10-1976

Mt. Healthy City School District Board of Education v. Doyle

Lewis F. Powell, Jr.

Discuss

(Case may be CVS on juris. issue & even on merits

Resp., a non-tenured teacher in public school system, sued Board for not renewing ctt. - alleging exercise of 1st Amend Rts had prompted his not being renewed.

CA 6 agreed & claim that 1983 suit - no juris - could not be brought vs a school Board (not a person) - but held a suit might be upheld under 14 Amend + § 1331

Preliminary Memo

Conf. of April 16, 1976
List 3, Sheet 3

No. 75-1278

Discuss. The juris-dictional point may be cert-worthy though I'm inclined to think it is not clear from presented Cert.

MT. HEALTHY CITY SCHOOL DIST. BD. OF EDUCATION	Cert. to CA 6 (Weick, Peck, Miller; PC)	Timely
V.		
DOYLE	Federal/Civil	

1. SUMMARY: Judgment was entered in this § 1983 action by the DC (SD Ohio, Hogan) against petr school board in favor of resp non-tenured teacher for reinstatement, damages, and attorney's fees, on the finding that a non-permissible reason - exercise of 1st Amendment rights - played a "substantial part"

in petr's decision not to renew resp's contract. CA 6 in a brief PC found the decision supported by substantial evidence, and affirmed all but the award of attorney's fees, which it vacated under Alyeska.

2. FACTS: Resp started teaching business in high school in 1966, at age 24, later acquiring an MA. His non-tenured contract was renewed each year up through 70-71. By petr's April 1971 decision, resp was not renewed for 71-72;[1/] he sued in July 1971 (naming the Board; its members, officially and individually; and likewise the superintendent). Resp claimed 1st Amendment; petr claimed the non-renewal was based on "immaturity" and lack of "tact." The DC canvassed the facts in full detail, finding:

(a) Resp had a very good record as teacher and as contributor to the school's extra-curricular activities, etc; he had in 1969-70 been president of teacher's association (Assn), which came to be the collective agent for various teacher vs. board problems. The Assn haggled with school officials over procedural aspects of bargaining, culminating in a strike threat, in Feb. 1970. Out of this arose the "Hinkle" incident: Hinkle, a fellow teacher, slapped resp during a heated argument (having to do

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1/A renewal in the spring of 1971 for the year 71-72 would have automatically given resp tenure under state law; resp makes no claim that the discharge was tied to this fact.

with some decision resp made as leader of the Assn); resp refused to accept the apology, wanting to take his case beyond the principal to the superintendent and the Board; the next school day, both were "suspended", i.e., sent home to cool off; and the teachers then walked out. The suspensions were lifted, and the incident apparently became a catalyst to break the negotiating impasse - the Board and the Assn reached an agreement.

(b) Five other incidents occurred between Feb. 1970 and April 1971, as labeled and found by the DC: (1) "direct dealing" - at one point resp arranged a negotiating meeting between the Assn "team" and the Board, but in fact most of the Assn members showed up, upsetting the Board, especially one who was an AFL-CIO member in his occupation; (2) "spaghetti" - resp hassled the school cafeteria help over the paucity of his portion, calling them "stupid"; resp subsequently apologized, publicly, when they complained to the principal; (3) "sons of bitches" - after bringing 4 boys to the asst principal for discipline, resp referred to them as such (4) "gesture" - resp, as lunchtime supervisor, was hustling students out of the cafeteria to clear it for the next period; an argument ensued with some girls over their deliberate "slowdown," culminating in a 2-fingered gesture by resp (student translation: "bullshit"), to which the girls responded with the well-known middle finger. Resp later apologized during a meeting with the asst principal and the girls. (5) "radio" -

in Feb. 1971, the principal circulated a "mild" 1 and 1/2 page memo on teacher dress and appearance; resp called it to the attention of a youth-oriented radio station in Cincinnati, which repeated the memo's substance over the air with "comment that might be expected" from such a station (the DC does not elaborate). The memo was prompted by the principal's concern for public support for the bond issues;[2] the principal, guessing it was resp, called him on the carpet; resp apologized, agreeing that it would have been better to criticize the memo internally first.

(c) The Superintendent made his usual yearly evaluations and recommendations to the Board in March 1971, according to which petr and several others were not renewed. Two weeks after resp was notified, and after he requested a statement of reasons, the superintendent sent a written statement citing a "lack of tact" and giving as examples the "radio" incident and the "gesture" incident.[3]

(d) The fact that several other Assn-active teachers, one of whom was likewise non-tenured, were contract renewed, indicated that resp's Assn activities were not related to the non-renewal.[4]

2/The DC specifically found that the relationship between public support for bonds and teachers' dress was established by the record.

3/The DC noted that under Ohio law a non-tenured teacher may be denied re-employment for no reason at all. Petn 11a.

4/The DC noted that while the Assn had gone on strike over resp's "suspension" in 1970, there was no similar reaction to his non-renewal in 1971

(e) Resp had since taught elsewhere for 3 years, at a slightly lower salary, the differential being some $5,000.

(f) Under Ohio law, the "State" does not include political subdivisions; the Board is a "political subdivision" and as such is "capable of suing and being sued." Ohio Code, petn 20a-21a. The Board members are "state officers." There was no malice, this being a case of "some permissible and some not permissible" "moving causes."

The DC, citing other lower courts, reasoned that if "a non-permissible reason . . . played a substantial part in the decision not to renew - even in the face of other permissible grounds - the decision may not stand." That such was involved here was clear from the superintendent's letter to resp, with one of the 2 examples of lack of "tact" being the "clearly protected" call to the radio station. The Board members, as "individuals", were dismissed, as was the superintendent. As to the claim that the Board, qua Board, was not suable under § 1983, City of Kenosha v. Bruno, 412 U.S. 507 (1973), that need not be addressed because the case comes properly within 28 U.S.C. § 1331. There are no 11th Amendment problems since the state statute supplies the necessary "waiver." Judgment for reinstatement, damages, and attorney's fees was entered against the "Mt. Healthy School Board of Education" and in favor of the named defendants/Board members.

CA 6, affirming all but the attorney's fees, stated simply that substantial evidence supported the finding that petr's non-renewal action "was motivated at least in part" by resp's "action in informing a local radio station of an 'appropriate dress code' suggested for teachers", and the DC did not err in concluding that the refusal was "based on a constitutionally impermissible reason."

3. CONTENTIONS: (a) Petr: the DC had no jurisdiction over the "Board": (i) the Board is not a person under § 1983 (citing numerous CA & DC decisions so holding under Monroe v. Pape) (ii) while claimed $50,000 punitive damages, reinstatement (with back pay), and attorney's fees, the first and the third were disallowed, and the value of reinstatement at the time suit was filed could not have exceeded $10,000 since by then resp had already secured another job - the most he could properly claim was the differential. Thus § 1331 jurisdiction was lacking. Resp: there is no need to argue the § 1983 point, since his well-pleaded complaint clearly claimed in excess of $10,000.

(b) Petr: The Board is immune from money damages under the 11th Amendment. Resp: the Board is a local political subdivision, with much autonomy vis-a-vis the State; the majority of school district funds derive from local property taxes, so there is no Edelman v. Jordan problem.

(c) Petr: the DC took the wrong view of the letter, which was written by the superintendent, not the Board, and expressly cited resp's "notable lack of tact in handling professional matters"; only one of the 2 illustrations implicated the First Amendment. All the Board members testified that their votes were not in any way colored by resp's 1st Amentment activity. Resp: aligns with the DC's facts.

(d) Petr: the CA 6 standard - "motivated at least in part" - conflicts with other CAs, in that all have required that the constitutionally impermissible reason play a substantial part in the non-renewal. Resp: However CA 6 might have rephrased it, the DC used the "substantial part" test and found it satisfied on the facts.

4. DISCUSSION: The jurisdictional question is certworthy, for many, if not most, of the CAs and DCs have ruled that a school board is like a county or city for purposes of suit under § 1983. Most have gotten around the limitation, however, by holding that the members thereof, in their official capacities, are "persons" against whom equitable and damage relief may be entered, a fiction akin to the "distinction" drawn in Ex parte Young. The underlying fear, of course, is that if no relief under § 1983 can be directed against a board qua board, nor against its members "officially", some 22 years of desegregation cases are drawn into serious question. If a possible "out" is

to imply a cause of action under the 14th Amendment, together with § 1331, then the rulings as to "person" in § 1983 in Monroe and City of Kenosha are rather easily circumvented.

Here, the lower cts simply held the Board suable as such, so the use of the "official capacity" fiction for reaching the same result against its members is arguably not presented, although to me the 2 would seem almost inseparable. I note that the same question is presented in Bd. of Junior College Dist. v. Hostrop, striken from Mar. 19 Conf., No. 75-1035, although perhaps not as clearly. Caveat: While petr in his argument headings does state that the DC "does not have jurisdiction of this matter", its § 1331 argument is only that the jurisdictional amount was not satisfied,[5/] and not that § 1331 cannot be used because there can be no implied cause of action under the 14th Amendment against the Board. I would think petr has preserved all aspects of § 1983 and § 1331 jurisdiction, though not articulated.

Merits. The case is perhaps independently certworthy on the question of the proper standard. Pickering v. Bd. of Educ., 391 U.S. 563 (1968), does not specifically address the question. CA 6's affirming language - "motivated at least in part" - is

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5/This claim seems specious, and in any case is not certworthy.

troubling, and as such creates a conflict with the "substantial part" test; the plethora of cases in this area makes the question a significant one.

Resp appears correct on the 11th Amendment question.

There is a response.

4/7/76 Mason Opins in petn.

Conference 4-16-76

Court CA - 6 ..... Voted on ....., 19...

Argued ....., 19... Assigned ....., 19... No. 75-127

Submitted ....., 19... Announced ....., 19...

MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION, Petitioner

vs.

FRED DOYLE

3/9/76 - Cert.

Jurisdiction was based on § 1331 - by-passing 1983 to avoid whether school bd is a person. I think ~~the~~ CA 6 was wrong both on merits and on jurisdiction. By-pass Florida School Bd as not subject to 1983 suits.

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
.....			✓										
Stevens, J.		✓	✓										
Rehnquist, J.		✓											
Powell, J.		✓											
Blackmun, J.			✓										
Marshall, J.			✓										
White, J.		✓											
Stewart, J.			✓										
Brennan, J.			✓										
Burger, Ch. J.		✓											

LFP/vsl
8/16/76

No. 75-1278, Mt. Healthy City School District Board of Education v. Doyle.

This memorandum, dictated after a preliminary look at the briefs, is intended only as an "aid to memory" that will refresh my recollection when I return to a more careful study of the case prior to argument and decision. When an opinion is expressed or intimated, it is wholly tentative.

* * * * *

The contract of respondent, a 29-year-old non-tenured public school teacher, was not renewed by petitioner (the School Board). If the contract had been renewed, in view of his having served four years already, he would have acquired tenure under Ohio law. Respondent was notified, by a two-sentence letter dated April 2, 1971, that the Board "will not extend to you a contract for teaching in the 1971-72 school year." (Exhibit No. 4, A. 287.) Respondent then requested reasons for the non-renewal, and the superintendent wrote him a letter that said:

> You have shown a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships.

The letter further cited two incidents, (i) the use of "obscene gestures to correct [female] students . . . in the cafeteria," and (ii) a telephone call advising a local radio station of a proposal by the School Board to "establish an appropriate dress code for professional people," resulting in the proposal being broadcast prematurely.

Respondent then sued the School Board, its members individually, and the superintendent, demanding reinstatement, back pay and punitive damages. The complaint primarily averred jurisdiction under Section 1983, but also asserted a denial of First and Fourteenth Amendment rights, relying upon 28 U.S.C. § 1331 (federal question), and averring more than $10,000 in controversy.

Decisions of the Courts Below

The district court started its opinion by saying:

> Basically this is a civil rights case (42 U.S.C. § 1983) . . . [and] this court has jurisdiction under 28 U.S.C. § 1331 . . . [since the amount in controversy] would have amounted to more than $10,000.

Having disposed of jurisdiction in two sentences, the DC addressed the merits at length. Respondent apparently had a good many "pluses" and "minuses" in his record that included a variety

of activities. He served as president of the Teachers' Association for the 1969-70 term, an organization that threatened to strike at one point. The DC's opinion does not suggest that the School Board's action was related to respondent's having served as an officer of the Association. Rather, the DC reviewed "a number of specific instances [detailed in the evidence] as relevant to the 1971 Board decision not to renew the contract." These included, in briefest summary: a controversy with a fellow teacher (the Hinkle incident); a controversy with cafeteria personnel over the food, in which respondent publicly called employees "stupid;" in connection with a disciplinary complaint, respondent called several students "sons of bitches;" on another occasion, respondent had a controversy with four girl students that produced "a heated verbal dispute" in which respondent "gave the girls the two fingered gesture;" and the calling of the radio station mentioned above. Despite these episodes, respondent received high ratings on his classroom performance.

The DC's conclusions reflect the conceded uncertainty of the judge. Among other things, the opinion states (and respondent's brief concedes) that under Ohio law a non-tenured teacher "may be denied re-employment for no reason at all." (Petition 11a.) The opinion went on as follows:

> No member of the Board acted with any malice. That is true of the Superintendent. In fact, as this Court sees it and finds, both the Board and

no malice

> the Superintendent were faced with a situation in which there did exist in fact reason -- (see James v. West Virginia, 322 F. Supp. 217 (S.D. W. Va. 1971), aff. 448 F.2d 785 (4th Cir. 1971)) independent of any First Amendment rights or exercise thereof, to not extend tenure. It is important to note that the new contract involved "tenure" and the record must be viewed with that in mind (i.e., prior recommendations and evaluation lose some force a/c not made in a similar situation). As we see it and find as a fact, the Superintendent and the Board were faced with a situation in which there were a number of moving causes, some permissible and some not permissible. The action based thereon, whatever its legal results, cannot be described as arbitrary or retaliatory or malicious or marked by bad faith.

no bad faith by Board

The DC then moved to its conclusions of law, holding that "if a non-permissible reason, e.g., exercise of First Amendment rights, played a substantial part in the decision not to renew -- even in the face of other permissible grounds -- the decision may not stand." The DC found that the call to the radio station "did play a substantial part," and therefore held that respondent was "entitled to reinstatement with back pay" and "to tenure on the same basis as if he had been employed by the defendant Board."

The DC dismissed the suit, however, against the individual defendants, leaving only the Board itself as a defendant. The DC expressly found no malice or bad faith, and denied punitive damages. Finally, the DC admitted that it "may be wrong:"

> The Board acted here in a rather untrod field (several causes, one impermissible). This Court, while concluding as it has, recognizes a great deal of doubt and may be wrong. In such a situation it would be inequitable to award "punitive" damage.

CA6 affirmed by order, and without an opinion.

Petitioner's Position

Petitioner relies heavily on two issues not mentioned by the courts below. It argued that the DC lacked jurisdiction because a Board of Education is not a "person" under § 1983, and therefore is not subject to money damages. Under Ohio law, a School Board is a subdivision of the state and not a person. (Brief 19.) A long list of cases is cited as supporting petitioner's position that a Board may not be sued under § 1983. Two of these are recent decisions from the Fourth and Fifth Circuits, which my clerk should read.

Petitioner also argues that respondent never had a claim that could be valued at $10,000, and therefore cannot be sued under Section 1331. Finally, as to the right to sue the Board, petitioner relies on the Eleventh Amendment.

On the merits, petitioner argues that there were abundant reasons for not renewing the contract quite independent of the telephone call to the radio station -- even if that ~~call~~ can be regarded as exercise of a First Amendment right.

Respondent's Position*

My recollection (without having my file here in Richmond)

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* Respondent is represented by the Bredhoff firm, one of the best labor law and civil rights firms in Washington. As would be expected, it has filed a strong brief. As so often ~~h~~a~~ppens~~, the interest of the state of Ohio is rather feebly represented.

is that we took this case to resolve the jurisdictional issue with respect to whether a School Board, an instrumentality of the state, may be sued under § 1983. Respondent argues that we need not reach this issue. It is said that jurisdiction is asserted "on two grounds: a cause of action directly under the Fourteenth Amendment, with jurisdiction predicated upon 28 U.S.C. § 1331; and a cause of action under the Civil Rights Act of 1871 (1983) with jurisdiction predicated upon 28 U.S.C. § 1343(3) and (4)."

In City of Kenosha v. Bruno, 412 U.S. 507, we held that municipalities are not "persons" within the meaning of § 1983. This holding was based in part on Monroe v. Pape. The question of what governmental instrumentality -- if any -- constitutes a "person" is referred to as the "Monroe-Kenosha problem." Respondent, obviously anxious to avoid that "problem," says the district court was right in ruling (actually it was an assumption without any discussion) that it had jurisdiction under § 1331.

There is a more basic question that respondent also would like to avoid. This is whether a cause of action for damages "exists directly under the Fourteenth Amendment irrespective of the implementing civil rights legislation," a question we merely posed in Aldinger v. Howard decided last Term. Respondent agrees that we may inquire into jurisdiction sua sponte, but avers conclusorily that this question is not "a jurisdictional question." Reference is made to a note in 89 Har. L. Rev. 922.

As to the jurisdictional amount under § 1331, I am inclined to think respondent is right that the fact that tenure ultimately was in issue insures the requisite amount. But one does not reach this question unless the action may be brought directly under the Fourteenth Amendment without relying on implementing civil rights statutes.

On the merits, respondent makes the arguments that would be expected. He relies primarily on Perry v. Sindermann, 408 U.S. 593, 597-98. But respondent recognizes that Pickering v. Board of Education, 391 U.S. 563, 568, requires a balancing type of analysis where the implicated First Amendment right is that of a school teacher who has responsibilities to the system and the public it serves.

Comment

My interest in the case is not on the merits, but on the fundamental questions whether a school board may be sued either under § 1983 or directly by virtue of asserting First Amendment rights through the Fourteenth Amendment.

I comment here, for the benefit of my present clerks, that I have little enthusiasm for the open-ended expansion of § 1983 jurisdiction that has occurred since Monroe v. Pape, an expansion that no one dreamed of for nearly the first century after passage of the Civil Rights Acts. My primary concern has

been the draining of all rational content from the phrase "color of law," but this is not an issue in this case.

I take it as probably settled by Monroe v. Pape and City of Kenosha v. Bruno that a school board is not a "person" within the meaning of § 1983. In Ohio a school board is an instrumentality of the state. I see no principled difference, in this respect, between a school board and a municipality or a county.

This leaves the more serious question whether there may be a judicially created right of action for damages directly against a school board to vindicate Fourteenth Amendment rights? I have taken a quick look at the excellent Note in 89 Har. L. Rev. 922, and confess surprise that this question already has attracted so much attention from district and circuit courts of appeal, apparently with considerable lack of unanimity.

I agree that Bivens may be read as supporting the judicial creation of such a remedy. But, as the authors of the Note also recognized, Bivens is readily distinguishable. It involved federal agents who could not be sued under § 1983; nor did it involve an instrumentality or entity of a state. These distinctions do not necessarily preclude an extension of what might arguably be characterized as the rationale of Bivens, but they are not insubstantial distinctions especially in view of principles of federalism

and the acceptance (since the defeat of the Sherman Amendment in 1871) of the policy against federal damage suits against state entities. I will not undertake in this brief memorandum to weigh the arguments pro and con that are set forth quite well in the Harvard Law Review Note, nor to explore other arguments and policy considerations. I will welcome enlightenment by my clerk.

I will mention one practical consideration with which any litigation lawyer is familiar: a jury is more likely to bring in a verdict against a municipality or a state entity than against an individual, even though it is now assumed widely that state provided insurance protects such individuals.* Juries -- despite being taxpayers in varying degrees -- also tend to be more than generous in awarding damages against municipalities and state or municipal entities. At a time when a good many municipalities are in financial difficulties, the prospect of uninsurable damage suits by any citizen who perceives an injury -- and they are likely to be legion -- is not one to gladden the hearts of municipal financial officers or of the banks and underwriters who extend necessary credit.

At a somewhat higher level of policy consideration, direct action for damages under the Fourteenth Amendment would simply bypass

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* I am informed by School Board members that since Wood v. Strickland many individuals will no longer serve on such boards unless they are adequately protected by insurance. Certainly I would not.

the body of law that, until now, has protected state entities from federal damage suits.

Perhaps I have said enough to indicate that if this question is fairly before us* (even though it was not addressed by the DC or CA6 and has not been argued adequately in the briefs), I consider it a question of major significance requiring careful thought by our chambers.

* * * *

As to the merits of this case, if we reach them, I am inclined to disagree with the courts below. One is reluctant, for the reasons stated in Perry v. Sindermann, to appear to endorse any restraint on an arguable First Amendment right. But the asserted right in this case, involving a single, apparently minor episode, must be judged under Pickering standards. Moreover, and -- to me, more important -- the right of this teacher to reinstatement with tenure and to recover back pay damages should hardly turn rationally on the single fact that the phone call to the radio station was mentioned in the Superintendent's letter. The DC found as a fact that other reasons existed that would have justified fully the School Board's action. I believe the testimony before the DC (which should be read more carefully) also supports the view that respondent's contract would not have been renewed had the phone call never been made.

But see Board v Hood 327 U.S. 678, 682

* Washington v Davis (DC Police test case) holds

There is something slightly ridiculous about this case. It is conceded that no reason need have been given for not renewing the contract. Nor is it seriously disputed, as noted above, that there were valid reasons for non-renewal. Thus, the Board could have terminated respondent's relationship with impunity had it (i) assigned no reason whatever,* or (ii) assigned only the reasons identified by the DC as justifying non-renewal. Simply because the Board, without understanding these subtleties, also mentioned one "wrong reason," we now have a "First Amendment case."

Much -- indeed often the ultimate result -- would depend in these cases on who has the better legal advice or who is just plain lucky (as respondent appears to have been). If a teacher or other state employee wishes not to be discharged, or to be sure his contract is renewed, he will be careful to make at least one outrageous speech every year against his employer. He thereby could create a First Amendment issue that would virtually foreclose the exercise of discretion by the employer to terminate the services of an incompetent or even dishonest employee. On the other hand, the Board itself -- by giving no reasons or the "right reasons" -- may terminate the services of an employee when the "real reason" (unacknowledged or unproved) may in fact implicate First Amendment rights. The law should not be quite this much of an "ass."

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* And assuming there was no proof that the Board's action was in fact retaliation for the exercise of First Amendment rights.

9/22/76

To: Justice Powell

From: TAB

Re: Doyle v. Mt. Healthy City School Dist. Bd. of Educ.
No. 75-1278

As I mentioned to you yesterday, I am interested in getting your reaction to what appear to be unanticipated problems with this case. Because several cases raising the same legal issue for which this case was taken will be discussed at Conference and because I was slated to do one of my full-dress summer bench memos on this case, I felt that I should raise the problems now.

As I understand it, the case was taken primarily to resolve certain issues regarding the jurisdiction of the federal courts under §1983 for actions against school boards and the like. Although the D.C. opinion is terse to the point of being inadequate, it seems clear that the D.C. concluded that two approaches were open to it with respect to jurisdiction. With a bit of reconstruction, one can fairly say that one approach was an action under §1983 with jurisdiction based on §1343(3) and that the other approach was an action based directly on the 14th Amendment with jurisdiction based on §1331, the ordinary federal question provision. The D.C. recognized the problems stemming from Monroe and City of Kenosha with a §1983 action against a body that might be deemed to be the equivalent of a municipality. Accordingly, although §1983 was not abandoned by the D.C., the court placed primary emphasis on the fact that the amount in controversy requirement of §1331 was satisfied. The D.C. concluded that it did not need to address the §1983 problem. Implicit in this approach is the conclusion that an action can be based directly on the 14th Amendment for a refusal to rehire a public school teacher when that decision is based at least in part on grounds made impermissible by the First Amendment.

The School Board has argued, in addition to the merits, that it cannot be sued under §1983 and that jurisdiction was not available under §1331 because of Doyle's failure to meet the amount in controversy requirement. At no point has the School Board challenged the implicit holding of the D.C. and the C.A. that an action of this type can be based directly on the 14th Amendment with jurisdiction under §1331. I agree with resp's argument that this 14th Amendment point cannot be raised by the Court sua sponte. The reason for this conclusion is a rather arcane, but important distinction between dismissing a claim for failure to state a claim upon which relief can be granted and dismissing it for want of jurisdiction. See Resp's Brief at 17 n.7 and Bell v. Hood, 327 U.S. 678, 682-83 (1964).

As a result of the above analysis, in order to reach a significant issue--namely, §1983 jurisdiction over school boards and the like--the Court would have to conclude that the D.C. and the C.A. erred on the question of amount in controversy. Based on one reading of the briefs, I find the argument made on this point by resp to be basically in line with my previous understanding of the law. If resp had been rehired the next time, he would have been a tenured teacher under Ohio law. It is true that he had no right to be rehired, but if one assumes that the decision not to rehire him was constitutionally infirm, a calculation of damages incorporating his continuing losses from the lack of tenure seems appropriate. In any event, this question is hardly certworthy standing alone. The decisions below are so limited that there is little danger of their harming the law--C.A.6 did not even mention the issue.

Assuming that the Court were inclined to push through the amount in controversy point so that §1983 was a necessary basis of D.C. jurisdiction, the case would be in a poor posture

for review by this Court. The D.C. specifically avoided basing jurisdiction primarily on §1983 so that it would not have to discuss the hard questions that the case was taken by this Court to discuss. The C.A. opinion avoided the question of jurisdiction altogether.

I have discussed this problem with two other clerks. Dianne Wood feels quite strongly that the case should be DIG'ed, particularly in light of the good cases that present the §1983 issue. Although John Spiegal has some doubts about the amount in controversy question, he is more fundamentally outraged by the failure of the D.C. or the C.A. to address squarely the question of a cause of action based directly on the 14th Amendment. I agree that the courts below displayed sloppy judicial form, but the fact remains that that issue was not raised on appeal, and I am quite convinced that this Court should not, indeed cannot, raise it on its own initiative. ?

From my very limited perspective, this seems to be a good case to DIG. To resolve the case would require considerable effort which would have little useful result, at least as far as the jurisdictional questions are concerned. I know, however, that you have some interest in the case on its merits. You may decide that the case should be kept for those issues. I have no recommendation on the merits at this stage, having concentrated on the jurisdictional questions for this mini-memo.

TAB

But see Washington v Davis (last Term) (We may consider "plain error" even if not presented by parties or addressed by courts below)

TB/tb 10/28/76

BENCH MEMO

TO: Mr. Justice Powell DATE: October 28, 1976

FROM: Tyler Baker

No. 75-1273 Mt. Healthy School District Board of Education v. Doyle

1) Amount in Controversy for Jurisdiction Under §1331:

In Horton v. Liberty Mutual Insurance Company, 367 U.S. 348 (1961), the Court reaffirmed what is the traditional test for amount in controversy:

> The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed "in good faith." In deciding this question of good faith we have said that it "must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." Id. at 353.

Applying the Horton test to resp's complaint, it seems rather clear that he would survive a pre-trial motion to dismiss, and that is the relevant standard.

Resp's salary, had he been awarded a new contract, would have been, more than $10,000. Resp points to the general rule that the salary of a job is the normally accepted amount in controversy in actions challenging the loss of the job. In this case, resp had secured a new job before filing this action, and he falls back to a secondary position. The new job, which was on a year-to-year contract, paid approximately $2000 less than the job resp would have had if he had been rehired. By the end of the third year, the difference in pay totalled $5,158. Obviously, the amount in controversy would be met, eventually, if resp continued in the lower paying job, as he apparently has. At the time of the complaint, there was also the real possibility that resp would be thrown out of work altogether, in which case the amount in controversy would be met much more quickly.

The only real question is whether resp should be allowed to cumulate his loss, and I think that he obviously should be so allowed. If he had been rehired, he would have had the Ohio equivalent of tenure in the school district. In an action for not being rehired,

the benefits that the resp would have had if he had been rehired seem entirely appropriate for meeting the amount in controversy requirement. The Court evidenced no concern with the cumulation of loss in Weinberger v. Wiesenfeld, 420 U.S. 636, 642 n.10 (1975), where the amount in controversy could only be met if the loss of social security benefits could be cumulated for more than three years. That case also involved the possibility of interim changes in status that might have resulted in the amount in controversy falling below $10,000.

Petrs argue that resp should not be able to cumulate benefits because he was not entitled to be rehired. But, they do not dispute that resp would have been tenured had he been rehired, so their argument is very weak.

There is another basis for finding the requisite amount in controversy. Resp's complaint requested $50,000 in damages. I am not sure that this was denominated as punitive damages or that this would make a difference. Petrs apparently view it as a claim for punitive damages , at least in part, because they address an argument to that issue. They acknowledge that punitive damages can be used to meet the amount in controversy. Bell v. Preferred Life Assurance Society, 320 U.S. 238 (1943). They argue that punitive damages should not be counted if they are not claimed in good faith or if they are claimed merely to establish jurisdiction. They do not claim, however that resp did not claim the punitive damages in good faith. Needless to say, the fact that the D.C. did not award any punitive damages is not determinative. Thus, punitive damages could provide another basis for supporting the finding of amount in controversy.

2) Can an Action Be Brought Here Directly Under the 14th Amendment:

As I said in my earlier memorandum on this question, I think that the Court should wait for a case from a C.A. in which this case is clearly presented, so that the Court will have the benefit of the C.A.'s efforts and the briefing of the parties. That said, I will outline the issues involved here. In approaching this question I have relied heavily on the student note that you mention in your "aid to memory" memorandum, "Damage Remedies Against Municipalities For Constitutional Violations", 89 Harv. L. Rev. 922 (1976). Because of time pressures, I have only been able to spot check the many cases cited in the note, and the following analysis is, in effect, an exercise in "counter-punching" against the arguments made in the note.

There are policy arguments in favor of allowing recovery against municipalities for constitutional violations. The possibility of easier proof problems and the advantage of the deeper pocket of the municipality would allow compensation of the victims. By making the municipalities pay, there is a chance of greater deterrence of constitutional violations that can be prevented. In a brief aside, the author of the note concludes that there is no 11th Amendment problem with recovery from municipalities or, among others, school boards.

The central question is, of course, what to do with Bivens. The case can be limited to mean nothing more than protection for victims of federal officials, who are not protected by §1983. Also, the Court in Bivens specifically stated that in that case there were no problems with the holding, that is, no "explicit congressional declaration" barring the result. As will be developed below, it can be argued that the same statement cannot be made here.

An important and complex question is the power of Congress to limit the scope of remedies available for constitutional violations. The note writer here refers to the cases involving judicial deference to Congress when Congress is enacting remedies to enforce such rights. He concludes that Congress could, by virtue of its balancing of various considerations, preclude a direct cause of action for constitutional violations

I agree with some of the policy considerations that the note writer uses in this context. He argues that the Court, in general, should put the burden of inertia on the non-protection of constitutional rights, so that a remedy should be provided subject to Congress' decision that it is inappropriate.

The question then is whether Congress has done anything to indicate a strong preference against an action against municipalities. The note writer makes some good points here which are drawn from the legislative history of §1983. Most of these points would also be appropriate criticisms of the decision in Monroe v. Pape. The Sherman Amendment was an attempt to cut down the level of private violence by making members of the communities in which such violence occurred liable for it. The defeat of this amendment was, of course, the primary reason for the decision in Monroe. There were a number of objections to the Sherman Amendment: constitutionality, fiscal harm to municipalities, but also danger of making municipalities liable for acts of private persons over whom they have no effective control. There is a difference between the liability contemplated by the Sherman Amendment and the liability that would result from an expansion of Bivens. Bivens would only allow recovery where there was state action within the 14th Amendment; whereas, the Sherman Amendment covered a broad spectrum of private violence.

The likely interpretation of an expanded Bivens right would be to require an abuse of some magnitude of governmental power.

The note writer argues that the Court should not give any deference to the Congress of 1871. The present situation is obviously different and different factors must be weighed. The problem with this argument is that it takes no account of the deference that XX is due to the present day Congress, which is perfectly capable of weighing XX these factors. I suppose that the answer to this response is the balance of inertia argument, supra.

The note writer also relies, in a rather XX murky way, on the fact that §1983 has only recently re-emerged into the light of day. The point here, I XXXX think, is that a number of courts have used §1331 and the XXXXXX Constitution without much thought about it. This is the area that most concerns me. Before the Court makes an pronouncements about direct actions under the 14th Amendment, I would like to see it make a careful study of the cases in the past that would not be possible under a narrow view of Bivens and the "no person" interpretation of §1983. I simply have not had time to make such a careful study for this case.

If an expansion of Bivens were accepted, the Court would have to consider a range of questions concerning immunity. These issues are canvassed in the note.

The biggest problem with the note writer's argument is the line of cases since Monroe v. Pape. The Court has viewed the legislative history less broadly XXXX than the note writer and has concluded (apparently) that there was an explicit congressional intention to immunize municipalities.XX This approach is most evident in Moor v. County of Alameda, 411 U.S. 693 (1973), and Aldinger v. Howard, 44 U.S.L.W. 4988 (1976). In Moor one of the XXXXXXX

reasons for XXX rejecting the argument that §1988 incorporated the state law on vicarious XXXXXX liability of counties was that such a result would be XXX inconsistent with the Court's decision in Monroe. Again looking to the legislative history, the Court stressed the concern about the constitutionality of imposingXX liability on municipalities and found a congressional intent to exclude all municipalities. A similar reasoning went into the XX Aldinger decision. The Court concluded that Congress had directly or XX by implication negated the existence of jurisdiction over municipalities. The best hope XX for the note XXX writer's position is XXXX the fact that the Court remanded in City of Kenosha for XXXXXXXXXXXXXX consideration of the amount in controversy question. The implication of that actionX is that an action is possible under §1331. But, on balance, the directionX of the cases is against the expansion of Bivens. Even now, the result suggested by the note writer could be reached, but it would require a new look at the legislative history of §1983. (Judge Renfrew in Dahl v. City of Palo Alto, 372 F.Supp. 647 (N.D. Cal. 1974), allowed an action based on the 14th Amendment and §1331. He relied on part of the legislative history showing that there was some concern about actions being brought where there was only a small amount in controversy. This approach does, however, fly in the face of the legislative history showing concern about constitutionality and fiscal danger to the municipalities.)

3) Is the Board a Person Under §1983: Yes / I thought the memo pointed the other way?

Given what I perceive as a strong case for jurisdiction under §1331, I think that it is unlikely that the Court will reach this issue here. (As you know, there are several good cases waiting in the wings to raise this question.) From the rather hurried research that I have been able to do on this question, I think that the two approaches that might be adopted are represented in Muzquiz v. City of San Antonio, 520 F.2d 993, 1004-05 (C.A.5 1975), rev'd, 528 F.2d 499 (1976)(en banc). The issue in Muzquiz was whether a Firemen's and Policemen's Pension Fund could be sued under §1983. Judge Tuttle, writing for the panel majority, concluded that it could. He held that the question was whether the fund has "such duties, powers, and purposes as would make it of 'the nature of a municipality'." 520 F.2d at 997. In making that determination, he asked whether it was "responsible for any broad governmental function" and indicated that factors which are relevant are " geographical area and boundaries, public elections, public officials, taxing power and a general public purpose or benefit." Id. at 998. Under this test, I would have to say that the School Board in the instant case probably qualifies. In the en banc reversal, C.A.5 decided that Judge Tuttle's formulation was too narrow and adopted the dissenting position of Judge Godbold. He held that, "Entities that do not possess broad governmental powers and functions can, and frequently do, fall within the Monroe-Kenosha exemption." Id. at 1005. Judge Godbold argued that:

I'm inclined to agree

> The inquiry in such a case becomes whether the public body is so connected--administratively, functionally, fiscally, and in other ways--to a state, city or county that it is not suable under §1983, not because of its characteristics as an independent entity but because it is in effect an arm or agency of the state, city, or county. Id. at 1005.

There is really not much of an argument for holding that school boards, ~~with~~ with the duties and powers that they typically have, do not fall within the rationale of Monroe v. Pape. Pension funds may be somewhat harder, but that is another issue. Resp does not even argue the ~~1983~~ §1983-person issue.

But the largest item in state budgets is public education

4) Does the 11th Amendment Protect Petr from this Action:

My reading of the cases here indicates that the 11th Amendment applies if the entity in question is an arm or alter ego of the state, and that it does not apply if the entity is a relatively autonomous entity, like a county. Thus, Hart and Wechsler state that "a suit against a county, a municipality, or other lesser governmental unit is not regarded as a suit against a state within the meaning of the Eleventh Amendment." 2nd Ed. at 690. I've never known any reason for this view

Resp notes correctly that the autonomy of local school boards was a factor which was recognized and relied on in Milliken v. Bradley, 418 U.S. 717 (1974). Resp also cites a long string of cases in which courts have concluded that school boards are not immunized by the 11th Amendment. The primary thrust of resp's argument is, however, directed to the situation of the school board in Ohio.

In Ohio there are state-wide governing statutes, and there is a state board of education, but the management and supervision of the local schools is apparently left largely to the local school boards. The members of the school board are popularly elected. The board is given the powers of "contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district, any grant or devise of land and any donation or bequest of money or other personal property." Resp Br. at 53. The boards have considerable financial powers. Although each board receives state money* under a per capita formula, each board also has the power to levy and collect taxes, unilaterally up to certain limits and, by concurrence of the local electorate, beyond those limits, and to issue bonds.

* See Rodriguez

Resp answers the petrs' argument that the state would have to pay any judgment. Resp argues that state law would allow the issuance of bonds to pay the judgment and also that the general levying authority of the board is sufficiently broad to allow for the payment of such a judgment as was entered here. Even if there were no way that a judgment could be satisfied under existing powers, the conclusion does not follow that the state treasury would be required to pay.* ?

Petr bases a ~~XX~~ large part of ~~XXXXXX~~ their arguments on the immunity under state law of school boards from tort actions. The Ohio courts have held that school boards can be sued in matters relating to their specific power to contract. Resp argues that the Ohio courts might decide that this case, which does "relate" to those powers of contracting, could be brought under that heading. More fundamentally, resp argues that the issue here is federal immunity, and that the particular immunity doctrines established by state law do not govern. One looks to the state law to determine the kind of entity one is dealing with, and, beyond that, one applies federal standards. This seems correct to me, and a school board like this one seems like the other "lesser governmental units" to which the 11th ~~XXXXXXX~~ Amendment has been held to be inapplicable. ?

I'm not yet convinced

* In the end, state would pay part of any judgment.

5) The Standard for the 1st XXX Amendment Analysis:

There is not a great deal that I can add to your decision here. I think that the previous cases leave a fair amount of room for XX maneuver. Pickering was a case in which the teacher was dismissed for the sole reason of writing the letter to the newspaper. I think that one can quite legitimately take the balancing considerations from Pickering and apply them to thisX kind of case, but the XX situations can be distinguished. Perry involved a similar setting, but it does not help at all with the problem of an impermissible reason mixed in with obviously permissible reasons, because that case was XXXXXXXXX sent back to the lower court for the development of these facts.

Were the decision mine, I think that I would go with the "substantial part" standard used by the D.C. I think that that standard is sufficiently high to avoid problems of "faked" XX 1st Amendment exercise. Your concern about the poor dupes who say the wrong thing and the smart folks who know better than to say why they did what they did is certainly understandable, but that problem is present in a number of situations. This result would vindicate the 1st Amendment values without giving incompetent teachers a free ride. Although the resp certainly had some XXX flaws, the record indicates that he was a good and energetic teacher with a number of positive attributes. The letter from the Superintendent listed only two XXXXXX reasons, one of them impermissible, and the letter was written after consultation with the Board, making it a fairly accurate indicator XX of the real reason. The D.C., after hearing all of the evidence, found that the XXXXX impermissible reason was a substantial part of the decision. I would say that his decision should stand. If C.A.6 intended to state a separate standard in its casual order, that standard would lend itself too much to the abuses that concern you. XXXXXX Finally, XXXX I find the balancing of the various interests identified in Pickering to favor

resp more than the balancing favored the teacher in Pickering. See Resp Br. at 29-33.

75-1278 MT. HEALTHY v. DOYLE - School Bd cert to CA6 Argued 11/3/76

Suit was brought under 1983 and 14th Amend (Fed Q juris under 1331).

1. School Bd is not a "person". Hence 1983 action doesn't lie.

2. But DC, w/out discussion, appeared to assume juris under ~~1331~~/14th Amend. DC viewed the $10,000 juris. amt. as an issue, but neither court nor parties addressed 14th Amend issue.

We are urged (i) not to consider it, as not having been raised or below or adequately briefed, and (ii) also that it is not "jurisdictional."

I think issue is "juris" - rather than "merits".

Different from Bivens. Congress has not acted at all under 4th Amend (involved in Bivens). Congress has acted under Clause 5 of 14th (1983) and limited 1983 to suits vs "persons."

Olivier (Petr)

made fairly thoughtful argument.
~~(500 discussion~~

Gotterman (Resp)

Relies on cause of action directly under 14th amend.

But even if 1983 is only basis of juris, and even if a School Bd can't be sued for damages under Monroe v Pape, injunctive relief — for reinstatement (under 1983) — would still be appropriate. (Stevens noted that D C dismissed all individual Δs.)

? ~~Suit under 14th Amend as OK because~~ City of Kenosha

I didn't follow this part of argument - check transcript.

Gottesman (cont)

Actions under 14th Amend is OK:

Relies on Bivens - which was against a fed. official and a cause of action for damages under 4th Amend was implied. Court noted that Congress had not provided a cause of action & hence there would be no remedy absent implied ~~~~ right.

(J Stewart noted that if Congress had provided a remedy it could have imposed conditions)

(J Rehnquist commented that Bell v Hood reserved this issue - i.e. whether Bivens could apply to imply cause of action.)

The Complaint asserted a claim under the 14th Amend - but Δ did not deny existence of cause of action on this basis.

Urges not to decide 14th Amend. issue on this case. Not addressed below or in briefs.

Gotteman (Cont.)

[There was quite an exchange bet. counsel; Rehnquist & Stewart as to whether the 14th Amend issue is a "merits" rather than a "jurisdictional" issue. Gotteman agrees if latter, we can address it even tho not raised below.] Rehnquist relied on Bell v Hood - as being jurisdictional.

11th Amend issue

Not raised in D C.

1st Amend - Merits - two questions:

1. Was school bd. entitled to rely on "phone call" — No.
2. What is law where S/Ct relies on two reasons - one of which is OK & one improper?

No. 75-1278, Mt. Healthy v. Doyle — Conf. 11/3/76

DIG - 6-3

The Chief Justice

C J addressed merits first & would Reverse on theory that DC made a "harmless error" in finding a first amend violation (I don't have vaguest notion what C.J. is talking about). C J did not mention juris issues.

× × ×

After prolonged deliberation, voted to DIG.

~~Douglas, J.~~ Stevens - DIG

Would not Reargue - let the 14th Amend issue be further litigated at CA level. Would decide this case on other grounds.

S/Board is a "person" under 1983.

There is no "person" limitation in 1331.

But the 14th A. issue was waived.

Brennan, J. Affirm or DIG

Difficult case on juris issue. Rocks with Q

The 14th amend (§1331) issue is a "merits" - not a "juris" question. There was no objection to juris on this issue (True) Thus under Rule 12 there was a waiver as to 1331 juris. Thus no quest. as to "person" under 1983.

We accordingly reach merits, & agree with cts. below that School Bd acted on 1st grounds.

Stewart, J. Reverse

Don't reach merits.

Word "person" doesn't include a municipal corp. A school board in Ohio is equivalent of a municipal corp. No juris. under 1983.

Thus if we must reach the §1331 juris. issue. No problem as to $10,000 amt.

Basic Q is whether under 1331 there is an implied cause of action. Unlike Bivens, an action was provided under §5 of 14th amend & it is limited to "persons".

Thus no a juris issue.

On merits, would Reverse.

We are seeking Mungus - a little case.
Also Monell 75-1914

White, J.

White DIG
1983 issue not properly here (?)
Only quest. properly here is the merits.

Marshall, J.

Marshall* - Hold for Musgrave or DIG

Blackmun, J. Reverse on merits*
Discussed merits.
Thought 1331 was satisfied, but discussion has addressed matters not considered by Harry.

* But could go along with DIG

Powell, J.

See my notes
I'd favor setting this case for reargument with Musgrave + Monell
If we do not do this, [redacted] see my notes.

Rehnquist, J. OK to Reargue
On jurisdiction issue, agree with Potter.
Since Congress excluded municipalities from 1983, it would be perverse to hold that municipalities may be held liable by employing a different type of damage action.

* Most of school board cases were vs members as officers & most of suits were for injunction.

Supreme Court of the United States
Washington, D. C. 20543

I can join this disposition
LFP

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

At Conference on 11/12

November 9, 1976

5 of us agreed generally to this.
CJ
Stewart
Harry
WHR
LFP
& Possibly Byron

MEMORANDUM TO THE CONFERENCE

Re: No. 75-1278 - Mount Healthy City School District

Relist for Nov 12th Conference - with Muniquiz & Monell

ing Conference with the e renewal of rence. I was n last Friday, feel the case ecome more ally voted with Potter to set the case down for reargument on the issue of whether 1331 jurisdiction obtained in this case, notwithstanding the fact that the jurisdictional amount was present, but the alternative view which I tentatively expressed and now set forth in more detail, is as follows:

Supreme Court of the United States
Washington, D. C. 20543

I can join this dispositive
LFP

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

At Conference on 11/12
5 of us agreed generally to this.

November 9, 1976

MEMORANDUM TO THE CONFERENCE

Re: No. 75-1278 - Mount Healthy City School District Board of Education v. Doyle

CJ
Stewart
Harry
WHR
LFP
& Possibly Byron

Because I took two different positions during Conference discussion of this case I submit the following with the thought that it might be at least useful for the renewal of our consideration of the case at Friday's Conference. I was quite confused at the end of our long discussion last Friday, and I may not have been the only one. I do not feel apologetic about my confusion, because I think the case virtually "bristles" with difficulties, which become more apparent on extended examination. I had originally voted with Potter to set the case down for reargument on the issue of whether 1331 jurisdiction obtained in this case, notwithstanding the fact that the jurisdictional amount was present, but the alternative view which I tentatively expressed and now set forth in more detail, is as follows:

(1) On the first question raised by the petition for certiorari, which is simply a challenge to the jurisdictional finding of $10,000 in controversy, I would find in favor of respondent, believing that he has satisfied all of the normal tests for showing jurisdictional amount.

(2) On the second question presented, I would hold that the Mount Healthy School District Board of Education is much closer to a county or municipal corporation than it is to the State of Ohio, and therefore under Thurgood's opinion in Moor v. Alameda County, 411 U.S. 693, it cannot claim the benefit of the Eleventh Amendment.

(3) I would hold with respect to the question raised in the supplemental authorities and reply brief filed by petitioner that it was not properly preserved. This is the really difficult issue in the case: whether, in view of the fact that Congress has enacted

a substantive cause of action in 42 U.S.C. § 1983, and that substantive cause of action has been held by us to exclude a municipal corporation from liability, a cause of action may nonetheless be inferred directly from the Fourteenth Amendment to the Constitution which does not contain such exclusion, and which will support jurisdiction under 28 U.S.C. § 1331. I would point out that this is not, strictly speaking, a jurisdictional question (which may be raised at any time, or even by the Court on its own motion), relying on Byron's distinction between a claim under § 1343, where absence of a § 1983 cause of action may be jurisdictional, City of Kenosha v. Bruno, 412 U.S. 507, and a § 1331 action where only a colorable claim is necessary for jurisdiction. Montana-Dakota Utilities v. Public Service Co. 341 U.S. 246; Bell v. Hood,

327 U.S. 678. I would make it clear that we are not deciding the § 1983 issue here.

(4) I would then go on to rule on the merits, and if there were a majority to follow the views advanced by the Chief, calling it "harmless error", or by Potter and me, saying that we would require a "but for" causation in order to sustain a First Amendment claim, I would vacate and remand on the merits. But if a majority is of the other view, I would still adhere to the analysis of the non-merits questions, in order to decide the case. We have already voted to dismiss as improvidently granted in Cook v. Hudson; we have affirmed Parker Seal by an equally divided Court; we have remanded Scott v. Kentucky Parole Board for consideration of mootness. I agreed with each of those dispositions, but with those

dispositions having taken place, I think we have added reason to decide this case on the merits.

Yes

Sincerely,

WM

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 10, 1976

MEMORANDUM TO THE CONFERENCE:

Re: No. 75-1278 - Mount Healthy City School District Board v. Doyle

I am generally in accord with Bill Rehnquist, that is:

1. I, too, believe that the plaintiff-respondent has satisfied the normal test for showing jurisdictional amount.

2. I conclude that the Board cannot claim the benefit of the Eleventh Amendment. For what it is worth, Ohio law seems fairly clear that school boards do not equate with the State. They are given rights to sue and be sued. One could even espouse a theory of waiver.

3. I would be willing not to decide the § 1983 issue in this case. We certainly have little help from counsel, and I doubt if much more would be forthcoming even if reargument were ordered. I am content to rule that the issue was not properly reserved.

4. I agree that it would not be wise to dismiss as having been improvidently granted. I could participate in an approach on "but for" causation. This, in fact, might clear the atmosphere for situations that are cluttered by a secondary First Amendment claim.

H.A.B.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: DEC 8 1976

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1278

Mt. Healthy City School District Board of Education, Petitioner, *v.* Fred Doyle. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[December —, 1976]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Doyle sued petitioner Mt. Healthy Board of Education in the United States District Court for the Southern District of Ohio. Doyle claimed that the Board's refusal to renew his contract in 1971 violated his rights under the First and Fourteenth Amendments to the United States Constitution. After a bench trial the District Court held that Doyle was entitled to reinstatement with back pay. The Court of Appeals for the Sixth Circuit affirmed the judgment, and we granted the Board's petition for certiorari to consider an admixture of jurisdictional and constitutional claims.

I

Although the respondent's complaint asserted jurisdiction under both 28 U. S. C. § 1343 and 28 U. S. C. § 1331, the District Court rested its jurisdiction only on § 1331. Petitioner's first jurisdictional contention, which we have little difficulty disposing of, asserts that the $10,000 amount in controversy required by that section is not satisfied in this case.

Received
12/10
Will join
if I can
square
language
here with
that in
Arlington
Heights

OK
12/13
Join
WHR

But will change
"substantial" to "motivating".

The leading case on this point is *St. Paul Indemnity Co. v. Red Cab Co.*, 303 U. S. 283 (1938), which stated this test:

> ". . . The sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plantiff to recover an amount adequate to give the Court jurisdiction does not show his bad faith or oust the jurisdiction." *Id.*, at 288–289.

We have cited this rule with approval as recently as *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 642 n. 10 (1975), and think it requires disposition of the jurisdictional question tendered by the petition in favor of the respondent. At the time Doyle brought this action for reinstatement and $50,000 damages, he had already accepted a job in a different school system paying approximately $2,000 per year less than he would have earned with Mt. Healthy Board had he been rehired. The District Court in fact awarded Doyle compensatory damages in the amount of $5,158 by reason of income already lost at the time it ordered his reinstatement. Even if the District Court had chosen to award only compensatory damages and not reinstatement, it is far only compensatory damages and not reinstatement, it was far from a "legal certainty" at the time of suit that Doyle would not have been entitled to more than $10,000.

II

The Board has filed a document entitled "Supplemental Authorities" in which it raises quite a different "jurisdictional" issue than that presented in its petition for certiorari and disposed of in the preceding section of this opinion. Relying on the District Court opinion in *Weathers* v. *West Yuma County School District*, 387 F. Supp. 552, 556 (1974), the Board contends that even though Doyle may have met the jurisdictional amount requirement of § 1331, it may not be subjected to liability in this case because Doyle's only

substantive constitutional claim arises under 42 U. S. C. § 1983. Because it is not a "person" for purposes of § 1983, the Board reasons, liability may no more be imposed on it where federal jurisdiction is grounded on 28 U. S. C. § 1331 than where such jurisdiction is grounded on 28 U. S. C. § 1343.

The District Court avoided this issue by reciting that it had not "stated any conclusion on the possible *Monroe-Kenosha* problem in this case since it seems that the case is properly here as a § 1331 as well as a § 1983 one." App. to Pet., at 15a. This reference to our decisions in *Monroe* v. *Pape*, 365 U. S. 167 (1961), and *City of Kenosha* v. *Bruno*, 412 U. S. 507 (1973), where it was held that a municipal corporation is not a suable "person" under § 1983, raises the question whether petitioner Board in this case is sufficiently like the municipal corporations in those cases so that it, too, is excluded from § 1983 liability.

The quoted statement of the District Court makes clear its view that if the jurisdictional basis for the action is § 1331, the limitations contained in 42 U. S. C. § 1983 do not apply. The Board argues, on the contrary, that since Congress in § 1983 has expressly created a remedy relating to violations of constitutional rights under color of state law, one who seeks to recover for such violations is bound by the limitations contained in § 1983 whatever jurisdictional section he invokes.

The question of whether the Board's arguments should prevail, or whether as respondent urged in oral argument, we should, by analogy to our decision in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U. S. 388 (1971), imply a cause of action directly from the Fourteenth Amendment which would not be subject to the limitations contained in § 1983, is one which has never been decided by this Court. Counsel for respondent at oral argument suggested that it is an extremely important question and one which should not be decided on this record. We agree with respondent.

The Board has raised this question for the first time in a document filed after its reply brief in this Court. Were it in truth a contention that the District Court lacked jurisdiction, we would be obliged to consider it, even as we are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction. *Liberty Mutual Insurance Co.* v. *Wetzel,* 424 U. S. 737, 740 (1976); *Louisville & Nashville Railroad Co.* v. *Mottley,* 211 U. S. 149, 152 (1908). And if this were a § 1983 action, brought under the special jurisdictional provision of 28 U. S. C. § 1343 which requires no amount in controversy, it would be appropriate for this Court to inquire, for jurisdictional purposes, whether a statutory action had in fact been alleged. *City of Kenosha* v. *Bruno, supra.* However, where an action is brought under § 1331, the catch-all federal question provision requiring $10,000 in controversy, jurisdiction is sufficiently established by allegation of a claim under the Constitution or federal statutes, unless it "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction . . . ." *Bell* v. *Hood,* 327 U. S. 678, 682 (1946); *Montana-Dakota Utilities* v. *Public Service Co.,* 341 U. S. 246, 249 (1951).

Here respondent alleged that the Board had violated his rights under the First and Fourteenth Amendments and claimed the jurisdictionally necessary amount of damages. The claim that the Board is a "person" under § 1983, even assuming the correctness of the Board's argument that the § 1331 action is limited by the restrictions of § 1983, is not so patently without merit as to fail the test of *Bell* v. *Hood, supra.* Therefore, the question as to whether the respondent stated a claim for relief under § 1331 is not of the jurisdictional sort which the Court raises on its own motion. Because it has not been preserved on appeal, the related questions of whether a school district is a person for purposes of § 1983 is likewise not before us. We leave

those questions for another day, and assume, without deciding, that the respondent could sue under § 1331 without regard to the limitations imposed by 42 U. S. C. § 1983.

III

The District Court found it unnecessary to decide whether the Board was entitled to immunity from suit in the federal courts under the Eleventh Amendment, because it decided that any such immunity had been waived by Ohio statute and decisional law. In view of the treatment of waiver by a State of its Eleventh Amendment immunity from suit in *Ford Motor Co.* v. *Department of Treasury,* 323 U. S. 459, 464–466, we are less sure than was the District Court that Ohio had consented to suit against entities such as the Board in the federal courts. We prefer to address instead the question of whether such an entity had any Eleventh Amendment immunity in the first place, since if we conclude that it had none it will be unnecessary to reach the question of waiver.

The bar of the Eleventh Amendment to suit in federal courts extends to states and state officials in appropriate circumstances, *Edelman* v. *Jordan,* 415 U. S. 651 (1974); *Ford Motor Co.* v. *Department of Treasury, supra,* but does not extend to counties and similar municipal corporations. See *County of Lincoln* v. *Luning,* 133 U. S. 529, 530 (1890); *Moor* v. *County of Alameda,* 411 U. S. 693, 717–721 (1973). The issue here thus turns on whether the Mt. Healthy Board of Education is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend. The answer depends at least in part upon the nature of the entity created by state law. Under Ohio law the "state" does not include "political subdivisions," and "political subdivisions" do include local school districts.

Ohio Rev. Code § 2743.01. Petitioner is but one of many local school boards within the State of Ohio. It is subject to some guidance from the State Board of Education, Ohio Rev. Code § 3301.07, and receives a significant amount of money from the State. Ohio Rev. Code § 3317. But local school boards have extensive powers to issue bonds, Ohio Rev. Code § 133.27, and to levy taxes within certain restrictions of state law. Ohio Rev. Code §§ 5705.02, 5705.03, 5705.192, 5705.194. On balance, the record before us indicates that a local school board such as petitioner is more like a county or city than it is like an arm of the State. We therefore hold that it was not entitled to assert any Eleventh Amendment immunity from suit in the federal courts.

IV

Having concluded that respondent's complaint sufficiently pleaded jurisdiction under 28 U. S. C. § 1331, that the Board has failed to preserve the issue whether that complaint stated a claim upon which relief could be granted against the Board, and that the Board is not immune from suit under the Eleventh Amendment, we now proceed to consider the merits of respondent's claim under the First and Fourteenth Amendments.

Doyle was first employed by the Board in 1966. He worked under one-year contracts for the first three years, and under a two-year contract from 1969 to 1971. In 1969 he was elected president of the Teachers' Association, in which position he worked to expand the subjects of direct negotiation between the Association and the Board of Education. During Doyle's one-year term as president of the Association, and during the succeeding year when he served on its executive committee, there was apparently some tension in relations between the Board and the Association.

Beginning early in 1970, Doyle was involved in several incidents not directly connected with his role in the Teach-

ers' Association. In one instance, he engaged in an argument with another teacher which culminated in the other teacher's slapping him. Doyle subsequently refused to accept an apology and insisted upon some punishment for the other teacher. His persistence in the matter resulted in the suspension of both teachers for one day, which was followed by a walkout by a number of other teachers, which in turn resulted in the lifting of the suspensions.

On other occasions, Doyle got into an argument with employees of the school cafeteria over the amount of spaghetti which had been served him; referred to students, in connection with a disciplinary complaint, as "sons of bitches"; and made an obscene gesture to two girls in connection with their failure to obey commands made in his capacity as cafeteria supervisor. Chronologically the last in the series of incidents which respondent was involved in during his employment by the Board was a telephone call by him to a local radio station. It was the Board's consideration of this incident which the court below found to be a violation of the First and Fourteenth Amendments.

In February of 1971, the principal circulated to various teachers a memorandum relating to teacher dress and appearance, which was apparently prompted by the view of some in the administration that there was a relationship between teacher appearance and public support for bond issues. Doyle's response to the receipt of the memorandum—on a subject which he apparently understood was to be settled by joint teacher-administration action—was to convey the substance of the memorandum to a disc jockey at WSAI, a Cincinnati radio station, who promptly announced the adoption of the dress code as a news item. Doyle subsequently apologized to the principal, conceding that he should have made some prior communication of his criticism to the school administration.

Approximately one month later the superintendent made

his customary annual recommendations to the Board as to the rehiring of nontenured teachers. He recommended that Doyle not be rehired. The same recommendation was made with respect to nine other teachers in the district, and in all instances, including Doyle's, the recommendation was adopted by the Board. Shortly after being notified of this decision, respondent requested a statement of reasons for the Board's actions. He received a statement citing "a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships." That general statement was followed by references to the radio station incident and to the obscene gesture incident.*

The District Court found that all of these incidents had in fact occurred. It concluded that respondent Doyle's telephone call to the radio station was "clearly protected by the First Amendment," and that because it had played a "substantial part" in the decision of the Board not to renew Doyle's employment, he was entitled to reinstatement with backpay. App. to pet., at 12a–13a. The District Court did not expressly state what test it was applying in determining that the incident in question involved conduct protected by the First Amendment, but simply held that the commu-

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*"I. You have shown a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships.

"A. You assumed the responsibility to notify W. S. A. I. Radio Station in regards to the suggestion of the Board of Education that teachers establish an appropriate dress code for professional people. This raised much concern not only within this community, but also in neighboring communities.

"B. You used obscene gestures to correct students in a situation in the cafeteria causing considerable concern among those students present.

Sincerely yours,
Rex Ralph
Superintendent"

nication to the radio station was such conduct. The Court of Appeals affirmed in a brief *per curiam* opinion.

Doyle's claims under the First and Fourteenth Amendments are not defeated by the fact that he did not have tenure. Even though he could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, *Board of Regents* v. *Roth*, 408 U. S. 564 (1972), he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms. *Perry* v. *Sinderman*, 408 U. S. 593 (1972).

That question of whether speech of a government employee is constitutionally protected expression necessarily entails striking "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Education*, 391 U. S. 563, 568 (1968). There is no suggestion by the Board that Doyle violated any established policy, or that its reaction to his communication to the radio station was anything more than an *ad hoc* response to Doyle's action in making the memorandum public. We therefore accept the District Court's finding that the communication was protected by the First and Fourteenth Amendments. We are not, however, entirely in agreement with that court's manner of reasoning from this finding to the conclusion that Doyle is entitled to reinstatement with backpay.

The District Court made the following "conclusions" on this aspect of the case:

> "(1) If a non-permissible reason, *e. g.*, exercise of First Amendment rights, played a substantial part in the decision not to renew—even in the face of other per-

missible grounds—the decision may not stand (citations omitted).

"(2) A non-permissible reason did play a substantial part. That is clear from the letter of the Superintendent immediately following the Board's decision, which stated two reasons—the one, the conversation with the radio station clearly protected by the First Amendment. A court may not engage in any limitation of First Amendment rights based on 'tact'—that is not to say that 'tactfulness' is irrelevant to other issues in this case." App. to pet., at 12a–13a.

At the same time, though, it stated that

"in fact, as this Court sees it and finds, both the Board and the Superintendent were faced with a situation in which there did exist in fact reason . . . independent of any First Amendment rights or exercise thereof, to not extend tenure." App. to pet., at 12a.

Since respondent Doyle had no tenure, and there was therefore not even a state law requirement of "cause" or "reason" before a decision could be made not to renew his employment, it is not clear what the District Court meant by this latter statement. Clearly the Board legally *could* have dismissed respondent had the radio station incident never come to its attention. One plausible meaning of the court's statement is that the Board and the Superintendent not only could, but in fact *would* have reached that decision had not the constitutionally protected incident of the telephone call to the radio station occurred. We are thus brought to the issue whether, if that were the case, even though the protected conduct played a "substantial part" in the actual decision not to renew, Doyle is nonetheless entitled to automatic reinstatement. We do not think so.

A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in

a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

This is especially true where, as the District Court observed was the case here, the current decision to rehire will accord "tenure." The long term consequences of an award of tenure are of great moment both to the employee and to the employer. They are too significant for us to hold that the Board in this case would be precluded, because it considered constitutionally protected conduct in deciding not to rehire Doyle, from attempting to prove to a trier of fact that quite apart from such conduct Doyle's record was such that he would not have been rehired in any event.

In other areas of constitutional law, this Court has found it necessary to formulate a test of causation which distinguishes between a result proximately caused by a constitutional violation and one not so caused. We think those

cases are instructive in formulating the test to be applied here.

In *Lyons* v. *Oklahoma,* 322 U. S. 596 (1944), the Court held that even though the first confession given by a defendant had been involuntary, the Fourteenth Amendment did not prevent the State from using a second confession obtained 12 hours later if the coercion surrounding the first confession had been sufficiently dissipated as to make the second confession voluntary. In *Wong Sun* v. *United States,* 371 U. S. 471, 491 (1963), the Court was willing to assume that a defendant's arrest had been unlawful, but to hold that "the connection between the arrest and the statement given several days later had 'become so attenuated as to dissipate the taint.' *Nardone* v. *United States,* 308 U. S. 338, 341." *Parker* v. *North Carolina,* 397 U. S. 790, 796 (1970), held that even though a confession be assumed to have been involuntary in the constitutional sense of the word, a guilty plea entered over a month later met the test for the voluntariness of such a plea. The Court in *Parker* relied on the same quoted language from *Nardone, supra,* as did the Court in *Wong Sun, supra.* We think that the proper test to apply in the present context is one which likewise protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights.

Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or, to put it in other words, that it played a significant role—in motivating the Board's decision not to rehire him. It should then, however, have been open to the Board to prove to the satisfaction of the trier of fact that even in the absence of the protected conduct, it would have reached the same decision as to the re-employment of respondent.

We cannot tell from the District Court opinion and conclusions, nor from the opinion of the Court of Appeals affirming the judgment of the District Court, what conclusion those courts would have reached had they applied this test. The judgment of the Court of Appeals is therefore vacated, and the case remanded for further proceedings consistent with this opinion.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 13, 1976

Re: No. 75-1278, Mt. Healthy City School District Board of Education v. Doyle

Dear Thurgood:

Thank you for your letter of December 13, commenting about the penultimate paragraph of the draft opinion in this case. I do not disagree at all with the substance of the test which you state in the first paragraph of your letter, and I also realize that the draft opinion may not be a model of clarity on this point. One of the reasons for any possible confusion is that the District Court used the word "substantial factor" in its opinion, and we must necessarily at least recognize this as a historical fact. Lewis' Arlington Heights opinion has something of the same problem in it, and I understand he is making some revisions in its language. When I see what he recirculates, I will try to sharpen up the paragraph to which you refer in order to accomodate your view and make it consistent with the corresponding part of his draft.

Sincerely,

WEB

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 13, 1976

Re: No. 75-1278, Mt. Healthy City School District Board of Education v. Doyle

Dear Bill:

I am somewhat troubled by aspects of the penultimate paragraph of your opinion. I agree, of course, that to prevail plaintiff must prove that his action in phoning the radio station was constitutionally protected. I also agree that plaintiff must prove more than that the school board was aware of this action, or that they discussed it in making the decision not to renew the contract. Rather, in my view, plaintiff must prove that his constitutionally protected activity actually played a role in (i.e., was one of the reasons for) the decision not to renew his contract. But once plaintiff meets this burden, he has established that the board acted impermissibly, and to defeat the remedy of reinstatement I believe the school board then should be required to prove that it would not have renewed the contract in any event.

This may well be what you mean to convey in the paragraph that concerns me. But the terms "substantial factor" and "significant role" are at least ambiguous, and it would be much easier for me to join if you were able to clarify the relevant paragraph along the lines I've suggested.

Sincerely,

T. M.

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 13, 1976

Re: No. 75-1278 - Mount Healthy City School District Board v. Doyle

Dear Bill:

Please join me.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

December 13, 1976

No. 75-1278 Mt. Health City School District
v. Doyle

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 15, 1976

75-1278, Mt. Healthy v. Doyle

Dear Bill,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.
I.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 22, 1976

Re: 75-1278 - Mt. Healthy City Board of Ed. v. Doyle

Dear Bill:

If you are willing to revise the sentence at the bottom of page 12 and the final paragraph of the opinion to make it clear that the District Court is merely directed to clarify its finding, rather than to hold a new trial, I will join your opinion.

I would also like to suggest that consideration be given to adding a footnote indicating that equitable relief would not necessarily and inevitably require restatement with tenure. I should think, for example, that a chancellor could fashion a decree that would postpone the tenure decision for a year or so and give the teacher employment for that period. Perhaps such a footnote would be too advisory in character to be included in this opinion, but at least I thought I would mention the point for possible future consideration.

Respectfully,

JPS

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 27, 1976

Re: No. 75-1278, Mt. Healthy City School District Board of Education v. Doyle

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 29, 1976

RE: No. 75-1278 Mt. Healthy City School District Board of Education v. Doyle

Dear Bill:

I am finally at rest and am happy to join your opinion.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 29, 1976

Re: No. 75-1278 - Mt Healthy City School District
v. Doyle

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Rehnquist

Copies to Conference

P. 4, 10, 12

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

L.F.P.

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: JAN 3 1977

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1278

Mt. Healthy City School District Board of Education, Petitioner, *v.* Fred Doyle.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[December —, 1976]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Doyle sued petitioner Mt. Healthy Board of Education in the United States District Court for the Southern District of Ohio. Doyle claimed that the Board's refusal to renew his contract in 1971 violated his rights under the First and Fourteenth Amendments to the United States Constitution. After a bench trial the District Court held that Doyle was entitled to reinstatement with back pay. The Court of Appeals for the Sixth Circuit affirmed the judgment, and we granted the Board's petition for certiorari to consider an admixture of jurisdictional and constitutional claims.

I

Although the respondent's complaint asserted jurisdiction under both 28 U. S. C. § 1343 and 28 U. S. C. § 1331, the District Court rested its jurisdiction only on § 1331. Petitioner's first jurisdictional contention, which we have little difficulty disposing of, asserts that the $10,000 amount in controversy required by that section is not satisfied in this case.

✓

Words "motivating factor" have been added as suggested.

LFP

The leading case on this point is *St. Paul Indemnity Co. v. Red Cab Co.*, 303 U. S. 283 (1938), which stated this test:

> ". . . The sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plantiff to recover an amount adequate to give the Court jurisdiction does not show his bad faith or oust the jurisdiction." *Id.*, at 288–289.

We have cited this rule with approval as recently as *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 642 n. 10 (1975), and think it requires disposition of the jurisdictional question tendered by the petition in favor of the respondent. At the time Doyle brought this action for reinstatement and $50,000 damages, he had already accepted a job in a different school system paying approximately $2,000 per year less than he would have earned with Mt. Healthy Board had he been rehired. The District Court in fact awarded Doyle compensatory damages in the amount of $5,158 by reason of income already lost at the time it ordered his reinstatement. Even if the District Court had chosen to award only compensatory damages and not reinstatement, it is far only compensatory damages and not reinstatement, it was far from a "legal certainty" at the time of suit that Doyle would not have been entitled to more than $10,000.

II

The Board has filed a document entitled "Supplemental Authorities" in which it raises quite a different "jurisdictional" issue than that presented in its petition for certiorari and disposed of in the preceding section of this opinion. Relying on the District Court opinion in *Weathers* v. *West Yuma County School District*, 387 F. Supp. 552, 556 (1974), the Board contends that even though Doyle may have met the jurisdictional amount requirement of § 1331, it may not be subjected to liability in this case because Doyle's only

substantive constitutional claim arises under 42 U. S. C. § 1983. Because it is not a "person" for purposes of § 1983, the Board reasons, liability may no more be imposed on it where federal jurisdiction is grounded on 28 U. S. C. § 1331 than where such jurisdiction is grounded on 28 U. S. C. § 1343.

The District Court avoided this issue by reciting that it had not "stated any conclusion on the possible *Monroe-Kenosha* problem in this case since it seems that the case is properly here as a § 1331 as well as a § 1983 one." App. to Pet., at 15a. This reference to our decisions in *Monroe* v. *Pape,* 365 U. S. 167 (1961), and *City of Kenosha* v. *Bruno,* 412 U. S. 507 (1973), where it was held that a municipal corporation is not a suable "person" under § 1983, raises the question whether petitioner Board in this case is sufficiently like the municipal corporations in those cases so that it, too, is excluded from § 1983 liability.

The quoted statement of the District Court makes clear its view that if the jurisdictional basis for the action is § 1331, the limitations contained in 42 U. S. C. § 1983 do not apply. The Board argues, on the contrary, that since Congress in § 1983 has expressly created a remedy relating to violations of constitutional rights under color of state law, one who seeks to recover for such violations is bound by the limitations contained in § 1983 whatever jurisdictional section he invokes.

The question of whether the Board's arguments should prevail, or whether as respondent urged in oral argument, we should, by analogy to our decision in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U. S. 388 (1971), imply a cause of action directly from the Fourteenth Amendment which would not be subject to the limitations contained in § 1983, is one which has never been decided by this Court. Counsel for respondent at oral argument suggested that it is an extremely important question and one which should not be decided on this record. We agree with respondent.

The Board has raised this question for the first time in a document filed after its reply brief in this Court. Were it in truth a contention that the District Court lacked jurisdiction, we would be obliged to consider it, even as we are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction. *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U. S. 737, 740 (1976); *Louisville & Nashville Railroad Co.* v. *Mottley*, 211 U. S. 149, 152 (1908). And if this were a § 1983 action, brought under the special jurisdictional provision of 28 U. S. C. § 1343 which requires no amount in controversy, it would be appropriate for this Court to inquire, for jurisdictional purposes, whether a statutory action had in fact been alleged. *City of Kenosha* v. *Bruno, supra.* However, where an action is brought under § 1331, the catch-all federal question provision requiring $10,000 in controversy, jurisdiction is sufficiently established by allegation of a claim under the Constitution or federal statutes, unless it "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction . . . ." *Bell* v. *Hood*, 327 U. S. 678, 682 (1946); *Montana-Dakota Utilities* v. *Public Service Co.*, 341 U. S. 246, 249 (1951).

Here respondent alleged that the Board had violated his rights under the First and Fourteenth Amendments and claimed the jurisdictionally necessary amount of damages. The claim that the Board is a "person" under § 1983, even assuming the correctness of the Board's argument that the § 1331 action is limited by the restrictions of § 1983, is not so patently without merit as to fail the test of *Bell* v. *Hood, supra.* Therefore, the question as to whether the respondent stated a claim for relief under § 1331 is not of the jurisdictional sort which the Court raises on its own motion. The related question of whether a school district is a person for purposes of § 1983 is likewise not before us. We leave those questions for another day, and assume, with-

out deciding, that the respondent could sue under § 1331 without regard to the limitations imposed by 42 U. S. C. § 1983.

III

The District Court found it unnecessary to decide whether the Board was entitled to immunity from suit in the federal courts under the Eleventh Amendment, because it decided that any such immunity had been waived by Ohio statute and decisional law. In view of the treatment of waiver by a State of its Eleventh Amendment immunity from suit in *Ford Motor Co.* v. *Department of Treasury,* 323 U. S. 459, 464–466, we are less sure than was the District Court that Ohio had consented to suit against entities such as the Board in the federal courts. We prefer to address instead the question of whether such an entity had any Eleventh Amendment immunity in the first place, since if we conclude that it had none it will be unnecessary to reach the question of waiver.

The bar of the Eleventh Amendment to suit in federal courts extends to states and state officials in appropriate circumstances, *Edelman* v. *Jordan,* 415 U. S. 651 (1974); *Ford Motor Co.* v. *Department of Treasury, supra,* but does not extend to counties and similar municipal corporations. See *County of Lincoln* v. *Luning,* 133 U. S. 529, 530 (1890); *Moor* v. *County of Alameda,* 411 U. S. 693, 717–721 (1973). The issue here thus turns on whether the Mt. Healthy Board of Education is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend. The answer depends at least in part upon the nature of the entity created by state law. Under Ohio law the "state" does not include "political subdivisions," and "political subdivisions" do include local school districts. Ohio Rev. Code § 2743.01. Petitioner is but one of many

local school boards within the State of Ohio. It is subject to some guidance from the State Board of Education, Ohio Rev. Code § 3301.07, and receives a significant amount of money from the State. Ohio Rev. Code § 3317. But local school boards have extensive powers to issue bonds, Ohio Rev. Code § 133.27, and to levy taxes within certain restrictions of state law. Ohio Rev. Code §§ 5705.02, 5705.03, 5705.192, 5705.194. On balance, the record before us indicates that a local school board such as petitioner is more like a county or city than it is like an arm of the State. We therefore hold that it was not entitled to assert any Eleventh Amendment immunity from suit in the federal courts.

IV

Having concluded that respondent's complaint sufficiently pleaded jurisdiction under 28 U. S. C. § 1331, that the Board has failed to preserve the issue whether that complaint stated a claim upon which relief could be granted against the Board, and that the Board is not immune from suit under the Eleventh Amendment, we now proceed to consider the merits of respondent's claim under the First and Fourteenth Amendments.

Doyle was first employed by the Board in 1966. He worked under one-year contracts for the first three years, and under a two-year contract from 1969 to 1971. In 1969 he was elected president of the Teachers' Association, in which position he worked to expand the subjects of direct negotiation between the Association and the Board of Education. During Doyle's one-year term as president of the Association, and during the succeeding year when he served on its executive committee, there was apparently some tension in relations between the Board and the Association.

Beginning early in 1970, Doyle was involved in several incidents not directly connected with his role in the Teachers' Association. In one instance, he engaged in an argument

with another teacher which culminated in the other teacher's slapping him. Doyle subsequently refused to accept an apology and insisted upon some punishment for the other teacher. His persistence in the matter resulted in the suspension of both teachers for one day, which was followed by a walkout by a number of other teachers, which in turn resulted in the lifting of the suspensions.

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the rehiring of nontenured teachers. He recommended that Doyle not be rehired. The same recommendation was made with respect to nine other teachers in the district, and in all instances, including Doyle's, the recommendation was adopted by the Board. Shortly after being notified of this decision, respondent requested a statement of reasons for the Board's actions. He received a statement citing "a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships." That general statement was followed by references to the radio station incident and to the obscene gesture incident.[1]

The District Court found that all of these incidents had in fact occurred. It concluded that respondent Doyle's telephone call to the radio station was "clearly protected by the First Amendment," and that because it had played a "substantial part" in the decision of the Board not to renew Doyle's employment, he was entitled to reinstatement with backpay. App. to pet., at 12a–13a. The District Court did not expressly state what test it was applying in determining that the incident in question involved conduct protected by the First Amendment, but simply held that the communication to the radio station was such conduct. The Court of Appeals affirmed in a brief *per curiam* opinion.

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[1] "I. You have shown a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships.

"A. You assumed the responsibility to notify W. S. A. I. Radio Station in regards to the suggestion of the Board of Education that teachers establish an appropriate dress code for professional people. This raised much concern not only within this community, but also in neighboring communities.

"B. You used obscene gestures to correct students in a situation in the cafeteria causing considerable concern among those students present.

Sincerely yours,
Rex Ralph
Superintendent"

Doyle's claims under the First and Fourteenth Amendments are not defeated by the fact that he did not have tenure. Even though he could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, *Board of Regents* v. *Roth,* 408 U. S. 564 (1972), he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms. *Perry* v. *Sinderman,* 408 U. S. 593 (1972).

That question of whether speech of a government employee is constitutionally protected expression necessarily entails striking "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Education,* 391 U. S. 563, 568 (1968). There is no suggestion by the Board that Doyle violated any established policy, or that its reaction to his communication to the radio station was anything more than an *ad hoc* response to Doyle's action in making the memorandum public. We therefore accept the District Court's finding that the communication was protected by the First and Fourteenth Amendments. We are not, however, entirely in agreement with that court's manner of reasoning from this finding to the conclusion that Doyle is entitled to reinstatement with backpay.

The District Court made the following "conclusions" on this aspect of the case:

> "(1) If a non-permissible reason, *e. g.,* exercise of First Amendment rights, played a substantial part in the decision not to renew—even in the face of other permissible grounds—the decision may not stand (citations omitted).

> "(2) A non-permissible reason did play a substantial part. That is clear from the letter of the Superintendent immediately following the Board's decision, which stated two reasons—the one, the conversation with the radio station clearly protected by the First Amendment. A court may not engage in any limitation of First Amendment rights based on 'tact'—that is not to say that 'tactfulness' is irrelevant to other issues in this case." App. to pet., at 12a–13a.

At the same time, though, it stated that

> "in fact, as this Court sees it and finds, both the Board and the Superintendent were faced with a situation in which there did exist in fact reason . . . independent of any First Amendment rights or exercise thereof, to not extend tenure." App. to pet., at 12a.

Since respondent Doyle had no tenure, and there was therefore not even a state law requirement of "cause" or "reason" before a decision could be made not to renew his employment, it is not clear what the District Court meant by this latter statement. Clearly the Board legally *could* have dismissed respondent had the radio station incident never come to its attention. One plausible meaning of the court's statement is that the Board and the Superintendent not only could, but in fact *would* have reached that decision had not the constitutionally protected incident of the telephone call to the radio station occurred. We are thus brought to the issue whether, even if that were the case, the fact that the protected conduct played a "substantial part" in the actual decision not to renew would necessarily amount to a constitutional violation justifying remedial action. We think that it would not.

A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally-

protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

This is especially true where, as the District Court observed was the case here, the current decision to rehire will accord "tenure." The long term consequences of an award of tenure are of great moment both to the employee and to the employer. They are too significant for us to hold that the Board in this case would be precluded, because it considered constitutionally protected conduct in deciding not to rehire Doyle, from attempting to prove to a trier of fact that quite apart from such conduct Doyle's record was such that he would not have been rehired in any event.

In other areas of constitutional law, this Court has found it necessary to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused. We think those are instructive in formulating the test to be applied here.

In *Lyons* v. *Oklahoma,* 322 U. S. 596 (1944), the Court held that even though the first confession given by a defendant had been involuntary, the Fourteenth Amendment did

not prevent the State from using a second confession obtained 12 hours later if the coercion surrounding the first confession had been sufficiently dissipated as to make the second confession voluntary. In *Wong Sun* v. *United States,* 371 U. S. 471, 491 (1963), the Court was willing to assume that a defendant's arrest had been unlawful, but to hold that "the connection between the arrest and the statement given several days later had 'become so attenuated as to dissipate the taint.' *Nardone* v. *United States,* 308 U. S. 338, 341." *Parker* v. *North Carolina,* 397 U. S. 790, 796 (1970), held that even though a confession be assumed to have been involuntary in the constitutional sense of the word, a guilty plea entered over a month later met the test for the voluntariness of such a plea. The Court in *Parker* relied on the same quoted language from *Nardone, supra,* as did the Court in *Wong Sun, supra.* While the type of causation on which the taint cases turn may differ somewhat from that we apply here, those cases do suggest that the proper test to apply in the present context is one which likewise protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights.

Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" [2] in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

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[2] See *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* No. 75–616 (December —, 1976), at —.

We cannot tell from the District Court opinion and conclusions, nor from the opinion of the Court of Appeals affirming the judgment of the District Court, what conclusion those courts would have reached had they applied this test. The judgment of the Court of Appeals is therefore vacated, and the case remanded for further proceedings consistent with this opinion.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 3, 1977

Re: No. 75-1278 - Mt. Healthy City Board of Education v. Doyle

Dear John:

I am quite willing to revise the sentence at the bottom of page 12 to carry out the suggestion contained in your letter of December 22nd, and would suggest the following revised version of that sentence:

> "Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct."

The suggestion contained in the second paragraph of your letter of that date is, as you indicate, a little harder to incorporate into the opinion. Since by hypothesis under our analysis the District Court may order reinstatement only where it concludes that the Board would have re-employed respondent had the protected conduct not occurred, certainly a fairly strong argument may be made that reinstatement is

necessary in most such cases in order to avoid penalizing a teacher for exercising First Amendment rights. I fully agree with you, however, that federal courts should retain a good deal of flexibility in order not to reach absurd results in such cases, and if you could suggest some language which would not lose me the votes of some who have already joined, I would be glad to give it a try.

Sincerely,

WJM

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 3, 1977

Re: 75-1278 - Mt. Healthy City School Dist. etc.
v. Doyle

Dear Bill:

Please join me.

Respectfully,

Jph

Mr. Justice Rehnquist

Copies to the Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
							11/15/76	
	Join WHR 12/29/76	Join WHR 12/15/76	Join WHR 12/29/76	Join WHR 12/27/76	Join WHR 12/13/76	Join WHR 12/13/76	1st draft 12/8/76	Join WHR 1/3/77
							2nd draft 12/14/76 3rd draft 1/3/77	
				75-1278 Mt. Healthy v. Doyle				