

# TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

CITY OF ST. LOUIS,            )  
  )  
                          Petitioners, )  
  )  
v.                                    )        No. 86-772  
  )  
JAMES H. PRAPROTNIK.        )

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SUPREME COURT, U.S.  
WASHINGTON, D.C. 20543

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----X  
3 CITY OF ST. LOUIS, :

4 Petitioners, :

5 v. :

No. 86-772

6 JAMES H. PRAPROTNIK :

7 -----X

8 Washington, D.C.

9 Wednesday, October 7, 1987

10 The above-entitled matter came on for oral argument  
11 before the Supreme Court of the United States at 10:01 a.m.

12 APPEARANCES:

13 JAMES J. WILSON, ESQ., St. Louis, Missouri;

14 on behalf of the Petitioners.

15 CHARLES R. OLDHAM, ESQ., St. Louis, Missouri;

16 on behalf of Respondent.

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P R O C E E D I N G S

(10:01 a.m.)

1  
2  
3 CHIEF JUSTICE REHNQUIST: We will hear argument first  
4 this morning in No. 86-772, the City of St. Louis v.  
5 Praprotnik. Mr. Wilson, you may proceed whenever you are  
6 ready.

7 ORAL ARGUMENT OF JAMES J. WILSON

8 ON BEHALF OF PETITIONER

9 MR. WILSON: Thank you. This proceeding, brought  
10 under Section 1983, involves the imposition of municipal  
11 liability upon the Petitioner for the single isolated act of a  
12 city official who lacked general authority in the area and  
13 whose action was contrary to the policy of the city.

14 This is a Monell type case. In Monell, this Court  
15 indicated that it was going to leave to future decisions the  
16 full contours of municipal liability. It is our position in  
17 respect to single incidents that this Court has shaped those  
18 contours in its decisions in cases such as Owens, Tuttle, and  
19 particularly the recent Pembaur decision. And what this  
20 proceeding calls for is an application of those principles to  
21 the facts herein.

22 The facts are largely undisputed. The Plaintiff was  
23 a civil service employee of the City of St. Louis. He was a  
24 planner for our community development commission. Around 1980,  
25 he became embroiled in a dispute with his supervisor. This led  
to a 15-day suspension for violation of the secondary

1 employment rule. He appealed to our Civil Service Commission  
2 which reduced that to a reprimand.

3 In April 1981, because of a change of  
4 administrations, the new mayor appointed a Defendant Frank  
5 Hamsher as the head of the community development agency.  
6 Approximately one year later, Mr. Hamsher, as director of that  
7 agency, transferred the Plaintiff to another City department.  
8 He filed an appeal with the Civil Service Commission. The  
9 Civil Service Commission declined that appeal on the basis that  
10 no injury was done to him at that time since this was a lateral  
11 transfer.

12 Subsequent to that, the Plaintiff filed a 1983 action  
13 naming three City officials and the City as Defendants.  
14 Defendant Hamsher was one of those named.

15 The Plaintiff was subsequently laid off from his  
16 position some 17 months after the transfer. He took an appeal  
17 from that layoff and that appeal has been deferred awaiting the  
18 outcome of this proceeding.

19 We believe the question is whether or not the acts of  
20 the Defendant Hamsher in transferring the Plaintiff fall within  
21 the language of Monell which imposes liability for acts which  
22 can be said to fairly represent governmental policy.

23 Now, the court below, the trial court rendered  
24 through a jury verdict a judgment against the City of  
25 St. Louis. It exonerated the three individual defendants. The  
Court of Appeals in its opinion determined that the jury had

1 found that the act of transfer was a retaliatory act on the  
2 part of Defendant Hamsher and he was impermissibly motivated  
3 and caused constitutional injury to the Plaintiff who had been  
4 exercising his right of First Amendment by appealing to the  
5 Civil Service Commission.

6 The Eighth Circuit determined that the Defendant  
7 Hamsher was a policy maker and his action, therefore, in  
8 transferring the Plaintiff bound the City of St. Louis so that  
9 Monell type liability was imposed upon the City as a policy  
10 maker.

11 It is our position that the crux of this matter  
12 involves the distinction between a City official who has the  
13 discretion to act. In this case, the discretion to hire and  
14 fire and transfer employees as opposed to the authority of a  
15 policy maker. In this case, it would be the authority to set  
16 employment policy for the City of St. Louis.

17 Clearly, the Defendant Hamsher had the former: the  
18 discretionary power to hire, fire and transfer employees. But  
19 nowhere in the record is there presented any evidence that the  
20 Defendant Hamsher was a policy maker for purposes of setting  
21 the employment policy of the City of St. Louis.

22 The Court of appeals misconstrued Pembaur. They  
23 adopted in their opinion what has been labeled the final  
24 authority test, which the court said was a two-pronged test to  
25 determine Monell liability.

QUESTION: Mr. Wilson, may I ask you a question

1 before you get into the more details?

2 MR. WILSON: yes.

3 QUESTION: Is it your view that the question whether  
4 a particular agent of the City is a policy making official is a  
5 question of fact or a question of law?

6 MR. WILSON: Clearly, a question of law.

7 QUESTION: So, then it doesn't -- and you point is  
8 that regardless of what the evidence was, since he didn't -- I  
9 mean it was with regard to a particular transaction, he could  
10 not qualify?

11 MR. WILSON: Yes, that would be correct. The record  
12 does not support any imposition of liability upon the City.

13 QUESTION: And the judge shouldn't have even given  
14 the jury the instruction, "If you find him to be a policy  
15 making official."

16 MR. WILSON: That is correct. They should have never  
17 reached that point. We do not believe that a submissible case  
18 was made under these facts.

19 QUESTION: Well, Mr. Wilson, the jury was instructed  
20 that they could determine in effect whether the named  
21 defendants were policy makers; were they not? That was part of  
22 the instructions.

23 MR. WILSON: They were instructed that high  
24 government officials could be held liable.

25 QUESTION: And you did not object to that  
instruction. In fact, I guess it was one that you prepared?

1 MR. WILSON: Yes, that's correct.

2 QUESTION: But now you say that was wrong?

3 MR. WILSON: Yes. The instructions were totally  
4 inadequate, but what we are presenting here and what we have  
5 preserved is the error in overruling our motions for directed  
6 verdicts which we made at each critical stage in respect to the  
7 sufficiency of the evidence to impose under any proper standard  
8 liability --

9 QUESTION: Was there evidence in the record from  
10 which the jury might have concluded that the mayor or a member  
11 of the mayor's cabinet or council had approved the transfer  
12 knowing that it was in retaliation for --

13 MR. WILSON: Well, the jury would have had to follow  
14 the instructions, I think. And the verdict directing  
15 instruction only named the three defendants, Hamsher and two  
16 other supervisors. It did not name the mayor --

17 QUESTION: Well, I asked you whether there was  
18 evidence in the record from which a jury might have concluded  
19 that the mayor or member of his council or cabinet had approved  
20 the transfer knowing it was in retaliation?

21 MR. WILSON: There is nothing in -- my interpretation  
22 of the record, there is nothing in there that would support  
23 that inference. There is some allusions to the mayor. I think  
24 there is an allusion that the mayor knew that there was a  
25 transfer of functions from one department to another, but that  
was different than having knowledge particularly of this



1 Plaintiff. So, our answer would be no, although the mayor was  
2 never named in a verdict director by the Plaintiff in this  
3 particular instance.

4 We believe that the test of the final -- the final  
5 authority test at the Eighth Circuit placed in its opinion is  
6 erroneous. It is contrary to Pembaur. The delegated authority  
7 to act, I think may be categorized as discretion. And this  
8 Court made clear in Pembaur in Part 2(b) that discretion is not  
9 enough to impose liability. If I may quote:

10 "The official must be responsible for establishing  
11 final government policy respecting such activity."

12 Aside from the being contrary to Pembaur, the test  
13 promoted by the Eighth Circuit in its opinion is unreasonable.  
14 The question of delegating out authority is one that runs  
15 throughout all of City officialdom in employment. We could not  
16 conduct business without delegating out discretion to employees  
17 all the way down the line.

18 Also, the second part of the test, the lack of  
19 de novo review is equally unreasonable. There are countless  
20 decisions that are made everyday operationally that there is no  
21 apparatus to provide review. As an example, the police officer  
22 in Tuttle who was involved in the shooting. There would have  
23 been nothing that would have provided reasonably any review for  
24 that act prior to what had occurred.

25 We believe the test is totally unreasonably, but the  
main point is that it is contrary to the opinions -- most of

1 the opinions that were rendered in Pembaur. The plurality  
2 opinion I think clearly, which relies upon, as a basis the  
3 identification of a policy maker. And the policy maker  
4 identification is arrived at by an inquiry into state law as to  
5 the authority of that official to set policy.

6 Here I believe you have a contrast in Pembaur between  
7 the official who was held liable and the Defendant Hamsher, who  
8 we assert should not have been considered to be a policy maker.  
9 The prosecutor in Pembaur was an elected county-wide official.  
10 The Sixth Circuit had held clearly interpreting Ohio law that  
11 he was the chief law enforcement officer for that particular  
12 county. He was not answerable or responsible in respect to any  
13 of his conduct, other than to the voters. There were no  
14 parameters or criteria that circumscribed his action.

15 Here, in respect to Hamsher, our purported policy  
16 maker, the record is very sparse; but we do know he is  
17 appointed by the mayor. He is a functionary in respect to  
18 approving development plans for the City and in administering  
19 community development funds.

20 QUESTION: Mr. Wilson, as the case comes to us, I  
21 gather that the argument that there is a policy maker here is  
22 that it is Hamsher?

23 MR. WILSON: Yes. This is what the Eighth Circuit  
24 construed the jury verdict to be: that the Defendant Hamsher  
25 made a retaliatory act in transferring --

QUESTION: Does the Respondent argue differently?

1 Does Respondent identify anyone else as a policy maker except  
2 Hampshire?

3 MR. WILSON: The Respondent did in their verdict  
4 directing instruction, Your Honor, two other supervisors. One  
5 who succeeded Hamsher. The evidence is almost non-existent the  
6 Defendant Patterson in respect to that?

7 QUESTION: Well, what does Respondent argue here?

8 MR. WILSON: I believe the Respondent --

9 QUESTION: Just defends the Eighth Circuit decision?  
10 Is that it?

11 MR. WILSON: No. The Respondent has abandoned the  
12 Eighth Circuit decision in respect to the test, the final  
13 authority test. I don't believe the Respondent has abandoned  
14 the Eighth Circuit determination and what the jury did was find  
15 that Frank Hamsher made an impermissibly motivated  
16 unconstitutional act by reason of retaliatory transfer. That  
17 would be our interpretation of the Respondent's brief.

18 QUESTION: The Eighth Circuit exonerated the other  
19 two; did it not?

20 MR. WILSON: Yes.

21 QUESTION: Or did the jury do it?

22 MR. WILSON: Well, the jury exonerated all the  
23 individual defendants. And the Eighth Circuit focused in  
24 upholding the verdict on the Defendant Hamsher that his single  
25 act of transferring was a retaliatory act for filing the Civil  
Service Appeal. He is the only one that would have had the

1 ability to have made the transfer under our --

2 QUESTION: Well, and that that act represented City  
3 policy?

4 MR. WILSON: Yes, that's right. That was their  
5 categorization of what the jury had determined. I think the  
6 difference between our prosecutor in Pembaur and the Defendant  
7 Hamsher here is: Hamsher's discretion to hire and fire was  
8 subject to Civil Service rules and our entire Civil Service  
9 system. He was not unfettered in making employment decisions  
10 in respect to his particular employees.

11 I think there was a number of appeals that the  
12 Plaintiff made and that he received relief in the main on those  
13 appeals which indicated that Hamsher was not in a position to  
14 set policy for his employees. He had the Civil Service  
15 Commission of the City looking over him.

16 Footnote 12 in Pembaur, the plurality opinion, we  
17 believe anticipated exactly the fact situation we have there.  
18 The Court in that opinion hypothesized a county sheriff, a  
19 hypothetical county sheriff who, while being the chief law  
20 enforcement officer, received rules and regulations in respect  
21 to employment from the County Board of Commissioners. In that  
22 hypothetical, that county sheriff, if he committed an  
23 unconstitutional act in respect to his employees, it would not  
24 impose liability upon the county; although, if he acted in  
25 respect to his function as chief law enforcement officer,  
liability would be imposed.

1           That is what we believe is exactly what we have in  
2 this record in respect to the Defendant Hamsher.

3           QUESTION: Who was the policy maker in your view in  
4 this case? The Commission?

5           MR. WILSON: The Civil Service Commission.

6           QUESTION: They set the rules of the game about  
7 hiring and firing and transferring?

8           MR. WILSON: Yes. We have a charter amendment that  
9 specifically sets up a civil service system and it gives our  
10 Civil Service Commission rule making authority and they have  
11 been recognized --

12          QUESTION: And people like Hamsher are just -- are  
13 supposed to take acts consistent with that policy?

14          MR. WILSON: Yes, that's correct.

15          QUESTION: Mr. Wilson, if your view is correct, why  
16 wouldn't it be in the interest of every municipality to confer  
17 all policy making authority for everything upon one individual,  
18 say, the mayor. And he can't possibly execute it all,  
19 certainly. So, de facto, a lot of people beneath the mayor are  
20 really making policy; but he doesn't know what those policies  
21 are in fact. He just doesn't have the time to set them all.  
22 So, then there would be no municipal policy on any of these  
23 things established by the only person authorized by law to  
24 establish them and there would never be any 1983 liability.  
25 Isn't that what everybody ought to do?

          MR. WILSON: Well, I guess if I could explain,

1 Justice Scalia. I believe that that would call into play a  
2 second type of Monell liability. And that is what we would  
3 find as custom and usage. If you delegated out authority and  
4 with the passage of time it became open and notorious that  
5 there were widespread unconstitutional practices, then I think  
6 there attaches liability on the City because the policy maker,  
7 the mayor in your hypothetical --

8 QUESTION: Well, then it is not a question of law,  
9 exclusively, as you told us earlier?

10 MR. WILSON: In respect I think to single incident  
11 liability. Now, we are separating out the types of Monell  
12 liability. I think there are three kinds. There is general  
13 rules of application. I think there is custom and usage. And  
14 then I think there is a third type of liability which I would  
15 call single incident liability.

16 Under Pembaur, I think the threshold question is who  
17 is a policy maker and that, we would believe, is purely a  
18 question of law. If we are in the second category, custom and  
19 usage and practice, then that would raise a number of factual  
20 issues for a jury.

21 QUESTION: I see. And you would not have to trace  
22 that custom or usage to the knowledge of the policy making  
23 official? Liability would exist whether or not the policy  
24 making official knew of the custom or use?

25 MR. WILSON: I think that is an open question. And I  
think the Fifth Circuit, which rendered an opinion on this

1 particular issue felt that constructive knowledge was enough in  
2 that instance to impose liability, constructive knowledge on  
3 the part, even though the Fifth Circuit is clearly in conflict  
4 with our present decision from the Eighth Circuit because they  
5 abandoned what we categorize as the final authority test.

6 I think the key here is, unlike the prosecutor in  
7 Pembaur, Hamsher had substantive constraints upon the scope of  
8 his employment decisions. The dissent in the Eighth Circuit I  
9 think captured the significance of these restraints in our  
10 appendix to our petition. The judge stated, Judge Ross stated  
11 the Civil Service rules permit appointing authorities  
12 discretion in making personnel decisions, but do not grant them  
13 the power to set personnel policy.

14 QUESTION: Where is that?

15 MR. WILSON: That's in our brief, in our petition at  
16 A-22. Judge Ross' dissent, which I might add cited the  
17 footnote 12 from Pembaur and set the footnote out verbatim  
18 indicating his belief that it is squarely on the facts in the  
19 present record.

20 QUESTION: Suppose that it was perfectly plain that  
21 the charter or the city council or whoever actually delegated  
22 to Hamsher the policy making authority to set the rules of the  
23 game. And he just happened in a particular case to make a  
24 retaliatory discharge, quite contrary to his own policy. Would  
25 there be municipal liability then?

MR. WILSON: Contrary to his own?

1 QUESTION: Well, certainly, he didn't -- certainly,  
2 he didn't publish a policy of discriminatory discharges.

3 MR. WILSON: No, that is correct.

4 QUESTION: But he did make a discriminatory discharge  
5 and he was the policy maker. Is there municipal liability  
6 there?

7 MR. WILSON: Under that hypothetical, we would say,  
8 no. Hamsher would still be circumscribed in the City of  
9 St. Louis by the Civil Service Commission rules. He would not  
10 be a policy maker because I think there is other indicia --

11 QUESTION: You are just not accepting my hypothesis,  
12 but that's all right.

13 MR. WILSON: If I may, Justice White?

14 QUESTION: Go ahead.

15 MR. WILSON: If there was a delegation of authority,  
16 if it was a lawful delegation, I think you are going to have  
17 difficulty finding lawful delegations of authority. But,  
18 assuming there was lawful delegation from the policy maker to  
19 another city official, then that city official would take on  
20 the responsibilities of a policy maker under Monell.

21 QUESTION: Well, what if a lower ranking city  
22 official assumes the responsibility for making decisions that  
23 could be interpreted as policy decisions? Now, are there  
24 circumstances in which the city could be found liable for the  
25 exercise of those decisions? For example, if higher authority  
knows or should have known about those actions of lower ranking



1 employees?

2 MR. WILSON: I think in respect to single incidents,  
3 we would say, no, unless the Civil Service Commission in this  
4 instance would have had actual knowledge that the transfer was  
5 impermissibly motivated.

6 QUESTION: Or constructive knowledge?

7 MR. WILSON: We would say that there would be --  
8 clearly, no liability in that particular case. Now, if you get  
9 into a widespread practice over a passage of time that is open  
10 and notorious, there we have the question that I think I  
11 attempted to answer with Judge Scalia, their constructive  
12 knowledge could operate to impose municipal liability, but not  
13 in respect to a single incident, unless the policy maker --

14 QUESTION: What if what is open and notorious is not  
15 the particular policy that has been adopted by the delegee, the  
16 de facto delegee? But what is open and notorious is merely the  
17 fact of delegation. Merely the fact that the Civil Service  
18 Commission is not making the policies, that it is allowing  
19 people out there to establish their own policies. What if that  
20 is open and notorious? Not the nature of each policy, but just  
21 the fact that the mayor or the Civil Service Commission is not  
22 running the show.

23 MR. WILSON: If, again, we're in the second category,  
24 custom and practice, liability can occur where there is  
25 acquiescence by the policy maker.

QUESTION: In the delegation. In the mere

1 delegation, not in the particular policies adopted.

2 MR. WILSON: In the mere delegation? No. We would  
3 say not. We would say, again, you would have to look at the  
4 state law. If there is an unlawful delegation, that would not  
5 satisfy what we understand the test of Pembaur, the plurality,  
6 to indicate. That you have to look to the authority that has  
7 been granted by state statute or city charter or ordinance.

8 If there were an unlawful delegation, that would not  
9 transfer on to the delegee the ability to impose municipal  
10 liability.

11 QUESTION: So the mayor can leave it to somebody and  
12 so long as that person does not act consistently enough to  
13 establish a policy that becomes open and notorious, there can  
14 be no municipal liability. Is that an accurate statement?

15 MR. WILSON: That is our position, yes.

16 The concurring opinions in Pembaur by Justice White  
17 and joined in by Justice O'Connor indicate and they are at  
18 variance with the plurality, although I think if applied here  
19 would reach the same result, which would be reversal, would  
20 indicate that where the law has placed limits on the city  
21 official and he acts contrary to and outside those limits, that  
22 his acts cannot be considered to be policies of the  
23 governmental entity.

24 Applied here, clearly there was criteria through our  
25 Civil Service system and parameters on the Defendant Hamsher.  
The Civil Service system has specifically provided in its

1 charter amendment that the system is to be run on merit and  
2 fitness based upon service ratings. There is a right of appeal  
3 that has been specifically granted. I think that right of  
4 appeal in a civil service system carries with it by clear  
5 implication that you can't retaliate against an employee for  
6 exercising his right of appeal. If you did, you would then be  
7 attempting to take away indirectly what the law has conferred  
8 directly upon the employee, the right of appeal.

9 Our rules and regulations forbid discrimination. It  
10 also provides a substantive rule in respect to transfers. You  
11 can't transfer an employee and have them meet a different test  
12 of fitness.

13 QUESTION: Mr. Wilson, can I ask you a question? I  
14 think it is rather important to your position that it be  
15 treated a single incident case, because otherwise you might  
16 have multiple incidents which amount to a custom.

17 MR. WILSON: Yes.

18 QUESTION: Could it get away from the single incident  
19 posture if several times this sort of thing happened to the  
20 same individual or would that still be a single incident as  
21 long as it is one individual?

22 MR. WILSON: Yes. That is not the record here, but,  
23 yes. I would say that that hypothetical --

24 QUESTION: If there was several retaliatory adverse  
25 actions against this individual, you would say that could  
amount to policy?

1 MR. WILSON: That would be still an ad hoc decision.  
2 Yes. Of the policy maker or whatever harm was done. That would  
3 be our position on it. Because you would have a singular  
4 employee involved.

5 QUESTION: Are you saying that still is a single  
6 incident if the same thing happened to Employee X six or seven  
7 times that he was constantly treated in this same way. That  
8 would be a single incident or would that amount to a custom.  
9 That is what I am not clear on at all.

10 MR. WILSON: I think it might -- it would be my  
11 position that that would still be a single incident.

12 QUESTION: What is the difference between six adverse  
13 actions for Mr. Smith and one adverse action for Mr. A, B, C,  
14 D, and E?

15 MR. WILSON: That would be my position. This would  
16 be analogous to the police chase where you had the -- stretched  
17 over three hours and umpteen miles and there were different  
18 shootings.

19 QUESTION: No, but I am assuming three police chases  
20 of the same individual. Wouldn't that be the same, just as  
21 much a custom as chasing three different individuals?

22 MR. WILSON: I don't think you can establish a custom  
23 in a relationship with a single employee. I think that would  
24 be a single incident.

25 QUESTION: No matter how often you repeated it?

MR. WILSON: If confined to that single employee --

1 QUESTION: What if the mayor called people in and he  
2 said, "Our policy is to get Praprotnik." Why isn't that a  
3 policy?

4 MR. WILSON: If the mayor did that, under our  
5 interpretation, the mayor would be a policy maker for certain  
6 instances, along with the Civil Service Commission, that would  
7 be -- impose municipal liability under a single incident,  
8 because the act, the impermissible conduct comes from the  
9 policy maker.

10 QUESTION: But if a lower official says, "Our policy  
11 is to get Praprotnik." And that policy becomes notorious, at  
12 that level, it is only a single incident?

13 MR. WILSON: Yes, until it would take on the custom  
14 and practice which would have to be developed by the totality  
15 of facts.

16 QUESTION: Is that the practice against Praprotnik or  
17 not?

18 MR. WILSON: We would say not.

19 QUESTION: I thought so.

20 MR. WILSON: That would be our position.

21 Your Honor, could I reserve the balance of my time?

22 CHIEF JUSTICE REHNQUIST: Yes, Mr. Wilson.

23 I will hear now from you, Mr. Oldham.

24 ORAL ARGUMENT OF CHARLES R. OLDHAM

25 ON BEHALF OF RESPONDENT

MR. OLDHAM: If the Court please, Mr. Chief

1 Justice:

2           There is a substantial difference between our version  
3 of the facts and the version of the facts as presented by  
4 counsel for Petitioner. I would like to point out that this  
5 was a jury tried case. And Respondent is entitled to the  
6 benefit of all evidence in his favor and all reasonable  
7 inference drawn therefrom.

8           Now, there are certain facts that are not in dispute.  
9 It is stipulated that the acts against Praprotnik were done  
10 under color of law. It was stipulated that he was engaged in  
11 protected activity at the time he appealed his actions to the  
12 Civil Service Commission. And there was evidence that he was  
13 also engaged in protected activity when he made some criticism  
14 of Seraph sculpture.

15           A jury clearly found that Praprotnik had been  
16 subjected to retaliation because of his exercise of First  
17 Amendment rights. Now, I want to get briefly into the facts  
18 where we are in difference.

19           For example, Petitioner argues that Hamsher was  
20 solely responsible for the transfer of Praprotnik from a secure  
21 position in the CDA to an insecure position at Heritage and  
22 Urban Design.

23           Now, let me explain that situation. Praprotnik had  
24 seniority position where he was the top seniority person. He  
25 had about 19 or 20 years of service at CDA. There were three  
or four people in his same position underneath him. So that in

1 order to reach Praprotnik, they would have had to lay off  
2 everybody underneath him in the same classification.

3 He was moved from that position to a position at  
4 Heritage and Urban Design where he was the only person in that  
5 classification. Since we have departmental lay off, he was  
6 subject to immediate lay off.

7 Now, in regard to the transfer, there are a few facts  
8 that led up to the transfer. There had been the situation with  
9 the Civil Service Commission. There had been acts of  
10 retaliation against Mr. Praprotnik in terms of taking away his  
11 personnel, reducing his scope of his responsibilities. Things  
12 of this nature.

13 After that, he was subpoenaed to appear before the  
14 Heritage and Urban Design Commission to testify concerning the  
15 piece of sculpture, the Seraph sculpture which was ensconced on  
16 the front yard of the Civil Courts Building in the City of  
17 St. Louis.

18 He testified and his testimony was not well received  
19 by the mayor. And he was immediately called into Mr. Hamsher's  
20 office and told that he should have mucked it, that he  
21 shouldn't have given this particular information to the  
22 Heritage and Urban Design Commission. Now, that was in the  
23 fall. The following spring, he was transferred.

24 Now, the act of transfer, in his particular  
25 situation, involved not only the transfer of the individual,  
but the transfer of functions. In order to transfer functions,

1 they had to get the approval of the Board of Estimate and  
2 Apportionment, which consisted of the mayor, the president of  
3 the board of aldermen and the comptroller, the three highest  
4 elected officials of the city. They had to approve the  
5 transfer of functions.

6 Now, the testimony is --

7 QUESTION: Well, by that, do you mean they had to  
8 approve what amounted to some kind of reorganization or  
9 restructuring of city agencies?

10 MR. OLDHAM: That's right.

11 QUESTION: In terms of what a specific agency would  
12 do.

13 MR. OLDHAM: They had to approve the change of the  
14 budget and the change of the functions so that they could be  
15 assigned over here.

16 QUESTION: Is that the evidence on which the jury was  
17 able to determine, if it did, that the mayor was linked to  
18 this?

19 MR. OLDHAM: That's part of the evidence. The other  
20 evidence is that Mr. Hamsher testified in his testimony that he  
21 went in and discussed this matter with the mayor and he  
22 recommended the transfer of Mr. Praprotnik and that the mayor  
23 made the decision to transfer Mr. Praprotnik and that he, as a  
24 good loyal servant of the mayor, followed his actions. That is  
25 in our brief. It is in the transcript.

QUESTION: Was there a change in the office of mayor,



1 Mr. Oldham, sometime during these proceedings

2 MR. OLDHAM: There was a Mr. Conway who was --  
3 preceded a Mr. Famel. And Mr. Spaid was the CDA director who  
4 originally took the action against Praprotnik and suspended him  
5 and later reduced him, responsibilities. Then, when  
6 Mr. Hamsher came in, there was the situation with the Seraph  
7 sculpture, there was a further reduction of responsibilities  
8 and after that the transfer of Mr. Praprotnik over to the  
9 Heritage and Urban Design Commission.

10 QUESTION: Mr. Oldham, may I inquire of your position  
11 whether -- if there is a policy making person or body of the  
12 city in charge of making policy for employment practices,  
13 hiring, transfers and discharge, and, if a lower ranking  
14 employee supervisor has the authority to actually hire, fire  
15 and transfer people, and, if that lower ranking employee  
16 decides for wholly improper reasons to make a retaliatory  
17 transfer and constructive discharge of an employee without the  
18 knowledge or consent of the policy making body, can the city be  
19 held liable?

20 MR. OLDHAM: Under 1983?

21 QUESTION: Yes.

22 MR. OLDHAM: Only on what we would consider  
23 appropriate circumstances where the higher officials or the  
24 policy making body was aware of what happened or had  
25 constructive notice of what happened and permitted it to go on.

QUESTION: So, you take the position that there would

1 be no liability under the example I gave unless there was  
2 actual or constructive knowledge and/or approval by the policy  
3 making body. Is that it?

4 MR. OLDHAM: That is correct. Let me explain what  
5 happened in this case.

6 QUESTION: And do you take the position that here the  
7 mayor was the policy maker or the Civil Service Commission?

8 MR. OLDHAM: All right. In this situation, which  
9 involved the transfer, the right to make transfers was  
10 delegated by the Civil Service Commission to Mr. Hamsher, the  
11 Director of Personnel, Mr. Duffe and the receiving official,  
12 Mr. Jackson.

13 QUESTION: Well, was the Civil Service Commission the  
14 policy making body?

15 MR. OLDHAM: For certain services it is a policy  
16 making body and for certain other purposes, it is not.

17 QUESTION: The right to make transfers is what you  
18 say they delegated is not necessarily the right to establish  
19 policy for transfers. Where do you assert that that resided?

20 MR. OLDHAM: All right. The policy for transfers was  
21 established in this case by the action of the mayor, the board  
22 of ENA and with the knowledge of the Civil Service Commission.

23 QUESTION: I am not saying in this case. I am saying  
24 as a matter of law, where do you think the power to establish  
25 policy for transfers resided within the city?

MR. OLDHAM: Every city has a different situation. I

1 think you have to look at the facts in a given situation and  
2 say, "Under these facts, this individual may have policy making  
3 authority. Under these facts, another individual might have  
4 policy making authority." That is why we say that it is a  
5 factual situation, which is a question of fact to the jury.

6 QUESTION: Do you think the jury can determine all  
7 that? Who is the policy making authority for the city? It is  
8 completely open for the jury to determine?

9 MR. OLDHAM: I think it is a mixed question of law,  
10 in fact, like many things. But I think the jury in this case  
11 was instructed and given the instructions to determine who was  
12 the policy maker and whether or not these high officials  
13 represented the actions of the City.

14 They were also told that the City can only be liable  
15 if it was part of a policy that was knowingly followed by the  
16 City so that this was what was submitted to the jury in this  
17 case. And the jury then found the City responsible.

18 And, based upon that, it is our contention that the  
19 act of a transfer in this particular situation was a policy  
20 action. Now, let me explain that a little further. The  
21 decision of Hamsher, Jackson, Duffe, who was Director of  
22 Personnel, and the mayor and the other two individuals I  
23 mentioned, comptroller and president of the board of aldermen,  
24 to transfer Mr. Praprotnik was not subject to review.

25 QUESTION: Did the same mayor make all of these  
decisions that you are talking about?

1 MR. OLDHAM: Yes, the same mayor was involved -- in  
2 the first instance, the first suspension was done by Mr. Spaid  
3 who was then Director of CDA under a different mayor. But  
4 Mr. Shamo was the mayor during most of this process.

5 QUESTION: And are you relying on the constructive  
6 discharge theory of the Eighth Circuit, here?

7 MR. OLDHAM: Well, that is what happened.

8 QUESTION: Well, do you agree with the Eighth  
9 Circuit? Is that the theory?

10 MR. OLDHAM: I don't agree with some of the parts of  
11 the decision of the Eighth Circuit. For example, I don't  
12 necessarily agree that our case was predicated upon a final  
13 authority situation.

14 QUESTION: You don't agree with the final authority  
15 test. Do you agree with the constructive discharge theory that  
16 the court --

17 MR. OLDHAM: Yes. I agree that that was a  
18 constructive discharge. The duties and responsibilities that  
19 Praprotnik were given were so menial for a person in his  
20 category as a licensed architect, to reduce him to filing maps  
21 and things of this nature, constituted a constructive  
22 discharge.

23 QUESTION: Was the jury instructed on that theory?

24 MR. OLDHAM: No. They were asked if he were -- the  
25 instructions were give on which there were no objections made  
that you could find the City liable if this was done by high

1 officials. It is not limited to the three officials that were  
2 named in the law suit.

3           You have to remember that this was a long time  
4 process and that in August prior to the trial, I attempted to  
5 amend the petition to bring in some additional named  
6 defendants, specifically, the mayor, Mr. Nash, who was the  
7 Director of the Department of Public Welfare and others. And  
8 that petition was denied. So, we were left in the posture  
9 where we were not able to get all the named defendants who had  
10 taken part in this particular action in that particular law  
11 suit. And we were left with the City as a Defendant.

12           Now, both myself and the attorney for the City  
13 pointed out to the jury that there were other high officials  
14 involved in this action. And that these other high officials,  
15 and our contention was that these other high officials did it,  
16 then the City was liable even if they should find that the  
17 three individuals were not responsible. So that that's a  
18 posture that we found ourselves at the time of trial.

19           QUESTION: And you think that a single action of a  
20 constructive discharge, even if known by the mayor can subject  
21 to 1983 liability?

22           MR. OLDHAM: Yes. When you have high officials of  
23 the government involved in this process and you have a Civil  
24 Service Commission in the position where they know about it  
25 because they have an appeal pending before them which they have  
declined to hear. And they take no action on it. They say,

1 "We will not hear transfer appeals."

2 Then when we have the lay-off, we also filed that  
3 appeal. And that appeal is still pending some three or four  
4 years later. We don't think this is an effective review. They  
5 have permitted this process to go on. And, so, they have had  
6 knowledge of this all during the time. And it is not a  
7 question of constructive knowledge, but actual knowledge of  
8 what occurred.

9 QUESTION: Well, suppose the City with knowledge of  
10 its mayor just makes a discharge of a Civil Service employee  
11 without good cause. Now, does that result in 1983 liability if  
12 the City's policy is clearly stated not to be that.

13 MR. OLDHAM: I think that you -- if you have a policy  
14 maker who makes a decision to violate somebody's constitutional  
15 rights --

16 QUESTION: A single decision?

17 MR. OLDHAM: Single decision. You have a policy  
18 maker who makes a single decision to violate somebody's  
19 constitutional rights and there is no effective appeal process  
20 within the city, itself, then I think that that is a policy  
21 decision that has been made by the city.

22 QUESTION: How is that any different than just  
23 ordinary respondents responding at superior, which Monell said  
24 that they were not going to settle for in the case of municipal  
25 liability.

MR. OLDHAM: As I understand Monell, it also said

1 that when a high public official or policy maker speaks on  
2 behalf of the city that that can create liability.

3 QUESTION: It can create a policy, but I thought you  
4 answer to Justice O'Connor's question intimated that all you  
5 need is the one instance. You don't need any policy.

6 MR. OLDHAM: Well, I think that one instance is --  
7 and, actually, one instance can in appropriate circumstances  
8 create the policy which raises the issue of liability. I think  
9 that there are times when that occurs.

10 QUESTION: Well, then that really is just  
11 indistinguishable from Respondent's superior? Isn't it? That  
12 someone acting for the city did this. It violated someone's  
13 constitutional right; therefore, the city is liable.

14 MR. OLDHAM: Justice Rehnquist, I differentiate that  
15 because I talk about a policy maker having that right. A high  
16 public official. For example, it is agreed that if the School  
17 Board of the City of St. Louis fires somebody because of their  
18 exercise of a constitutional right, that would create liability  
19 under 1983.

20 QUESTION: Even though it is hard to say that the  
21 firing of somebody for the exercise of constitutional rights is  
22 a policy; isn't it?

23 MR. OLDHAM: Well, I think the courts have held that  
24 there is liability under 1983. And I equate that with the same  
25 type of situation, Your Honor. In this situation, we get back  
to the basic fact that this was a jury tried case that the jury

1 found there was retaliation, the jury found liability on the  
2 part of the City. And one of the points that the City has  
3 talked about in its brief and presented in its argument is that  
4 there is a basic inconsistency about the verdict which  
5 exonerates the three individuals and the verdict which finds  
6 the City liable. And that is not the posture of the case  
7 because the instructions permitted you go beyond the three  
8 individuals.

9 The arguments of counsel for the City pointed out  
10 that these three individuals weren't responsible, that there  
11 were other high public officials that were responsible. And I  
12 pointed out that there were other high officials that were  
13 responsible so that the jury could, under the arguments and  
14 under the instructions, find liability by the City and excuse  
15 the three individuals.

16 QUESTION: Mr. Oldham, could the employee who alleges  
17 a constructive discharge by virtue of a transfer file an appeal  
18 with the Civil Service Commission and get it heard?

19 MR. OLDHAM: No, not in this case. We asked for a --

20 QUESTION: Well, now, wait a minute. After he has  
21 lost his job, he has been Riffed and he comes in and he says,  
22 "I was constructively discharged." Do we know that the  
23 Commission would not consider hearing an appeal?

24 MR. OLDHAM: This is the one the Commission refused  
25 to hear until the matter had been resolved by the courts. We  
filed an appeal --



1 QUESTION: Because it was already in court?

2 MR. OLDHAM: Oh, we were already in court on the  
3 transfer.

4 QUESTION: And so the Commission said, "As long as  
5 you are in court, we will wait."

6 MR. OLDHAM: Yes.

7 QUESTION: Because the employee chose to take it to  
8 court?

9 MR. OLDHAM: Well, we were already in court on the  
10 transfer situation.

11 QUESTION: A suit had been filed by your client?  
12 That's why you were in court?

13 MR. OLDHAM: We had filed a complaint in Federal  
14 Court.

15 QUESTION: Yes.

16 MR. OLDHAM: Under Section 1983 alleging the transfer  
17 was a violation of his constitutional rights. And then after  
18 -- they went ahead and did the lay-off. We then filed another  
19 appeal to the Civil Service Commission and they refused to hear  
20 that. They placed it on the back burner where it has been all  
21 this time so that we have not had an effective appeal process.

22 There is another thing that the Court must bear in  
23 mind. On a lay-off, the Civil Service Commission does not give  
24 you a full due process hearing. They limit the type of hearing  
25 that you can have.

QUESTION: Well, I take it that we should consider

1 this case only against the background of the transcript?

2 MR. OLDHAM: Well, I was responding to a question by  
3 Justice O'Connor.

4 QUESTION: Yes, I know, but not in light of any kind  
5 of a discharge?

6 MR. OLDHAM: There was a constructive discharge in  
7 this case by -- that resulted from the transfer, yes, Your  
8 Honor. And then ultimately the lay-off.

9 QUESTION: How do we know it was a constructive  
10 discharge?

11 MR. OLDHAM: Well, the Court of Appeals, you know, in  
12 reviewing the evidence felt that this was constructive  
13 discharge.

14 QUESTION: But that wasn't how the jury had been  
15 instructed. So, it didn't have that theory in front of it.

16 MR. OLDHAM: The jury was instructed on the transfer  
17 and the lay-off. The jury was instructed on the transfer and  
18 the lay-off so that both of those were involved in the jury  
19 instruction.

20 QUESTION: I take it that you don't -- let's assume  
21 that it is perfectly clear the Commission makes transfer policy  
22 and suppose the transfer policy says, "Never transfer for  
23 retaliatory reasons. Never." And some -- Mr. Herschler or  
24 whatever -- is Herschler, is that his name?

25 MR. OLDHAM: Hamsher.

QUESTION: Hamsher, all right. Hamsher nevertheless

1 makes a retaliatory transfer, is the City liable? You don't  
2 urge that the City would be liable in that case?

3 MR. OLDHAM: Not in every instance, Your Honor.

4 QUESTION: Well, if he acts quite contrary to an  
5 expressed policy, how can the City be liable in that case?

6 MR. OLDHAM: Well, I think that if you look at the  
7 history of 1983 you had a situation in the south where --

8 QUESTION: Just take my example.

9 MR. OLDHAM: Okay.

10 QUESTION: Do you think that the City is liable in  
11 that?

12 MR. OLDHAM: There are situations where the City  
13 would be liable. And those situations are where the decision  
14 was not made just by the low-level individual but where other  
15 people had knowledge of it.

16 QUESTION: Well, let's just say it was made solely by  
17 that subordinate officer supposedly carrying out a policy, but  
18 he disobeys it.

19 MR. OLDHAM: In a situation like that, Your Honor, I  
20 don't think there would be liability on the part of the City  
21 under 1983. But I would like to point out that that is not the  
22 situation in this case.

23 QUESTION: Well, I take it, then, that you don't  
24 really defend the Court of Appeals rationale of this final  
25 authority business?

MR. OLDHAM: Your Honor, I think there has to be a

1 little bit more than the final authority process. I think that  
2 there has to be action taken by high public officials.

3 QUESTION: Yes.

4 MR. OLDHAM: And that is the theory upon which this  
5 case was tried. And that was the theory that was presented to  
6 the jury. And that was the theory that was presented in the  
7 instructions to the jury so that we have to look at this case  
8 in the posture in which it was tried before the jury. And  
9 those instructions -- well, they might have been improved  
10 upon --

11 QUESTION: Well, suppose if we think -- if we think  
12 that the Court of Appeals proceeded on the wrong legal basis in  
13 doing what it did, shouldn't it have a chance to redo its  
14 appellate job based on the right rule of law?

15 MR. OLDHAM: Well, Your Honor, of course that is one  
16 of the options available to the Court. But I think the Court  
17 can also look at the basic case and say the decision of the  
18 Court of Appeals was right, but some of their reasoning was not  
19 correct and you could give the correct reasoning and go ahead  
20 and affirm the judgment that we received.

21 QUESTION: Right.

22 MR. OLDHAM: I think that is entirely possible.

23 QUESTION: Let me just ask you if you agree that this  
24 is a single incident case?

25 MR. OLDHAM: I do not.

QUESTION: Why not?

1 MR. OLDHAM: Well, because actions against Praprotnik  
2 covered a period of almost three years. And it covered a  
3 number of incidents. They involved, first of all, he was  
4 supposed to get a reprimand saying that he had not obtained a  
5 clear understanding of the policy established by Mr. Spaid.  
6 Instead, they reprimanded him for what he had originally been  
7 charged with before the Civil Service Commission and placed it  
8 in his personnel file. And even Mr. Kindleberger, the person  
9 who did it, admitted that he was in error on that or didn't do  
10 it right.

11 There were other things that happened. Mr. Spaid  
12 called him in and they reduced his pay a couple of pay steps  
13 right after they had recommended him for a two-step increase.  
14 And this happened right after the Civil Service hearing. After  
15 that, his responsibilities were reduced. When Mr. Hamsher came  
16 in, they had the incident with the Seraph sculpture and after  
17 that things went really downhill and he was reduced further in  
18 responsibilities. Much of his work was taken away from him.

19 QUESTION: But you don't give any other instances  
20 where any of these things was done to anyone else. So, if there  
21 is a policy that, as opposed to a single incident that you are  
22 complaining about, it really is a "Get Praprotnik policy." Is  
23 that the policy you are complaining about here?

24 MR. OLDHAM: That is about what happened, Judge,  
25 because I remember there was a --

QUESTION: Do you think that meets the -- do you

1 think that's what a policy means in our decisions? That if you  
2 go out after an individual several times or in several ways,  
3 even though the ways you go after him are contrary to  
4 established principles laid down by the municipality, you have  
5 established a policy of getting that individual. Do you think  
6 that's within the fair meaning of our earlier case?

7 MR. OLDHAM: I think that is within the meaning of  
8 1983. If you have a single isolated incident, that is one  
9 thing. That is something that happens within a relatively short  
10 period of time to one individual. But when you have a number of  
11 incidents and it is clear over a period of three years directed  
12 at that individual, I think you have a "Get Praprotnik" policy.  
13 And I remember that the case of Parlow v. Fitzgerald where  
14 there was a "Get Fitzgerald" policy and it is somewhat similar.  
15 Because Praprotnik was as well known within the  
16 St. Louis hierarchy as Fitzgerald was within the Federal  
17 Government hierarchy. And I don't see how you can say that a  
18 person -- that if a policy making people and people who are in  
19 a position to make decisions that effect an individual and do  
20 so for unconstitutional reasons, that that doesn't create the  
21 City's -- liability on the part of the City. Because,  
22 remember, in our instructions to the jury, we said that the  
23 high officials had to have the authority to speak for the City  
24 and it could only be -- the City could only be held responsible  
25 where they did it knowingly and with knowledge. And so that is  
the posture of this particular case --

1 QUESTION: But the policy is to get this one man.

2 MR. OLDHAM: Yes, Your Honor.

3 QUESTION: Well, that is single; isn't it? Or I  
4 should have said get a single man.

5 MR. OLDHAM: But there were a number of incidents  
6 involving that single --

7 QUESTION: But that is all it was: one man.

8 MR. OLDHAM: One man.

9 QUESTION: Secondly, how much of this was given to  
10 the mayor, presented to the mayor?

11 MR. OLDHAM: Pardon, Your Honor?

12 QUESTION: How much of this was told to the mayor?

13 MR. OLDHAM: That is difficult to say because --

14 QUESTION: Well, so far as the record shows --

15 MR. OLDHAM: -- in terms of direct words to  
16 Mr. Praprotnik, nobody said, "We are going to fire you because  
17 of this." Or, "We are going to transfer you because of this."

18 QUESTION: Well, how do you get the mayor involved in  
19 this?

20 MR. OLDHAM: Because the mayor made the decision to  
21 transfer Mr. Praprotnik and made decisions to transfer the  
22 function, which, incidentally, were never transferred. In  
23 order to be legal, under its charter, they had to transfer the  
24 functions over to the Division of Heritage and Urban Design.  
25 As a matter of fact, there is no record of any transfer of  
functions over to the Heritage and Urban Design so that it

1 indicates that even though there was a decision made --

2 QUESTION: Did the mayor ever see the Respondent?

3 MR. OLDHAM: Pardon?

4 QUESTION: Did the mayor ever lay his eyes on the  
5 Respondent?

6 MR. OLDHAM: I think so, yes.

7 QUESTION: When? Is it in the record?

8 MR. OLDHAM: The record reflects that --

9 QUESTION: The records reflect that he didn't even  
10 know anything about this man; doesn't it?

11 MR. OLDHAM: Oh, no. The record reflects that he did  
12 know about the man.

13 QUESTION: Well, that's what I asked you. What is  
14 there in the record that shows the responsibility of the mayor  
15 to discharge this man?

16 MR. OLDHAM: The record reflects that the mayor made  
17 the decision to transfer him. The record reflects that the  
18 mayor made the decision to transfer his functions. The record  
19 reflects that the mayor was involved in being unhappy about his  
20 testimony about the Seraph sculpture.

21 In order for the Court to understand that, the Seraph  
22 sculpture was being promoted by Emily Pulitzer, who is the wife  
23 of Joe Pulitzer, who owns the Post Dispatch, whose position is  
24 important to the mayor. And they had proposed a Seraph  
25 sculpture to be put out in the front yard of the courthouse.  
And when he testified that there were some problems with the



1 Seraph sculpture, under oath, before the Heritage and Urban  
2 Design Commission, he was called in and reprimanded by  
3 Mr. Hamsher and was told that he should have mucked the  
4 questions, that he should not have responded to them, that the  
5 mayor was unhappy. So that the mayor was involved in this  
6 situation and knew about it.

7 QUESTION: Somebody told somebody that the mayor was  
8 unhappy.

9 MR. OLDHAM: Yes.

10 QUESTION: And that charges the mayor with firing  
11 him?

12 MR. OLDHAM: Mr. Hamsher --

13 QUESTION: Somebody told somebody that the mayor was  
14 unhappy. So that makes the mayor responsible?

15 MR. OLDHAM: An agent of the mayor told Mr.  
16 Praprotnik -- his supervisor told Mr. Praprotnik --

17 QUESTION: Is there anything in the record to show  
18 that the mayor was unhappy?

19 MR. OLDHAM: Other than statements of his agents?

20 QUESTION: Is there anything other than hearsay in  
21 the record to show that the mayor was, quote, unhappy, end  
22 quote?

23 MR. OLDHAM: Your Honor, I don't think that a  
24 statement of an employee or agent of the mayor is hearsay. I  
25 think that is -- when you speak for your principal, that takes  
it beyond the hearsay stage. And, so, we have statements by

1 the employees, agents of the mayor, saying the mayor was  
2 unhappy. And I do not think that is hearsay.

3 If the Court please, I know my time is about up:

4 I think that our case should be affirmed for the  
5 reasons we have stated. That high public officials were  
6 involved, that the jury verdict under the Seventh Amendment  
7 should be respected and that the Court should grant the relief  
8 we have requested.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Oldham.

10 Mr. Wilson, you have three minutes remaining.

11

12

13

ORAL ARGUMENT OF JAMES J. WILSON

14

ON BEHALF OF PETITIONER - REBUTTAL

15

16 MR. WILSON: We have now in Respondent's argument  
17 interjected the mayor of the City of St. Louis into this  
18 dispute. I would like to in reflecting the record try to  
19 clarify or correct what I think have been some mis-  
20 characterizations of it.

21

22 There was nothing in the record that indicates that  
23 the mayor ever had any personal involvement with the Plaintiff.  
24 I question whether or not he knew of the Plaintiff. The  
25 Plaintiff was a middle manager city planner. We were involved  
in a cutback of some community development funds that caused a  
shortfall of \$35 million in the city budget and what was  
attempted to be done was to transfer functions from this large

1 department, the Community Development Agency, to various other  
2 city agencies. The reference that the mayor knew of the  
3 transfer is actually a reference to his knowledge, obviously,  
4 that functions were being transferred.

5 The Plaintiff attempted at various times to involve  
6 15 City officials into this dispute. His verdict director  
7 instruction, though, is quite clear. And I would read from it  
8 that: The Defendants Hamsher, Patterson and Kindleberger are  
9 high governmental officials with the right to make policy  
10 decisions.

11 QUESTION: But, Mr. Wilson, as I understand it, you  
12 are relying on your motion for a directed verdict at the close  
13 of his case.

14 MR. WILSON: Yes, that's correct.

15 QUESTION: Which, it seems to me, allows your  
16 opponent to rely on evidence in the record, even though it  
17 might not have been referred to in the instructions?

18 MR. WILSON: Yes, that is correct. We are pointing  
19 out, though, his theory of the case in no way is directed to  
20 the mayor as a policy maker.

21 QUESTION: No, but at the directed verdict stage, you  
22 are not really debating the theory of the case of whether there  
23 is any evidence that would sustain liability under 1983.

24 MR. WILSON: I think, Justice Stevens, I think we get  
25 to the point of attempting to identify the policy maker and I  
think for that purpose we wanted to make sure that it was clear

1 that the mayor, who may be, along with the Civil Service  
2 Commission, to be a policy maker, was not in any way involved  
3 in this particular retaliatory transfer. It was found by the  
4 Eighth Circuit to be the act of the Defendant Hamsher.

5 And I think that is the question is: Whether or not  
6 the Defendant Hamsher was a policy maker under state law.

7 In respect to the appeal from the lay-off that  
8 Mr. Oldham described which I would have to disagree with. I  
9 think the constructive discharge appeal would give the  
10 Plaintiff a right to a full hearing, either before the Civil  
11 Service Commission or under our state law, de novo in the  
12 Circuit Court.

13 CHIEF JUSTICE REHNQUIST: Your time is expired,  
14 Mr. Wilson.

15 The case is submitted.

16 (Whereupon, at 11:00 a.m., the case in the  
17 above-entitled matter was submitted.)

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3 REPORTER'S CERTIFICATE

4 DOCKET NUMBER: 86-772

5 CASE TITLE: City of St. Louis v. James H. Praprotnik

6 HEARING DATE: October 7, 1987

7 LOCATION: Washington, D.C.

8 I hereby certify that the proceedings and evidence  
9 are contained fully and accurately on the tapes and notes  
10 reported by me at the hearing in the above case before the  
11 United States Supreme Court.

12  
13 Date: October 14, 1987

14  
15  
16 *Margaret Daly*  
17 Official Reporter

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