE: There would be none under my last -- I do not believe that plaintiff has established a threshold question of deprivation of liberty.

QUESTION: And that is because you don't regard these comments as stigma?

MR. CARLISLE: They were not stigmatizing in connection with the discharge, Your Honor.

QUESTION: That is because they (a) were not stigmatizing or (b) were not in connection with the discharge?

MR. CARLISLE: Primarily they were not in connection with the discharge, although I think the District Court was correct in finding, and he was the tryer of fact that the plaintiff's name was cleared by the return of --

QUESTION: You have got three possible arguments: (1) not stigma; (2) not in connection; and (3) would be --

MR. CARLISLE: I have --

QUESTION: Now, which are you --

MR. CARLISLE: I have conceded for the purposes of argument all along that the robust comments of Paul Roberts were stigmatizing.

QUESTION: All right.

But you deny that they were in connection with the discharge?

MR. CARLISLE: I certainly do, Your Honor.

QUESTION: And you also argue that they were cured in any event.

MR. CARLISLE: I do, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

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