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Jay E. Grenig

Marquette University Law School, jay.grenig@marquette.edu

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Mixed Motives: Are City Council Members Absolutely Immune from Civil Rights Liability for Legislative Acts Taken for Both Lawful and Unlawful Reasons?

by Jay E. Grenig

PREVIEW of United States Supreme Court Cases, pages 147-150. © 1997 American Bar Association.

Jay E. Grenig is professor of law at Marquette University Law School, Milwaukee, WI; (414) 288-5377.

ISSUE

Are individual members of a city council absolutely immune from liability under federal civil rights law for enacting a budget ordinance that eliminated the plaintiff's job, or can a court consider the motives of the elected city officials who enacted the ordinance and signed it into law?

FACTS

In 1987, the City of Fall River, Massachusetts ("Fall River") enacted an ordinance establishing the Department of Health and Human Services ("DHHS" or the "Department"). Fall River hired Janet Scott-Harris, the respondent in this case, as the DHHS administrator. Scott-Harris was the first African American to hold a managerial position in Fall River's government.

In October 1990, Scott-Harris charged another Fall River employee, Dorothy Biltcliffe, with making racist comments and recommended Biltcliffe's discharge. In response to

Scott-Harris' charges, Biltcliffe threatened to use her "influence" and contacted several people including City Councilor Marilyn Roderick, one of the petitioners here.

Biltcliffe later accepted a 60-day suspension without pay. When Daniel Bogan, the second petitioner, became Fall River's mayor in December 1990, he reduced Biltcliffe's suspension.

In 1991, Mayor Bogan requested all Fall River departments to trim their fiscal 1992 budgets by 10 percent from the previous fiscal year because of an anticipated decline in state aid for 1992. Scott-Harris complied with this directive and submitted a budget for DHHS that eliminated vacant positions and reduced nursing services in public schools and senior centers.

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DANIEL BOGAN AND
MARILYN RODERICK V.
JANET SCOTT-HARRIS
DOCKET NO. 96-1569

ARGUMENT DATE:
DECEMBER 3, 1997
FROM: THE FIRST CIRCUIT

Case at a Glance

The Director of the Department of Health and Human Services in Fall River, Massachusetts, was terminated after her position was eliminated in the City's budget ordinance. The Director sued the City and various City officials. A jury award of damages to the Director was upheld on appeal. The Supreme Court now decides if elected City officials are protected by the absolute immunity from damages liability that is afforded government officials acting in a legislative capacity.

Bogan rejected Scott-Harris' budget and, instead, proposed eliminating DHHS, which also would eliminate Scott-Harris' position. Because the department had been created by ordinance, it could be eliminated only by ordinance. In March 1991, Bogan asked the City Council to eliminate DHHS, which it did by a vote of six to two; Roderick voted with the majority. Bogan subsequently signed the ordinance into law.

Only one reason was given for adopting Bogan's proposal to scrap DHHS — the projected shortage of money. There was no discussion of the Scott-Harris' charges of racism against Biltcliffe or any indication that Scott-Harris' job performance was unsatisfactory.

At about the same time that the ordinance eliminating DHHS became law, Bogan offered Scott-Harris the position of Public Health Director at a lower salary. Scott-Harris drafted a letter rejecting the job offer but did not send it. Nevertheless, the draft somehow was delivered to Bogan who accepted Scott-Harris' rejection of the job offer despite her efforts to retract it.

These events prompted Scott-Harris to file a federal civil rights suit under 42 U.S.C. § 1983 (1994) ("Section 1983") against Fall River, Bogan, Roderick, and other Fall River officials. Scott-Harris alleged the municipal and individual defendants had discriminated against her on the basis of race and had violated her First Amendment free-speech rights. Ultimately all defendants except Bogan and Roderick were dismissed from the case, and the case against them proceeded to a jury trial.

At trial the defendants asserted that their motive in passing the challenged ordinance was exclusively fiscal. Scott-Harris disagreed; she asserted that racial animus and a desire to punish her for protected speech, not budgetary constraints, had spurred introduction and passage of the ordinance. She claimed that Fall River was not anticipating a cut in state aid but a slight increase, and that Bogan did not consider other options for saving money.

The jury found that there was no racial discrimination, but found that punishing Scott-Harris' constitutionally protected speech was a substantial or motivating factor in Bogan's decision to recommend eliminating DHHS and in Roderick's decision to work for passage of the required ordinance. The jury then assessed compensatory damages (see Glossary) in the amount of \$156,000. The jury further assessed punitive damages (see Glossary) against Bogan in the amount of \$60,000 and against Roderick in the amount of \$15,000.

The First Circuit affirmed. 36 Fed. R. Serv. 3d 1150 (1st Cir. 1997). Recognizing that municipal officials have absolute immunity from civil liability for damages arising out of their performance of legitimate legislative activities, the appeals court held that the officials here had engaged in *administrative* acts, not legislative acts.

The First Circuit's decision is now before the Supreme Court, which granted Bogan and Roderick's joint petition for a writ of certiorari. 117 S. Ct. 2430 (1997).

CASE ANALYSIS

Bogan and Roderick argue that municipal legislators performing the same legislative functions as their federal, state, and regional counterparts should be entitled to absolute immunity. More precisely, Bogan and Roderick argue that the Supreme Court has explicitly disavowed the First Circuit's motive-based approach to absolute legislative immunity. In their view, the First Circuit's infusion of a subjective element into the absolute-immunity analysis forces defendants to defend against factual allegations and await their resolution — the very process that absolute legislative immunity was designed to avoid.

Bogan and Roderick claim that they are entitled to absolute immunity because in enacting the budget ordinance they were performing traditional legislative functions regardless of any improper motive. They explain that budget making, including the elimination of municipal positions, is the kind of prospective, policy-based action that is the hallmark of traditional legislative functions.

Bogan and Roderick contend further that the First Circuit's approach to legislative immunity opens the door for courts to impose liability on individual legislators despite enactment of facially neutral legislation. In their view, the First Circuit's approach would hinder local legislators in considering lawful and proper legislation.

Scott-Harris responds that the doctrine of absolute legislative immunity should not be applied at the local level. Relying on an analysis of the history of legislative immunity, Scott-Harris stresses that members of local governing bodies did not

have absolute immunity at common law. She explains that unlike members of state legislatures, members of municipal governing bodies could be held personally liable for their unlawful conduct if they used their official positions maliciously or in bad faith.

Scott-Harris maintains that Bogan and Roderick are seeking a vast expansion of immunity from the nation's civil rights laws. She asserts that if absolute immunity is granted to members of city and county governing bodies, some 342,812 additional persons will be able to engage in knowing and deliberate constitutional violations free of liability.

Scott-Harris contends that the public policy underlying Section 1983 would be better served by granting members of local governing bodies qualified immunity (see Glossary) rather than absolute immunity. She says that qualified immunity would provide sufficient protection for local government officials.

Scott-Harris also argues that the possibility of relief against a municipality alone is an inadequate remedy. Observing that punitive damages serve important purposes, Scott-Harris points out that municipalities are immune from punitive damages. See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 257 (1981).

Even if absolute immunity is available for the legitimate legislative acts of local officials, Scott-Harris contends that the conduct at issue in this case was not legislative in nature. According to Scott-Harris, the ordinance abolishing her job was not a rule of general application and, accordingly, cannot be considered a legislative act.

SIGNIFICANCE

The Civil Rights Acts of 1866, 1870, and 1871, generally known as the Reconstruction Civil Rights Acts and including Section 1983, were enacted to enforce the Thirteenth and Fourteenth Amendments in the post-Civil War era. Section 1983 is probably the most important part of the Reconstruction Civil Rights Acts. Section 1983 authorizes suits against any person for the deprivation of rights, privileges, or immunities secured by federal law if the defendant acted "under color of state law, custom or usage," i.e., acted as if authorized by state law.

The Supreme Court ruled in *Monell v. Department of Social Services*, 436 U.S. 658, 690-91 (1978), that municipalities could be held liable under Section 1983 for deprivations of federally protected rights that occurred "pursuant to official municipal policy of some nature." Although local government agencies do not enjoy immunity from suit under Section 1983, *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), ABA PREVIEW 161 (Dec 31, 1992), the Supreme Court has held that state lawmakers and regional government officials have absolute immunity both from suit and from liability for damages arising out of their performance of legitimate legislative activities, *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391 (1979).

The doctrine of absolute legislative immunity from civil suit and damages liability has its roots in the parliamentary struggles of 16th and 17th century England, and it is based on the need to protect the democratic decision-making process. Absolute legislative immunity avoids the danger that legislators will be subjected to the cost,

inconvenience, and distractions of a trial simply for doing their jobs as legislators. Moreover in *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719 (1980), the United States Supreme Court stated that in order to preserve legislative independence, legislators engaged in legitimate legislative activity should be protected not only from the consequences of litigation but also from the burden of defending themselves in the first place.

That said, it is also the case that members of local governing bodies did not have absolute immunity at common law, at least with respect to ministerial actions — actions not involving the use of discretion. See, e.g., *Amy v. Supervisors*, 78 U.S. (11 Wall.) 136 (1871).

The present case plays itself out on this historical and precedential stage and is informed by the fact that it is a case of first impression; until now, the Court has not considered whether municipal officials are protected by the doctrine of absolute immunity in their legislative activities. However, since the Court's decision in *Lake Country Estates*, lower federal courts generally have held that the doctrine of absolute legislative immunity is available to local legislators. See, e.g., *Fry v. Board of County Comm'rs*, 7 F.3d 936 (10th Cir. 1993); *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20 (1st Cir. 1992); *Gross v. Winter*, 876 F.2d 165 (D.C. Cir. 1989).

If Bogan and Roderick prevail, local legislative officials will have increased protection from civil rights suits. However, a holding that such officials are entitled to absolute immunity would not result in aggrieved persons' being deprived of all remedies.

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Injured persons usually can sue the local governmental entity directly, and willful deprivations of constitutional rights under color of state law can be punished in criminal proceedings under 18 U.S.C. § 242. See *Imbler v. Pachtman*, 424 U.S. 409 (1976); *United States v. Lanier*, 117 S. Ct. 1219 (1997), ABA PREVIEW 217 (Dec. 23, 1996). Finally, legislators are subject to the responsibility and brake of the electoral process.

If Scott-Harris prevails, individuals will have increased protection from local legislative officials who knowingly or in bad faith violate federal civil rights laws. Of course, the qualified-immunity defense remains available to protect all local government officials, including legislators, except those who knowingly violate the law. Because the question of qualified immunity typically is resolved well before trial and usually even before discovery (see Glossary), the cost to a local government official of defending a lawsuit under the qualified-immunity standard will not necessarily be increased beyond what it would have cost to respond to a suit under the absolute-immunity doctrine.

ATTORNEYS OF THE PARTIES

For Daniel Bogan and Marilyn Roderick (Thomas Shirley; Choate, Hall & Stewart; (617) 248-5000).

For Janet Scott-Harris (Harvey A. Schwartz; Schwartz, Shaw & Griffith; (617) 338-7277).

AMICUS BRIEFS

In support of Daniel Bogan and Marilyn Roderick

City of Fall River, Massachusetts (Counsel of Record: Thomas F. McGuire, Jr., Corporation Counsel of the City of Fall River, Massachusetts; (508) 324-2650);

Joint brief: Massachusetts Municipal Association, City of New Bedford City Council, and Massachusetts City Solicitors and Town Counsel Association (Counsel of Record: George J. Leontire; (617) 367-0333);

Joint brief: National League of Cities, Council of State Governments, U.S. Conference of Mayors, National Association of Counties, International City/County Management Association, International Municipal Lawyers Association (Counsel of Record: Richard Ruda; State and Local Legal Center; (202) 434-4850).