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42 U.S.C. 1983–Civil Rights–Municipalities Liable for Money Damages

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42 U.S.C. § 1983 — CIVIL RIGHTS — MUNCIPALITIES LIABLE FOR MONEY DAMAGES. *Monell v. Department of Social Services,* 436 U.S. 658 (1978).

Petitioners Monell, Zapata, Terrall, and Abbey, female employees of the New York City Department of Social Services and Board of Education, were compelled to take unpaid leaves of absence pursuant to the New York City maternity policy. The policy required a pregnant employee to take leave without pay after the fifth month of pregnancy unless the employee obtained permission to continue working from the agency doctor and approval from the agency head. None of the petitioners suffered incapacitating medical problems resulting from pregnancy that would have prevented them from working past the fifth month. They brought suit against New York City, the Board of Education, the Department of Social Services, and individual agency officials, seeking injunctive and declaratory relief[1] and money damages in the form of back pay for those months of mandatory leave. The action was brought under title 42, section 1983 of the United States Code, which allows an award of damages to any citizen or other person who is deprived of constitutionally protected rights by any "person."[2]

The district court dismissed petitioners' complaint, holding that although the deprivation of rights was a result of an unconstitu-

1. Pending disposition of the suit, New York City amended its policy to allow pregnant employees to continue working as long as they had the desire to work and were physically capable of doing so. The lower court's ruling that this amendment mooted the prayer for injunctive and declaratory relief was not challenged by the petitioners. Monell v. Dep't of Social Servs., 436 U.S. 658, 661 (1978).

2. 42 U.S.C. § 1983 (1976) reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The amended complaint additionally sought jurisdiction under Title VII of the Civil Rights Acts of 1964, *as amended,* 42 U.S.C. § 2000e (1976). The Court of Appeals for the Second Circuit affirmed the district court's ruling that the 1972 amendment to Title VII did not apply retroactively to this case. Monell v. Dep't of Social Servs., 532 F.2d 259, 261 (2d Cir. 1976).

If any question existed whether Title VII would have been applicable to those facts, even had the 1972 Amendment been retroactively applied, that question has now been resolved. In October of 1978, President Carter signed into law P.L. No. 95-555, which adds section 701 (k) to the Act. By defining "because of sex" and "on the basis of sex" to include pregnancy, childbirth or related medical conditions, and women affected thereby, the Congress sought to foreclose arguments that employment decisions based on pregnancy were not necessarily within the scope of Title VII.

tional policy,[3] back pay could not be awarded. The court based its ruling on *Monroe v. Pape*[4] which held municipalities and their governmental units immune from section 1983 actions because they were not "persons" within the meaning of that section.[5] The Court of Appeals for the Second Circuit affirmed.[6]

The Supreme Court reversed. Writing for the majority, Mr. Justice Brennan held that muncipalities were "persons" within the meaning of section 1983, and overruled *Monroe v. Pape*[7] insofar as it conferred a blanket immunity on municipalities in section 1983 actions. *Monell v. Department of Social Services,* 436 U.S. 658 (1978).[8]

The federal civil remedy for the deprivation of constitutionally guaranteed rights had its inception in the Civil Rights Act of 1871.[9] The Act was introduced as H.R. 320 and was entitled "An Act to Enforce the Provisions of the Fourteenth Amendment of the Constitution and for Other Purposes."[10] Section 1 was designed to secure equal protection for all citizens by providing a civil remedy against "persons" who violated constitutionally protected rights. Sections 2 through 4 were an attempt to suppress rampant Ku Klux Klan activity in the southern states. Section 1 passed both houses of Congress as proposed, with little debate. The remainder of the bill, with its drastic measures,[11] was the object of heated debate and

3. The policy was held to be unconstitutional under the test promulgated in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974). The Board's maternity leave/return to work policy was ruled "arbitrary and irrational" in that it created an irrebuttable presumption of physical incapacity for all pregnant teachers. *Id.* at 644.

4. 365 U.S. 167 (1961).

5. Monell v Dep't of Social Servs., 394 F. Supp. 853 (S.D.N.Y. 1975).

6. Monell v. Dep't of Social Servs., 532 F.2d 259 (2d Cir. 1976). The court also found that the individual defendants were "persons" within the meaning of § 1983 even when sued in their official capacities, but no monetary damages could be assessed against them because the city treasury would be ultimately responsible and the city was immune from money damage awards under Monroe v. Pape, 365 U.S. 167 (1961).

7. 365 U.S. 167 (1961).

8. The Supreme Court also held: (1) local governments are liable under § 1983 only when the deprivation of constitutional rights arises out of a government policy and not under a theory of *respondeat superior,* 436 U.S. at 691; (2) U.S. CONST. amend. X imposes no obstacle to municipal liability, 436 U.S. at 690 n.54; (3) U.S. CONST. amend. XI does not prohibit imposition of municipal liability, 436 U.S. at 690 n.54; (4) *stare decisis* will not be applied mechanically to prevent the Court from overruling *Monroe.* 436 U.S. at 701.

9. Act of Apr. 20, 1871, ch. 71, § 2, 17 Stat. 13, Rev. Stat. § 1979 (1871).

10. Monell v. Dep't of Social Servs., 436 U.S. 658, 665 (1978). *See* the text of 42 U.S.C. § 1983 (1976), *supra* note 2.

11. Section 2 created new federal crimes to supplement section 2 of the Civil Rights Act of 1866; section 3 authorized the President to send militia into states racked with Klan violence; section 4 provided for the suspension of *habeas corpus* in emergency situations. Monell v. Dep't of Social Servs., 436 U.S. 658, 665 n.11 (1978).

amendment before eventual passage.

Before H.R. 320 came to a vote in the Senate, Senator Sherman proposed an additional section to the bill (the Sherman Amendment) which would have placed liability for damage to persons or property occurring during "riotous and tumultuous" activity on the private inhabitants of municipalities.[12] Under the Sherman Amendment, suit could be brought by the injured party or his personal representative against the "county, city, or parish" where the damage occurred, and that county, city, or parish would in turn levy the judgment against the property of any of its inhabitants who were involved in the damaging riot.[13] The purpose of the amendment was to discourage the landed populace from violating the civil rights laws by making their property subject to levy and execution.[14] The Senate passed the Sherman Amendment with H.R. 320, but the House of Representatives was strongly opposed to the Amendment. The House concluded that Congress had no authority under the Constitution to impose an "obligation"[15] on a muncipality, a "mere instrumentality for the administration of state law."[16]

Congress, unable to agree on the Sherman Amendment, forwarded that portion of the bill to a joint conference committee for modification. The first revision of the Amendment would have placed liability for civil rights violations indirectly on municipalities. When any individual defendant who was joined in the action defaulted on the judgment against him, the county, city, or parish where the damage occurred became liable and subject to a lien upon its treasury and property. To reduce the burden upon municipalities, the bill further provided the municipality with a right of indemnification from those individuals who defaulted on the judgment.[17] This version of the Sherman Amendment passed in the Senate, but the House continued to oppose the placing of any "obligation" on municipalities without express constitutional power.[18]

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12. The text of the Sherman Amendment appears in full in the Appendix to the opinion. Monell v. Dep't of Social Servs., 436 U.S. 658, 702 (1978).

13. *Id.*

14. *Id.* at 667 n.16 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 761 (1871) [hereinafter cited as GLOBE]).

15. The precise meaning of the term, "obligation," is not clear from a reading of the debates. *See* GLOBE at 804. The United States Supreme Court in Monroe v. Pape, 365 U.S. 167 (1961), construed "obligation" to mean monetary liability. *See* note 29 *infra.* Seventeen years later in Monell v. Dep't of Social Servs., 436 U.S. 658, 679 (1978), the Court re-construed "obligation" to mean a requirement that municipalities establish peacekeeping forces.

16. Monell v. Dep't of Social Servs., 436 U.S. 658, 664 (1978) (quoting GLOBE at 804).

17. *Id.* at 703, 704 (quoting GLOBE at 749).

18. *Id.* at 668, 703-704 (quoting GLOBE at 755).

The second and final version of the Sherman Amendment reported out of committee complied with the demands of the House. This version abandoned an attempt to hold municipalities liable for riot damage.[19] Instead it joined as conspirators subject to liability any individuals who had knowledge of an impending riot and who failed to take steps to prevent it. This version was adopted by both houses of Congress and is now codified as title 42, section 1986 of the United States Code.[20]

After the Civil Rights Act of 1871 was adopted, fear arose throughout the nation that if the Act were given full force and effect by the courts, the power of the states to create and enforce their own laws could be severely impaired or destroyed.[21] In reaction to the fear for states' sovereignty, federal courts in the late nineteenth century limited the scope of section 1983.[22] The most effective limitation was accomplished by applying the doctrine of sovereign immunity to exclude municipalities and their officials acting under "color of law" from the meaning of "person" under section 1983.[23]

Municipal immunity was declared to be absolute in *Monroe v. Pape*,[24] a suit against the City of Chicago and thirteen of its police officers who made an illegal search of plaintiff's apartment and unlawfully detained him at police headquarters.[25] The United States Supreme Court reversed the lower court's dismissal of the claim against the officers but affirmed dismissal as to the City of Chicago. The Court based its decision on a narrow interpretation of legislative intent[26] regarding municipal liability in civil rights ac-

19. *Id.* at 704 (quoting GLOBE at 804).

20. *Id.* at 669.

21. *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977).

22. *See Ex Parte* Virginia, 100 U.S. 339, 346 (1880), *see generally Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977).

23. *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1191 (1977). Other limitations not on point to this discussion extended immunity to those who violated the civil rights of another but who believed they were acting under color of valid law, *see, e.g.*, Pierson v. Ray, 386 U.S. 547 (1964); and extended immunity to violators who had no intent to deprive any person of constitutionally protected rights, *see, e.g.*, Screws v. United States, 325 U.S. 91 (1945).

24. 365 U.S. 167 (1961). *See also* Egan v. City of Aurora, 365 U.S. 514 (1961).

25. Thirteen police officers broke into Monroe's apartment without a warrant, subjected his family to personal indignities, and ransacked his home. He was then detained at police headquarters, incommunicado, on "open charges" and questioned about a two-day old murder without benefit of counsel. No criminal charges were filed against him. Monroe v. Pape, 365 U.S. 167, 169 (1961).

26. Section 1983 provides a remedy for "constitutional torts." Since there was no common law dealing with this type of tort, legislative intent had to be analyzed in order to

tions.[27] Mr. Justice Douglas reasoned that Congress did not intend to hold a municipality liable for civil rights violations because the House of Representatives never conceded to the "obligation" which the Sherman Amendment[28] would have placed on municipalities.[29] Douglas presumed the term "obligation" to mean *monetary liability* for actions brought under the Civil Rights Act of 1871.[30] Therefore, the Court held that municipal corporations were not "persons" within the meaning of section 1983 and consequently were wholly immune from liability.[31]

After *Monroe,* federal courts attempted to alleviate the harsh effect of municipal immunity by restricting the availability of immunity to those cases in which money damages were sought. A footnote in the *Monroe* decision[32] was interpreted by the Tenth Circuit Court of Appeals as allowing the imposition of *injunctive relief* against the city of Lawton, Oklahoma.[33] In *United States v. Jackson* the Fifth Circuit enjoined enforcement of an ordinance which required racial segregation in city rail and bus terminals.[34] The Seventh Circuit in *Adams v. City of Park Ridge* issued an injunction to prevent enforcement of an ordinance prohibiting solicitation of funds for charitable purposes.[35] The *Jackson* and *Adams* courts reasoned that the justification for denying an award of money damages against a municipality—that of foreseeable financial ruin—was not present where equitable relief was requested.[36]

In reaction to the above "bifurcated application"[37] of the word "person," which viewed a municipality as a person within the meaning of section 1983 for purposes of injunctive and declaratory relief but not a person for the purpose of money damages, the United

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construe the meaning of the statute. Bliss, Judge, & Schirott, *Civil Rights Act: A Close Look at Proper Parties,* 18 TRIAL LAW. GUIDE 105, 109 (1974).

27. Monroe v. Pape, 365 U.S. 167, 172 (1961).

28. *See* note 12 *supra.*

29. Monroe v. Pape, 365 U.S. 167, 190 (1961).

30. *Id.* at 191. *See* Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act,* 45 S. CAL. L. REV. 131, 135 (1972).

31. Monroe v. Pape, 365 U.S. 167, 192 (1961). *See* cases listed in Bliss, Judge, & Schirott, *Civil Rights Act: A Close Look at Proper Parties,* 18 TRIAL LAW. GUIDE 105, 115 (1974).

32. Monroe v. Pape, 365 U.S. 167, 191 n.50 (1961).

33. Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970). In the *Dailey* decision, an injunction was issued to prevent the city from denying a building permit for low-cost housing.

34. 318 F.2d 1 (5th Cir. 1963).

35. 293 F.2d 585 (7th Cir. 1961).

36. United States v. Jackson, 318 F.2d 1, 11 (5th Cir. 1963); Adams v. City of Park Ridge, 293 F.2d 585, 587 (7th Cir. 1961). *See also* Steel Hill Dev., Inc. v. Town of Sanbornton, 335 F. Supp. 947 (D.N.H. 1971).

37. Kenosha v. Bruno, 412 U.S. 507, 512 (1973).

States Supreme Court in *Kenosha v. Bruno* declared that municipalities were wholly immune from section 1983 actions for any purpose.[38] Mr. Justice Rehnquist based his reasoning on the legislative intent as analyzed by the Court in *Monroe* and found no indication that the nature of the relief sought should have any bearing on the interpretation of the word "person."[39]

The United States Supreme Court in *Monell v. Department of Social Services*[40] extensively reviewed the Congressional debates on the Sherman Amendment and determined that there was no discussion evincing an intent to exclude municipalities from monetary liability under section 1983.[41] Mr. Justice Brennan stated that the Court in *Monroe* erred in its interpretation of the "obligation" which the Sherman Amendment would have placed on municipalities. The "obligation" to establish police forces, not to pay money damages, was the duty which the opponents of the Amendment declared to be beyond the constitutional power of Congress.[42] By imposing liability on the municipality for a breach of the peace, Congress would have been indirectly compelling the municipality to create peacekeeping forces—a usurpation of authority delegated to the states.[43] However, even the opponents of the Amendment found that Congress had the power to impose liability upon a municipality that violated fourteenth amendment rights by abusing or failing to enforce the peacekeeping obligation imposed on it by the state.[44] Section 1 of the Civil Rights Act of 1871, codified at title 42, section 1983 of the United States Code, was an exercise of the Congressional power to protect constitutional rights, and no more. Consequently, Brennan found nothing in the debates on the Sherman Amendment evincing an intent that municipalities be immune from actions for civil rights violations under section 1983.[45]

Brennan argued that the word "person" in section 1983 applied to legal as well as natural persons.[46] He reasoned that in 1871, when the statute was passed, corporations, including municipal corpora-

38. *Id. See also* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (vacating and remanding lower court's reinstatement of teacher with back pay); Aldinger v. Howard, 427 U.S. 1 (1976) (affirming lower court's dismissal of suit for injunctive relief and back pay brought by employee of county treasurer's office).

39. Kenosha v. Bruno, 412 U.S. 507, 512 (1973).

40. 436 U.S. 658 (1978).

41. *Id.* at 683.

42. *Id.* at 679.

43. *Id.*

44. *Id.* at 680 (Rep. Poland).

45. *Id.* at 683.

46. *Id.*

tions or "bodies politic," were widely recognized as being equal to natural persons before the law.[47] In February of 1871 Congress had denominated corporations as "persons" in the Dictionary Act,[48] thereby recognizing that the usual meaning of "person" included corporations. Brennan found that Congress was clearly aware of the fact that municipal corporations were suable entities under section 1 of the Civil Rights Act of 1871.[49]

Monell may have an important impact on future civil rights litigation. Victims of discrimination are no longer barred from seeking monetary redress for wrongs perpetrated by the customs and policies of municipalities. Further, the mere possibility of having to pay a large settlement may cause errant municipalities to align their policies and customs with constitutionally acceptable standards.[50] The full impact of the decison, however, may not be felt for some time due to the Court's failure to address the scope of municipal liability.[51] Many questions remain as to the degree and extent of liability, defenses available to the municipality, and identification of funds available to satisfy any judgment against the city.

Arkansas, too, may be affected by the decision in *Monell.* Title 12, section 2901 of the Arkansas Statutes Annotated,[52] which expressly extended tort immunity to municipalities, is in direct conflict with *Monell.* It states as follows:

> State subdivisions immune from tort liability— It is hereby declared to be the public policy of the State of Arkansas that all counties, municipal corporations, school districts, special improvement districts, and all other political subdivisions of the State shall be immune from liability for damages, and no tort action shall lie against any such political subdivision, on account of the acts of their agents and employees.

Arkansas case law has not dealt directly with the issue of municipal liability in section 1983 actions. However, there have been decisions dealing with the liability of other "bodies politic" under

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47. *Id.* at 687.

48. Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431 (1871). The Act reads, in part, "[T]he word 'person' may extend and be applied to bodies politic and corporate . . . ." After amendment the definition was codified in 1 U.S.C. § 1, and reads, in part, "[T]he words 'person' and 'whoever' include corporations . . . as well as individuals . . . ."

49. Monell v. Dep't of Social Servs., 436 U.S. 658, 686 (1978).

50. *See* McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I,* 60 VA. L. REV. 1 (1974). *See generally* Bristow, *§ 1983: An Analysis and Suggested Approach,* 29 ARK. L. REV. 255 (1975).

51. Monell v. Dep't of Social Servs., 436 U.S. 658, 695 (1978).

52. (1968).

section 1983. These entities include school boards and their individual members,[53] members of the Board of Trustees of a state supported college,[54] and the State Department of Corrections.[55]

School boards are considered sub-divisions of the state under title 12, section 3406 of the Arkansas Statutes Annotated[56] for the purpose of tort liability,[57] but boards, as state bodies, have not generally been considered "persons" within the meaning of section 1983.[58] In order for an *individual* school board member to enjoy immunity from section 1983 actions, he must act in good faith in a manner not calculated to deprive the constitutional rights of anyone subordinate to him.[59] The test of good faith has predictably resulted in a great deal of uncertainty in the law due to the necessity of determining the elements of good faith on a case by case basis.

In *Floyd v. Trice*[60] the Court of Appeals for the Eighth Circuit enjoined board members and the school Superintendent of Texarkana from enforcing a continuing racially discriminatory policy against students. In *Williams v. Anderson*[61] the Eighth Circuit declared that although board members were entitled to assert a qualified immunity, the board members and Superintendent of Brinkley schools were nevertheless liable under section 1983 because they were put on notice by federal law[62] that their policy of hiring and promoting teachers violated plaintiff's constitutionally protected rights. Board members and the school Superintendent were found

53. Wood v. Strickland, 420 U.S. 308 (1975); Williams v. Anderson, 562 F.2d 1081 (8th Cir. 1977); Bramlet v. Wilson, 495 F.2d 714 (8th Cir. 1974); Floyd v. Trice, 490 F.2d 1154 (8th Cir. 1974).

54. Board of Trustees v. Davis, 396 F.2d 730 (8th Cir.), *cert. denied*, 393 U.S. 962 (1968).

55. Heard v. Boren, 368 F. Supp. 1321 (E.D. Ark. 1974).

56. (Cum. Supp. 1977). It reads: "State officers defined—Elected state officials and members of commissions, boards, or other governing bodies of agencies are officers of the State of Arkansas for the purposes of this Act."

57. ARK. STAT. ANN. § 12-3401 (Cum. Supp. 1977) reads:

> State payment of damages for act of state officer or employee— The State of Arkansas shall pay actual, but not punitive, damages adjudged by a state or federal court, or entered by such a court as a result of a compromise settlement approved and recommended by the Attorney General, against officers or employees of the State of Arkansas or against the estate of such an officer or employee, based on an act or omission by the officer or employee while acting without malice and in good faith within the course and scope of his employment and in the performance of his official duties.

58. Wood v. Strickland, 420 U.S. 308 (1975); Bramlet v. Wilson, 495 F.2d 714 (8th Cir. 1974); *see generally* Comment, *Suing the School Board Under Section 1983*, 21 S.D. L. REV. 452 (1976).

59. Wood v. Strickland, 420 U.S. 308, 322 (1975).

60. 490 F.2d 1154 (8th Cir. 1974).

61. 562 F.2d 1081 (8th Cir. 1977).

62. Equal Pay Act of 1963, 29 U.S.C. §§ 206(d), 216(b) (1976).

to be "persons" subject to suit in *Bramlet v. Wilson,*[63] a section 1983 action for cruel and unusual corporal punishment.

The Eighth Circuit Court of Appeals declined to rule on the immune status of a state supported college in *Board of Trustees of Arkansas A & M College v. Davis.*[64] The court in *Davis,* however, did hold individual members of the Board of Trustees liable for money damages in that action for racial discrimination in the dismissal of a faculty member.[65]

The State Department of Corrections is included within the meaning of title 12, section 3401 of the Arkansas Statutes Annotated.[66] In *Heard v. Boren*[67] the Department was held immune from money damages under section 1983 in a suit brought by a prisoner who sustained aggravated physical injury due to the oversight of the prison physician who failed to recommend the prisoner be exempt from heavy yard work.

Foreseeably, many suits for violations of civil rights could arise in Arkansas because *Monell* impliedly repeals the statutory immunity conferred on municipalities.[68] Municipal governments should reevaluate their policies, especially in hiring, promoting, dismissals, and maternity and sick leaves to insure that no constitutional violations exist. Citizens now have a functional remedy against municipalities whose policies and customs violate protected rights.

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63. 495 F.2d 714 (8th Cir. 1974).

64. 396 F.2d 730 (8th Cir.), *cert denied,* 393 U.S. 962 (1968). Other jurisdictions have held that state supported universities are not "persons" within the meaning of § 1983. Braden v. University of Pittsburgh, 477 F.2d 1 (3d Cir. 1973); Whitner v. Davis, 410 F.2d 24 (9th Cir. 1969); Anthony v. Cleveland, 355 F. Supp. 789 (D. Hawaii 1973).

65. Board of Trustees v. Davis, 396 F.2d 730 (8th Cir.), *cert. denied,* 393 U.S. 962 (1968).

66. (Cum. Supp. 1977). *See* note 57 *supra.*

67. 368 F. Supp. 1321 (E.D. Ark. 1974).

68. ARK. STAT. ANN. § 12-2901 (1968).