Public employer liability

How liable are public employers for the actions of their employees? The United States Supreme Court addressed this issue in its May 1997 decision in *Board of County Commissioners* v. *Brown*. In a five-to-four decision, the Court ruled that the municipality is not liable for the actions of a police officer using undue force. The claimant in this case argued that the county was liable because the offending officer had a criminal record which was overlooked in the municipality's employment screening process.

The incident began in the early morning hours of May 12, 1991, as Jill Brown and her husband were on the way home in their automobile. Mr. Brown, who was driving, decided to avoid a border checkpoint. Deputy Sheriff Robert Morrison and Reserve Deputy Stacy Burns, after seeing the Browns' truck turn away from the checkpoint, pursued the vehicle. The chase finally ended 4 miles south of the police checkpoint.

After Deputy Sheriff Morrison got out of the squad car, he pointed his gun toward the vehicle and ordered the Browns to raise their hands. Reserve Deputy Burns, who was unarmed, rounded the corner of the vehicle on the passenger's side. Burns twice ordered respondent Jill Brown from the vehicle. When she did not exit, he used an "arm bar" technique, grabbing Ms. Brown's arm at the wrist and elbow, pulling her from the vehicle, and spinning her to the ground. The deputy's technique resulted in severe knee injuries to Ms. Brown. Later, she underwent corrective surgery, and ultimately, she may need knee replacements.

Ms. Brown sought compensation for her injuries under State law[1] from Burns, Bryan County Sheriff B. J. Moore, and the county itself. The suit claimed that Bryan County was liable for Burns's alleged use of excessive force, based on Sheriff Moore's decision to hire Burns, who was coincidentally the son of his nephew. Lawyers for the Browns claimed that Sheriff Moore had inadequately reviewed Burns's background. Burns had a record of driving infractions and other misdemeanors, including assault and battery, resisting arrest, and public drunkenness. Oklahoma law precludes felons from serving as peace officers, but does not preclude applicants with misdemeanors on their record.[2] During the trial, Sheriff Moore testified that he had obtained Burns's driving record and arrest report, but had not closely reviewed them. Still, he authorized Burns only to make arrests, and not to carry a weapon or operate a patrol car.

The District Court denied the county's motions for judgment as a matter of law, which asserted that Sheriff Moore's hiring decision could not give rise to Sec. 1983 municipal liability. Ms. Brown prevailed in both the jury trial and the fifth-circuit appeal, each of which held that the county was properly found liable, based on Moore's decision to hire Burns.

The Supreme Court majority, formed by Justices Sandra Day O'Connor, William Rehnquist, Antonin Scalia, Anthony M. Kennedy, and Clarence Thomas, reversed the lower courts' ruling. The High Court found that the county was not liable for Sheriff Moore's isolated decision to hire Burns, because Brown had not "demonstrated that the decision reflected a conscious disregard for a high risk that Burns would use excessive force in violation of [the] respondent's federally protected right."

In the majority opinion, delivered by Justice O'Connor, the Court cited *Monell* v. *New York*,[3] which states that a municipality may not be held liable under Sec. 1983 solely because it employs a tort-feasor. Instead, the plaintiff must identify a municipal "policy" or "custom" that caused the injury.[4] Despite Ms. Brown's contention, the Court said, a "policy" giving rise to liability is not created merely by identifying a policymaker's decision that is properly attributable to the municipality. According to *Monell*, the plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the "moving force" behind the alleged injury.[5] In other words, a plaintiff must prove that the public employer's decision contributed to the violation with the "requisite degree of culpability, and must demonstrate a direct causal link between the municipal action and the deprivation of Federal rights." The Supreme Court's conclusion rested partly on the language of Sec. 1983 itself and partly on the statute's legislative history, as stated in *Pembaur* v. *Cincinnati*: "While Congress never questioned its power to impose civil liability on municipalities for their own illegal acts, Congress did doubt its constitutional power to impose such liability in order to oblige municipalities to control the conduct of others."[6]

Four Supreme Court Justices dissented from the O'Connor opinion: Justices Stephen Breyer, David Souter, John Paul Stevens, and Ruth Ginsburg. They offered two dissenting opinions, one written by Souter and joined in by Stevens and Breyer, and the other written by Breyer and joined in by Ginsburg and Stevens.

The Souter opinion purported that the case's central question was whether *Canton* v. *Harris*, a prior decision in which the Court held that "a plaintiff seeking to establish municipal liability on the theory that a [prima facie] lawful municipal action . . . has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was not simply negligent, but was taken with 'deliberate indifference' as to its known or obvious consequences"[7] would apply to a single act that itself does not violate Federal law. The answer is yes if the single act amounts to a deliberate indifference to a substantial risk that a violation of Federal law will result. In theory, there was agreement between the Court majority and Justice Souter on this point.

"The Law at Work" is prepared by Brinton E. Bohling of the Office of Employment and Unemployment Statistics, Bureau of Labor Statistics, and is largely based on information from secondary sources.

Justice Souter, however, took issue with the Court's deciding, as a matter of law, that the sheriff's act could not be considered deliberate indifference to a risk that his subordinate would use excessive force. Justice Souter wrote, "I respectfully dissent as much from the level of the Court's skepticism as from its reversal of the judgment."

Instead, Souter applied *Canton*, which states, "Only where a municipality's failure to train its employees . . . evidences a 'deliberate indifference' to the rights of its inhabitants can . . . a shortcoming be . . . city 'policy or custom' . . . actionable under Sec. 1983."[8] He reminded the Court that deliberate indifference in the law is treated as tantamount to intent, so that inaction by a policymaker, such as that involved in Sheriff Moore's decision to hire Burns, which shows the policymaker to be deliberately indifferent to a substantial risk of harm, is equivalent, in the eyes of the law, to the intentional action of setting policy.

The trial courts had every reason to hold the county liable based on the standard of "deliberate indifference," Justice Souter contended. Examining the testimony of Sheriff Moore shows a law enforcement officer so indifferent to the arrest record of his nephew's son (applying for a county peace officer's position), that, in the testimony, he appeared to lose interest halfway through reading the applicant's rap sheet. Souter maintained that the majority decision would hold a single-action case to an unreasonably high standard—that is, the requirement that the action be a "plainly obvious consequence of a particular injury."

Justice Breyer's opinion insisted that the language "plainly obvious consequence" of the "decision to hire" only adds complexity to the operating standard of municipal liability, but does not seem to reflect a difference that would significantly help courts and municipal policymakers understand the difference between "vicarious" liability and "policy or custom." For those reasons, Breyer advocated a reexamination that would question the continued viability of the distinction in *Monell*.

Contractors as employees

In a recent ninth-circuit case, the court expanded an Internal Revenue Service (IRS) decision based on the common-law definition of the term "employee"[9] that required Microsoft to treat a group of contractors as employees for tax purposes. Once designated as employees, Donna Vizcaino and seven other contractors sought the same coverage under the Microsoft retirement funds as all the company's common-law employees. When they were denied coverage, the eight sued Microsoft.

The issue arose when the IRS audited Microsoft; the Agency noted that sometime before 1990, Microsoft hired several contractors, including Vizcaino and colleagues, to perform services often exceeding 2 years. These contractors were hired to work on specific projects and performed a number of different functions, such as production editing, proofreading, formatting, indexing, and testing. Microsoft fully integrated the contractors into its work force: they often worked on teams along with regular employees, sharing the same supervisors, performing identical functions, and working the same core hours. However, they were not paid for their services through the payroll department; instead, they submitted invoices to, and were paid through, the accounts payable department. Microsoft did not withhold income or Federal Insurance Contribution Act (FICA) taxes from the contractors' wages, nor did the company pay the employer's share of the FICA taxes. Additionally, Microsoft did not allow the contractors to participate in the company's two retirement funds: the Savings Plus Plan and the Employee Stock Purchase Plan. At the time, the contractors did not complain about Microsoft's treatment of them.

However, in 1989, the IRS started examining Microsoft's records and decided that it should have been withholding and paying its portion of the "contractors'" taxes because, as a matter of law, these workers were not in fact independent contractors, but actual Microsoft employees. The IRS made that determination by applying common-law principles. Microsoft agreed with the IRS and made the necessary corrections by issuing W-2 forms to the workers and by paying the employer's share of FICA taxes to the Government.

Microsoft also realized that, because, in accordance with the law, these workers were now deemed employees, at least for tax purposes, the company had to change its accounting system. It made no sense anymore to have employees paid through the accounts payable department, so those who remained in essentially the same relationship as before were tendered offers to become acknowledged employees. Others had to discontinue working for Microsoft, but did have the opportunity to go to work for a temporary employment agency, which would supply workers to Microsoft on an as-needed basis. Some took advantage of that opportunity, but Vizcaino and colleagues did not.

Vizcaino and colleagues then asserted that they were employees of Microsoft and should have had the opportunity to participate in the Savings Plus Plan and the Employee Stock Purchase Plan, because those plans were available to all employees who met certain qualifications. Microsoft disagreed, and Vizcaino and colleagues asked the Savings Plus Plan administrator to exercise his authority to declare them eligible for benefits. The plan administrator, however, ruled that they were not entitled to any benefits from either fund. In essence, he took the position that Vizcaino and colleagues had agreed that they were independent contractors and therefore waived their right to participate in the benefit plans.

Originally, the district court granted summary judgment against Vizcaino and colleagues, and they appealed the determination. The ninth circuit then reversed

the district court's decision. The circuit court ruled that the workers were indeed common-law employees who could not be excluded from participation in the plans.

Judge Ferdinand Fernandez delivered the ninth circuit's opinion. Two other ninth-circuit judges, Betty Fletcher and Diarmuid O'Scannlain, submitted opinions, both partially concurring and partially dissenting.

Judge Fernandez's opinion decided two separate issues: Vizcaino and colleagues' disposition to participate in the Employee Stock Purchase Plan was remanded to the district court, whereas their participation in the Savings Plus Plan was remanded to the plan administrator. The circuit court acknowledged that there was no longer any question that these workers were employees of Microsoft, and not independent contractors; the IRS had clearly determined that they were employees. It might be argued that the IRS's decision was for tax purposes only, under a limited meaning of the term "employee." However, the IRS had made its determination on the basis of a list of factors that is generally used to decide whether a person is an independent contractor or an employee.[10]

The circuit court construed Microsoft's treatment of Vizcaino and colleagues as simply mistaking their true common-law employment status. Therefore, because the Employee Stock Purchase Plan is a stock purchase program that extends coverage to "employees," it should have been extended to these workers as well. Fernandez referenced a Washington State case which holds that a contract can be accepted, even when the employee does not know its precise terms.[11]

The Savings Plus Plan is a plan covered by the Employee Retirement Insurance Act (ERISA). Fernandez cited the ERISA language used to measure the legality of a plan administrator's decision to deny participation. Under ERISA, the decision of a plan administrator should be scrutinized according to the standard of whether the administrator's discretion in making the decision was "arbitrary or capricious."[12] In light of the actual mistake that was made, the court found the plan administrator's decision to be arbitrary and capricious and therefore remanded the case for review under the new conclusion regarding Vizcaino and colleagues' status.

Judge Fletcher prepared an opinion concurring in part and dissenting in part. Chief Judge Procter Hug and Judges Harry Pregerson, Daly Hawkins, and Thomas G. Nelson joined in. Fletcher and the judges joining in the dissent would not remand the issue of eligibility to participate in the Savings Plus Plan to the plan administrator. Instead, the group would rule immediately that the workers were eligible to participate. Judges Fletcher and Fernandez agreed that the plan administrator's decision was "arbitrary and capricious," but disagreed as to whether the administrator should be required to rule on the meaning of "on the United States payroll of the employer." Instead, they held, the circuit court should rule on this matter and should do so in favor of the workers' eligibility.

In the second dissenting opinion, written by Judge O'Scannlain and joined in by Judges Nelson and Cynthia Holcomb Hall, these judges concurred in the decision, but dissented to the court's analysis in determining Vizcaino and colleagues' eligibility for the Employee Stock Purchase Plan. Judge O'Scannlain regarded the workers' claim to participate in the plan as a contracts case. According to the judge, under Washington law, the workers never had a contract that included the Employee Stock Purchase Plan.

The distinction between employees and contractors is important. Employees are protected by a range of Federal and State laws, including the Fair Labor Standards Act and ERISA. The ninth-circuit case demonstrates that, as contingent work arrangements become more common, the distinction between an employee and a contractor comes under increasing legal scrutiny. Future issues for the courts might involve welfare-to-work participants seeking employee coverage under retirement plans or protection under minimum-wage laws. □

Footnotes

[1] Rev. Stat. Sec. 1979, 42 U.S.C. Sec. 1983.

[2] Okla. Stat., Tit. 70, Sec. 3311(D)(2)(a) (1991) (requiring that the hiring agency certify that the prospective officer's records do not reflect a felony conviction).

[3] *Monell* v. *New York City Dept. of Social Servs.*, 436 U.S. 658, 692.

[4] *Pembaur* v. *Cincinnati*, 475 U.S. 469, 480–481.

[5] *Monell.*

[6] *Pembaur*, citing *Monell*, supra, at 665–683.

[7] *Canton* v. *Harris*, 489 U.S. 378 (1989).

[8] *Ibid.*

[9] 26 C.F.R. 31.3401(c)-1(b).

[10] *Ibid.*

[11] *Dorward* v. *ILWU-PMA Pension Plan*, 75 Wash. 2d 478, 452 P.2d 258 (1996).

[12] *Snow* v. *Standard Ins. Co.*, 87 F.3d 327, 330 (9th Cir. 1996).