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Constitutional Law and Federal Statutory Rights

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CONSTITUTIONAL LAW AND FEDERAL STATUTORY RIGHTS

OVERVIEW

In the area of constitutional law, a majority of the cases decided by the Tenth Circuit Court of Appeals stemmed from civil rights actions, under either Title VII of the Civil Rights Act of 1964 or section 1983 of the Civil Rights Act of 1871. Other constitutional issues presented to the appellate court this past year included Indian rights, laetrile availability, the commerce clause, and abortion funding.

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

The Tenth Circuit Court of Appeals decided a number of cases during the 1979-80 term involving allegations of violations of Title VII of the Civil Rights Act of 1964.[1] The court used this opportunity to clarify and refine its position in several areas unique to Title VII. Due to a multiplicity of issues in a number of the cases, the decisions are discussed under headings corresponding to the relevant issue of the case.

A. *The Prima Facie Case*

The central issue in each of the cases discussed in this subsection was whether the claimant had established a prima facie case under the test enunciated by the Supreme Court in *McDonnell Douglas Corp. v. Green*.[2] Each Title VII case decided by the Tenth Circuit during the recent year which included a major discussion of the *McDonnell Douglas* test was included in the survey to assist the Tenth Circuit practitioner in understanding the court's application of the prima facie standards to a variety of fact situations.

In *Romero v. Union Pacific Railroad*,[3] the Tenth Circuit court reversed a decision of a district court which had ruled that the plaintiff, a Mexican-American, had not established a prima facie violation of Title VII. Upon motion for summary judgment, the trial court had dismissed the plaintiff's discrimination charge because the court found that the plaintiff was not qualified for the job.[4] The Tenth Circuit court, in an opinion written by Judge Seymour, held that there was sufficient contradictory evidence in the record to warrant a further inquiry. Evidence was offered to show that Ro-

1. 42 U.S.C. §§ 2000e to 2000e-16 (1976).

2. 411 U.S. 792 (1973). The Court, in the *McDonnell Douglas* decision, held that a plaintiff establishes a prima facie claim of a Title VII violation by showing: (i) that he belongs to a racial minority; (ii) that he applied for and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open, and the employer continued to seek applications from persons of complainant's qualifications. *Id.* at 802.

3. 615 F.2d 1303 (10th Cir. 1980).

4. The trial court found that Romero was not qualified for reinstatement to his former position because he had not participated satisfactorily in a drug and alcohol rehabilitation program sponsored by the employer. *Id.* at 1306.

mero was qualified for the job and that Romero had been the subject of discrimination by his employer.[5] The appellate court reasoned, therefore, that the motion for summary judgment should have been denied. The Tenth Circuit agreed with the district court in declaring that the *McDonnell Douglas* standards apply both to an accusation of discrimination on the basis of national origin and to a charge of employer retaliation against an employee for filing a discrimination suit. Additionally, the court of appeals held that a plaintiff's triumph in a discrimination suit is not a prerequisite to the successful prosecution of the charge of illegal retaliation.[6] The Tenth Circuit accordingly refused to uphold the lower court's grant of summary judgment on the issue of retaliation, finding that because the issue was primarily one of intent and motive,[7] it was not an issue properly disposed of upon motion for summary judgment.

In *Ray v. Safeway Stores, Inc.*,[8] the Tenth Circuit Court of Appeals agreed with the district court's finding that the complainant, a black man, had established a prima facie case under the *McDonnell Douglas* standards. The trial court, in adopting the findings of an appointed master, concluded, however, that the employer had articulated a valid business purpose for Ray's discharge.[9] The trial court reasoned that Safeway, therefore, had countered the prima facie test established by Ray.[10] Judge Seymour, writing for the court of appeals, decreed that whereas the plaintiff had failed to introduce any evidence to show that the business reason articulated by the employer was a mere pretext for discrimination,[11] the discrimination charge filed by Ray should be dismissed.[12]

In *Thornton v. Coffey*,[13] the plaintiff had established a prima facie claim of racial discrimination by the Oklahoma National Guard because of the Guard's refusal to hire Thornton, a black, for a position with the State's Equal Employment Office (EEO). The Guard contended that Thornton

5. Although there was evidence that Romero had participated satisfactorily in the employer's rehabilitation program, it had taken 15 months to reinstate Romero to his former position. In contrast, a white employee who had participated in the employer's program had been reinstated in 120 days. *Id.* at 1309.

6. 615 F.2d at 1307 (citing Rutherford v. American Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977)).

7. *Id.* at 1309 (citing Jeffries v. Harris County Community Action Ass'n, 425 F. Supp. 1208 (S.D. Tex. 1977) and Kornbluh v. Stearns & Foster Co., 73 F.R.D. 307 (S.D. Ohio 1976)).

8. 614 F.2d 729 (10th Cir. 1980).

9. Safeway alleged that Ray had been discharged for insubordination. Ray had refused to accept a job assignment change which was necessitated by a personality conflict between Ray and another employee. *Id.* at 730.

10. The *McDonnell Douglas* Court held that once a prima facie claim of discrimination has been established, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." 411 U.S. at 802.

11. Under the *McDonnell Douglas* test, if a court is satisfied that the employer has countered the prima facie claim by articulating a valid business reason for the employee's rejection, the burden shifts to the plaintiff to prove that the business reason offered by the employer is merely a pretext for discrimination. *Id.*

12. The appellate court suggested that the plaintiff could have established that the business excuse was a mere pretext for discrimination by showing that white employees, in substantially similar circumstances, were treated differently than Ray, or by showing that the employer had a general policy and practice of treating black employees differently than white employees. 614 F.2d at 731.

13. 618 F.2d 686 (10th Cir. 1980).

was not qualified for the position, and, in the alternative, the Guard asserted that the person hired for the job outranked Thornton. The Tenth Circuit Court of Appeals, in an opinion written by Judge Seymour, rejected the employer's contention that Thornton was unqualified for the position.[14] The court also rejected the business purpose excuse articulated by the Guard—that the appointment was based on a ranking system. The Guard had used a rating procedure which the court found, under the *Griggs* test,[15] to be in violation of Title VII.

In *EEOC v. Fruehauf Corp.*,[16] the court of appeals upheld the decision of the district court which had determined that the EEOC failed to establish a prima facie case against the employer. The employer had alleged, and the trial court agreed, that the aggrieved employees were not qualified for the disputed position of shop foreman. Judge McWilliams, writing for the Tenth Circuit court, conceded that the EEOC had established a prima facie case under the *McDonnell Douglas* standards. Because Judge McWilliams found that the applicants were not qualified for the position of shop foreman,[17] he affirmed the decision of the trial court.

The plaintiff in *Hernandez v. Alexander*[18] had established a prima facie case of national origin discrimination, but because the employer had articulated a valid business reason for the denial of Hernandez' promotion, the trial court granted judgment for the employer. The employer, the United States Army, stated that Hernandez had been denied the promotion because the person promoted had "broader" qualifications than Hernandez. Chief Judge Seth, writing for the appellate court, declared that the trial court had applied the correct standard in requiring the employer merely to *articulate* a reason for the promotion denial. The court of appeals stressed the importance of the statements made by the Supreme Court in *Trustees of Keene State College v. Sweeney*[19] because of the Court's emphasis on the *articulation* of business reasons as compared with *proof* of the absence of a discriminatory motive.[20] The Tenth Circuit opinion contained no discussion of whether Hernandez attempted to establish that the reason articulated by the employer was a mere pretext for discrimination.

In *Fitzgerald v. Sirloin Stockade, Inc.*,[21] the plaintiff had established a prima facie case of sex discrimination. The employer argued that the trial court erred in its finding of a prima facie case because the plaintiff had failed to establish that a vacancy existed or that she was qualified for a position.[22]

14. The evidence in the record demonstrated that Thornton had received favorable officer efficiency ratings while he was in the Army, Thornton's academic record showed that he had specialized in areas particularly well-suited as background for the EEO position, and Thornton's application for the EEO position listed impressive credentials for the job. 618 F.2d at 690.

15. Griggs v. Duke Power Co., 401 U.S. 424 (1971); *see* note 28 *infra*.

16. 609 F.2d 434 (10th Cir. 1979).

17. The appellate court's analysis is confusing. The court assumed that a prima facie case was established. The court subsequently found, however, that one of the requisite elements of a prima facie case, under the *McDonnell Douglas* test, was not satisfied. 609 F.2d at 435-36.

18. 607 F.2d 920 (10th Cir. 1979).

19. 439 U.S. 24 (1979).

20. 607 F.2d at 923.

21. 624 F.2d 945 (10th Cir. 1980).

22. The employer argued that there was no position open for the female employee because

The Tenth Circuit Court of Appeals, in an opinion written by Judge Doyle, rejected both of the employer's arguments. The appellate court noted that there had been numerous occasions when the employer had asked the plaintiff to perform responsible duties. Nevertheless, the employer continually refused to promote the plaintiff to positions commensurate with her duties when a job opening occurred. Although the court was reluctant to conclude that the employer had instituted a pattern and practice of discrimination against women,[23] Judge Doyle was convinced that there had been numerous specific acts of discrimination by the employer against the individual plaintiff.

In *Wittenbrink v. Western Electric Co.*,[24] the Tenth Circuit Court of Appeals affirmed the district court's ruling which held that the plaintiff had not been discriminated against by her employer on the basis of sex. The trial court found that the discrimination charge was based on the plaintiff's sense of frustration with the lack of upward mobility in her job and that the employer had not denied her a promotion because of her sex.[25] Relying on an earlier Tenth Circuit decision,[26] Judge Barrett determined that the plaintiff had not established a prima facie case of a Title VII violation merely because a qualified male employee was promoted rather than plaintiff. Absent any evidence of discriminatory *intent* by an employer to deny a female employee a promotion, the fact that a qualified man is promoted over a qualified woman is not sufficient grounds to sustain a claim of sexual discrimination.

B. *Policies Which Perpetuate Pre-Act Discrimination*

In *Thornton v. Coffey*,[27] the Tenth Circuit court ruled that a rating procedure used by the Oklahoma National Guard, when measured under the *Griggs* test,[28] violated the requirements of Title VII. The Guard had argued that Thornton was denied the EEO job position because the person who was hired outranked him. The rating procedure used by the Guard favored applicants who were full time civilian employees. As no black officer had ever been a full time civilian employee of the Guard, and since the person hired for the position had been a full time Guard employee since 1956, the court of appeals found that the rating procedure used by the Guard fell squarely within the *Griggs* prohibition. The court concluded that the procedure perpetuated the discriminatory impact of the prior legal segregation of the Guard.[29]

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there had been a lateral transfer of another worker into the vacancy. The employer also argued that the plaintiff was not as well qualified as the person who had filled the position. *Id.* at 954.

23. *See* notes 38-40 *infra* and accompanying text.

24. No. 78-1737 (10th Cir. June 7, 1979) (not for routine publication).

25. *Id.*, slip op. at 6.

26. Olson v. Philco-Ford, 531 F.2d 474 (10th Cir. 1976).

27. 618 F.2d 686 (10th Cir. 1980); *see* notes 13-15 *supra* and accompanying text.

28. Griggs v. Duke Power Co., 401 U.S. 424 (1971). *Griggs* held that employment practices, procedures, or tests which are neutral on their face cannot be maintained if they operate to freeze the status quo of prior discrimination. *Id.* at 430.

29. The Oklahoma National Guard was segregated by law until 1958.

In *United States v. Lee Way Motor Freight, Inc.*,[30] the Tenth Circuit court held that, under the *Griggs* test,[31] an employer's no-transfer rule violated Title VII. The employer's no-transfer policy forbade city drivers from transferring to a line or over-the-road driver position.[32] Finding that the employer had engaged in a pattern and practice of discrimination against blacks who had requested an over-the-road position,[33] the court of appeals held that the no-transfer policy impermissably locked blacks into city driver positions. The appellate court concluded, therefore, that the no-transfer policy of the employer perpetuated pre-Act discrimination in violation of the *Griggs* mandate.

The employer argued that the *Griggs* test was inapplicable in light of the two recent Supreme Court pronouncements in *United Air Lines, Inc. v. Evans*[34] and *International Brotherhood of Teamsters v. United States*.[35] The employer contended that the Supreme Court in these cases carved out two exceptions to the holding in *Griggs* and that the no-transfer policy of the trucking firm fell within the exceptions. The Tenth Circuit court rejected the argument, stating that "[t]here is not the slightest indication in *Evans* that the Supreme Court intended to overrule or disassociate itself from the decision in *Griggs*."[36] The court of appeals further noted that the Supreme Court had limited the application of its *Teamsters* decision to bona fide seniority systems. The court of appeals concluded that the no-transfer policy of the employer fell outside the scope of this limited exception.[37]

C. *A Pattern and Practice of Discrimination*

In *United States v. Lee Way Motor Freight, Inc.*,[38] the government introduced considerable evidence of the employer's company-wide discrimination against blacks. The government attempted to establish "a pattern and practice of discrimination" in order to set up the evidentiary presumption enunciated in the *Teamsters* case.[39] In the *Teamsters* decision, the Supreme Court explained that once a pattern and practice of discrimination is established, the rejection of an applicant of the class discriminated against creates the inference that an employer is pursuing a discriminatory hiring policy. The burden then shifts to the employer to establish that the individual applicant was denied employment for lawful reasons.[40]

The Tenth Circuit, agreeing with the district court, held that the gov-

30. 625 F.2d 918 (10th Cir. 1979).

31. *See* note 28 *supra*.

32. There was testimony indicating that the over-the-road drivers were paid more than the city drivers.

33. *See* notes 38-40 *infra* and accompanying text.

34. 431 U.S. 553 (1977). The *Evans* Court held that a discrimination charge which is not timely filed with the EEOC is considered to be equivalent to a pre-1964 act of discrimination, and, therefore, the charge has no legal effect.

35. 431 U.S. 324 (1977). The *Teamsters* Court held that bona fide seniority systems are protected from Title VII application under § 703(h) of the Act, 42 U.S.C. § 2000e-2(h).

36. 625 F.2d at 928.

37. *Id.*

38. *Id.*

39. International Bhd. of Teamsters v. United States, 431 U.S. at 359 n.45.

40. *Id.* at 364.

ernment had established the *Teamsters* evidentiary presumption. The court reasoned that since there was sufficient evidence in the record to support the trial court's finding, the employer was rightly found to have established a pattern and practice of discrimination against blacks. The appeals court ruled that the trial court had not erred in granting relief to the claimants without first requiring the government to prove instances of specific acts of discrimination.[41]

D. *Discrimination Charges Against Unions*

In *Romero v. Union Pacific Railroad*,[42] the Tenth Circuit court remanded the case to the trial court for an evidentiary determination of whether the employees' union was involved in the alleged national origin discrimination and retaliation practices of the employer. Considering the fact that union members had made retaliatory statements against Romero and the fact that the union worked closely with the employer in the employer's drug and alcohol rehabilitation program, the court of appeals held that there was sufficient contradictory evidence in the record to warrant reversal of the trial court's grant of the union's motion for summary judgment. In so doing, the appellate court relied on precedential decisions from other circuits wherein the courts of appeals have recognized the important role that labor organizations play in the enforcement of Title VII.[43]

E. *Title VII and the Equal Pay Act*

In *Fitzgerald v. Sirloin Stockade, Inc.*,[44] the Tenth Circuit Court of Appeals refused to apply the standards of the Equal Pay Act.[45] Although the trial judge had made a mistaken reference to the Equal Pay Act in his findings, the appellate court dismissed the employer's attempt to assert the Act on appeal. Application of the Equal Pay Act would have allowed the employer to request a jury trial. A right to a jury trial does not exist in cases brought exclusively under Title VII. Adjudication under the Equal Pay Act also would have allowed the employer to raise certain standards not available in Title VII cases.[46] The court rejected the employer's attempt to raise the Equal Pay Act because the trial court had proceeded consistently under Title VII.

In *Lemons v. City and County of Denver*,[47] the Tenth Circuit Court of Appeals, in an opinion written by Chief Judge Seth, rejected an attempt by

41. 625 F.2d at 930.

42. 615 F.2d 1303 (10th Cir. 1980).

43. *See* Donnell v. General Motors Corp., 576 F.2d 1292 (8th Cir. 1978) (labor organizations have an affirmative duty to insure employer compliance with Title VII); Gray v. Greyhound Lines, 545 F.2d 169 (D.C. Cir. 1976); Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976); Macklin v. Spector Freight Sys., Inc., 478 F.2d 979 (D.C. Cir. 1973) (a union may be held responsible for the discriminatory practices of the employer if the union takes no action to prevent those practices).

44. 624 F.2d 945 (10th Cir. 1980).

45. 29 U.S.C. § 206(d) (1976).

46. The Equal Pay Act standards, however, are applied in Title VII actions when the issue of discriminatory compensation arises.

47. 620 F.2d 228 (10th Cir.), *cert. denied*, 101 S. Ct. 244 (1980).

several nurses to restructure Denver's classification and pay plan. The nurses sought to adjust their wages so that their benefits would no longer be linked to the salaries of other nurses in the metropolitan community.[48] The nurses alleged that since most nurses are women, the prevailing low wages of nurses in the community reflected an historic pattern of discrimination against women. Furthermore, the Denver nurses argued that whereas the classification and pay plan of the city reflected the low community wages for nurses, the city's plan discriminated against them. The court of appeals rejected the nurses' claim, stating that the wage disparity articulated by the nurses was not the type of employment disparity contemplated by Congress in enacting Title VII and the Equal Pay Act.[49] The court declared that an employee can prevail under these acts only upon showing a differential in pay between persons doing equal work. The employee must further demonstrate that the differential is based on an unlawful reason. This is the "equal pay/equal work" concept. As the nurses were attempting to link their job classifications to employment categories requiring entirely different skills,[50] the court found that they merited no relief under either Title VII or the Equal Pay Act.

F. *Affirmative Action Plans*

In *United States v. Lee Way Motor Freight, Inc.*,[51] the Tenth Circuit Court of Appeals overturned a discretionary ruling of the trial court which had held that the facts of the case did not warrant the imposition of an affirmative action plan. Recognizing the broad discretion granted to the district courts under Title VII, the appellate court nonetheless ruled that the employer's history of racial discrimination mandated institution of affirmative action. The court enunciated five factors to be considered in determining whether affirmative relief should be granted. A trial court should consider: 1) whether there has been a long history of racial discrimination by the employer or the union; 2) whether the history of the employer's attempts to end racial discrimination by increasing minority hiring and promotion is relatively short; 3) whether there was any significant change in the employer's policies before the government filed suit; 4) whether the employer was recalcitrant in voluntarily taking action to correct the imbalances created by past discrimination; and 5) whether there was any significant improvement in the employer's practices.[52] Given the concentration of blacks in low paying, less desirable jobs at Lee Way Motor Freight, and given the reluctance of the employer to alter his employment practices despite two major lawsuits,[53] the

48. The nursing classification and pay plan of Denver placed city nurses on a parity with other nurses in the community. *Id.* at 229.

49. As a result of the Bennett Amendment, Title VII mirrors certain provisions of the Equal Pay Act with respect to discriminatory pay differentials. 42 U.S.C. § 2000e-2(h) (1976).

50. The nurses wanted their job classification to be linked to a city classification described as "General Administrative Series". 620 F.2d at 229.

51. 625 F.2d 918 (10th Cir. 1979).

52. *Id.* at 944.

53. These two major lawsuits were the instant case, 625 F.2d 918 (10th Cir. 1979), and Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971).

appellate court believed that affirmative relief was warranted.

G. *Subject Matter Jurisdiction*

In *Romero v. Union Pacific Railroad*,[54] the Tenth Circuit Court of Appeals ruled that the omission of a defendant's name from an EEOC charge does not require automatic dismissal of a subsequent Title VII action.[55] Recognizing that the timely filing of a charge of discrimination with the EEOC is a jurisdictional prerequisite to the institution of a lawsuit,[56] the court of appeals stated that "complaints to the EEOC must be liberally construed in order to accomplish the purposes of the Act."[57] As the Tenth Circuit was confronted with this issue for the first time, the court of appeals referred to four factors listed in the Third Circuit case of *Glus v. G.C. Murphy Co.*[58] as pertinent to an evaluation of a complainant's failure to name a party before the EEOC. The Tenth Circuit court instructed the trial court to consider: 1) whether the role of the unnamed party could be ascertained through reasonable efforts by the complainant at the time that the EEOC complaint is filed; 2) whether, under the circumstances, the interests of a named party are so similar to the interests of the unnamed party that, for the purposes of obtaining voluntary conciliation and compliance, it would be unnecessary to include the unnamed party in the proceedings; 3) whether the party's absence from the EEOC proceedings resulted in actual prejudice to the interest of the party; and 4) whether the unnamed party has in some way represented to the complainant that the party's relationship with the complainant is to be through the named party.[59] As this jurisdictional question was one of first impression, the case was remanded to the trial court for a reconsideration of the case in light of the *Glus* criteria.

H. *Timely Filing of Discrimination Charges*

In *Trujillo v. General Electric Co.*,[60] the Tenth Circuit court recognized that an EEOC district director has the implicit authority to rescind a notice of right to sue.[61] The court thereby preserved the plaintiff's discrimination charge, which charge would not have been considered as timely filed with the EEOC had this implicit authority not been acknowledged.

The defendant employer filed a motion to dismiss the Title VII claim because Trujillo's suit had not been filed within ninety days of the initial notice of right to sue.[62] The EEOC district director had notified Trujillo of

54. 615 F.2d 1303 (10th Cir. 1980).

55. The issue on appeal was whether the failure of the complainant to name the individual defendants in the charge brought to the EEOC precluded the district court from exercising jurisdiction as to the individual defendants. *Id.* at 1311.

56. *Id. See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974).

57. 615 F.2d at 1311.

58. 562 F.2d 880, 888 (3d Cir. 1977).

59. 615 F.2d at 1311-12.

60. Nos. 79-1071 & 79-1072 (10th Cir. May 29, 1980).

61. 42 U.S.C. § 2000e-5(f)(1) (1976) provides that the EEOC or the Attorney General shall notify a Title VII claimant of his right to sue where the Commission or the Attorney General decides that there is no cause to press a claim on the individual's behalf.

62. A Title VII claimant who has been notified of his right to sue by the EEOC or by the

his right to sue, but subsequently revoked this notice because of efforts to attempt a conciliation of the parties. When conciliation failed, the district director issued a second notice of right to sue. Trujillo had filed his claim within ninety days of the second EEOC notice, but not within ninety days of the original notice of the right to sue. The employer claimed that it was error to allow Trujillo to bring his Title VII claim after the initial ninety days had lapsed. General Electric argued that the district director is not authorized by statute to rescind a notice of right to sue and, subsequently, to issue a second notice.

In reliance upon a recent decision of the Fifth Circuit,[63] Judge McWilliams, writing for the court, reasoned that a district director has an implied authority to issue a second notice of right to sue. The judge declared that because the district director is authorized to reconsider a determination of "no cause",[64] the director has the analogous authority to rescind a notice of right to sue. To require the EEOC to conciliate within the limitations of the initial ninety day period would severely restrict the conciliation efforts. Judge McWilliams concluded, therefore, that the statutory ninety day time limit should be calculated from the date of the EEOC's second notice of right to sue.

In *Wilkerson v. Siegfried Insurance Agency, Inc.*,[65] the Tenth Circuit court ruled that the plaintiff had not timely filed her discrimination charges because she had not filed within the statutory period. The court of appeals held that the event which triggers the statutory period is the last day that the employee works. The date on which the employee ceased receiving severance pay or other extended benefits was deemed to have no legal significance.[66] The court of appeals relied upon a case decided by the Third Circuit, *Bonham v. Dresser Industries, Inc.*[67] The tribunal was persuaded by the *Bonham* court, which noted that if the statutory period during which a Title VII claimant must bring a claim were allowed to begin to run at the time the employee is taken off the payroll, rather than at the date when the employment relationship actually terminates, the employer would be penalized for granting severance pay and other extended benefits.[68]

I. *Discovery*

The court of appeals remanded the case of *Weahkee v. Norton*[69] to the district court to permit discovery which the trial court had denied the plaintiff. In a most unusual turn of events, the plaintiff sued his employer, the EEOC, alleging discrimination on the basis of the employee's national ori-

Attorney General must file his claim within 90 days of receipt of such notice. 42 U.S.C. § 2000e-5(f)(1) (1976).

63. Gonzalez v. Firestone Tire & Rubber Co., 610 F.2d 241 (5th Cir. 1980).

64. 29 C.F.R. § 1601.21(b) (1979).

65. 621 F.2d 1042 (10th Cir. 1980).

66. The employee argued that her charge was timely filed because it was filed within 90 days of her removal from the company's payroll. *Id.* at 1044.

67. 569 F.2d 187 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978).

68. 621 F.2d at 1044.

69. 621 F.2d 1080 (10th Cir. 1980).

gin. The EEOC had invoked a privilege defense in the trial court, claiming that provisions in the Privacy Act[70] and in the Freedom of Information Act[71] precluded claimant's requested discovery. Claimant had sought to obtain certain personnel files of EEOC employees. In denying the privilege claims of the Commission, the appellate court reaffirmed the extensive scope of discovery in a Title VII action.[72]

J. *Remedies*

In *Thornton v. Coffey*,[73] the Tenth Circuit court overturned the district court's order which required that the Oklahoma National Guard reinstate the plaintiff and retroactively promote him to the military rank of major. While recognizing the wide variety of discretionary powers afforded trial courts in fashioning appropriate relief,[74] the appellate court cautioned that courts must strike a balance between their authority to grant remedies and the judicial policy of nonintervention in internal military matters.[75] The court of appeals concluded that the remedial powers of the district courts do not extend to the ordering of military promotions. The court noted that the remedy was particularly inappropriate because the claimant failed to exhaust the administrative remedies available to him.

In *Fitzgerald v. Sirloin Stockade, Inc.*,[76] the court of appeals upheld the decision of the trial court which granted an award of "front pay" rather than reinstatement. The Tenth Circuit determined that where the evidence in the record establishes an atmosphere of hostility towards the plaintiff, reinstatement is not a precondition to the award of front pay. Because the evidence indicated that a working relationship between the employee and the employer would be impossible, the appellate court upheld the remedy of the trial court.[77]

In *United States v. Lee Way Motor Freight, Inc.*,[78] an issue analogous to the issue raised in the *Fitzgerald* case was considered by the Tenth Circuit Court of Appeals. The court, concurring with the report of an appointed master, held that a probationary period is not a prerequisite to an award of back pay where the claimant has a valid reason for refusing an offer of employment by the defendant employer. The appellate court reasoned that a mandatory probationary period could invite harassment by the employer, harassment designed to encourage the claimant to leave before the probationary period

70. 5 U.S.C. § 552a(b)(11) (1976) requires that a court order be obtained prior to the release of government personnel files.

71. 5 U.S.C. § 552(b)(6) (1976) exempts disclosure of personnel and medical files which "would constitute a clearly unwarranted invasion of personal privacy."

72. 621 F.2d at 1082 (citing Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975) and EEOC v. University of New Mexico, 504 F.2d 1296 (10th Cir. 1974)).

73. 618 F.2d 686 (10th Cir. 1980).

74. *Id.* at 691. *See* Albermarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).

75. 618 F.2d at 691. *See* Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953).

76. 624 F.2d 945 (10th Cir. 1980).

77. The court relied upon evidence which showed that the employer had questioned the loyalty of the plaintiff, had reduced the plaintiff's work responsibilities, and had inserted memoranda concerning her poor attitude in her personnel file. *Id.* at 957.

78. 625 F.2d 918 (10th Cir. 1979).

concluded. The court was concerned that employers could thereby induce claimants to forego the conditional back pay award.[79]

The court, in the *Lee Way* decision, aligned itself with other federal judicial circuits which have ruled that a Title VII claimant is entitled to a back pay award calculated from the date of injury until the time when remedial relief is actually realized.[80] The Tenth Circuit court rejected the argument of the employer who claimed that this test would penalize the employer where lengthy court proceedings are involved. The court countered that because the purpose of Title VII is to make whole aggrieved claimants, any hardship which may result from lengthy court proceedings should fall upon the "wrongdoing employer."[81] The appellate court added, however, that the two-year statute of limitations governing the award of back pay should commence to run on the date when the discrimination charge is filed with the EEOC under section 706(g) of the Act,[82] rather than from the date of the government's suit. If the statute began to run on the date of the government's suit, it could work a hardship on claimants because the government may file charges only upon a showing of a pattern and practice of discrimination by an employer.[83]

K. *Mitigation of Damages*

In *United States v. Lee Way Motor Freight, Inc.*,[84] the Tenth Circuit court indicated a preference for the individual approach rather than the "best man" or "average man" approaches to the mitigation of damages question.[85] Under the latter approaches, the group of employees is held to the standard of the most successful claimant ("best man") or the average claimant ("average man") in determining whether the individual claimant exercised reasonable diligence to mitigate damages as required by the Act.[86] Lee Way Motor Freight argued that it had satisfied the employer's burden of showing lack of reasonable diligence by the individual claimants who did not satisfy the standards of either the "best man" or "average man" approach. The appellate court rejected the employer's attempt to apply these standards, preferring to analyze the good faith mitigation efforts of the claimants on an individual basis.[87]

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79. *Id.* at 938.

80. *Id.* at 933. (citing EEOC v. Enterprise Ass'n. Steamfitters Local 638, 542 F.2d 579 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977); Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); James v. Stockham Valves & Fittings, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978)).

81. *Id.* at 931.

82. 42 U.S.C. § 2000e-5 (1976).

83. 42 U.S.C. § 2000e-6(e) (1976).

84. 625 F.2d 918 (10th Cir. 1979).

85. The individual approach recognizes the efforts of an individual to mitigate damages rather than the actions of a similarly situated group. The "best man" approach imputes the interim earnings of the most successful claimant to other claimants similarly situated. The "average man" approach imputes the average of the interim earnings to those claimants whose interim earnings are below average. *Id.* at 937.

86. 42 U.S.C. § 2000e-5(g) (1976).

87. 625 F.2d at 938 (quoting NLRB v. Madison Courier, Inc., 472 F.2d 1307 (D.C. Cir. 1972)).

L. *Interest on Back Pay Awards*

In *Weaver v. United States*,[88] the Tenth Circuit Court of Appeals reversed the judgment of the district court, which had ordered the federal government, as the defendant employer, to pay interest on a back pay award. The reviewing court ruled that because there was no express language in the 1972 amendment[89] to Title VII authorizing the award of back pay interest to federal employees, the lower court was mistaken in awarding interest to claimants. The appeals court reasoned that absent express congressional consent to the award of interest to claimants, the award was precluded, based on the theory of sovereign immunity.

M. *Attorneys Fees*

In *EEOC v. Fruehauf Corp.*,[90] the Tenth Circuit court overturned the trial court's award of attorneys fees to the successful defendant.[91] The appeals court ruled that the trial court had abused its discretion by awarding attorneys fees to the defendant. The appellate tribunal emphasized that there was insufficient evidence to warrant a finding that the action was frivolous, unreasonable, or without foundation in its inception.[92]

In *Booker v. Brown*,[93] the court of appeals held that a claimant, who had prevailed on the merits in his discrimination charge before the Civil Service Commission, but who was denied compensation for attorneys fees in the administrative proceeding, had standing, as an aggrieved person under Title VII,[94] to bring an action in the district court to enforce his right to attorneys fees. The appellate court relied upon a number of cases, decided in other circuits, which have recognized that the award of attorneys fees is appropriate for services rendered by a claimant's attorney before an administrative agency.[95]

II. SECTION 1983 OF THE CIVIL RIGHTS ACT OF 1871

During the past term the Tenth Circuit Court of Appeals was presented with a number of cases wherein there was a claimed violation of section 1983 of the Civil Rights Act of 1871.[96] The claimants alleged violations of constitutional rights by individuals acting under color of law. A significant issue concerned the availability of good faith as a defense to unconstitutional action of a local governmental body.[97] Other questions arising under section

88. 618 F.2d 685 (10th Cir. 1980).

89. 42 U.S.C. § 2000e-16 (1976). This 1972 addition to the statute brought federal employees within the coverage of Title VII.

90. 609 F.2d 434 (10th Cir. 1979).

91. 42 U.S.C. § 2000e-5(k) (1976) provides that reasonable attorneys fees may be awarded to the prevailing party in a Title VII action.

92. 609 F.2d at 436 (citing Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)). A prevailing defendant in a Title VII proceeding is to be awarded attorneys fees *only* when the court finds that the plaintiff's action was frivolous, unreasonable, or without foundation. *Id.*

93. 619 F.2d 57 (10th Cir. 1980).

94. 42 U.S.C. § 2000e-16(c) (1976).

95. 619 F.2d at 60.

96. 42 U.S.C. § 1983 (1976 & Supp. III 1979).

97. Bertot v. School District No. 1, 613 F.2d 245 (10th Cir. 1979).

1983 included the definition of "acts under color of law", the substantive basis for section 1983 liability, and the interrelationship between state common law remedies and the federal statutory remedies provided by the Civil Rights Act.

A. *The Effect of the Presence of Good Faith*

In *Bertot v. School District No. 1*,[98] the most significant section 1983 decision of the term, the Tenth Circuit court delineated the scope of municipal liability following the Supreme Court decision of *Monell v. Department of Social Services*.[99] In the *Monell* decision, the Supreme Court held that municipalities are not entitled to an absolute immunity when sued under section 1983.[100] The Supreme Court, however, left the task of defining the scope of any remaining immunity to the lower federal courts.

In its *Bertot* opinion, the Tenth Circuit Court of Appeals declared that good faith was not available to the school district[101] as a defense in an action for back pay under section 1983.[102] Judge McKay, writing for the majority, analyzed the history of the Civil Rights Act and the common law immunities, noting that the common law did not provide the same qualified good faith immunity for public *bodies* as it did for public *officials*.[103] The judge explained that the personal immunity doctrine for public individuals, acting in good faith, is based on two concerns. If an individual in public office fears personal financial liability because of a mistake in judgment, even though made in good faith, he or she will be deterred from exercising independent, forceful judgment. The chilling effect on the decision making process is considered a detriment to the long term public interest.[104] Furthermore, there is fear that qualified persons will hesitate to seek public office if there is the risk of personal liability.[105] The Tenth Circuit court found that these concerns were not equally applicable when liability is placed on a school board.[106] Judge McKay implied that the imposition of section 1983 liability will not hinder the decision process of the school board members because no board members will suffer personal financial loss as a result of mistaken judgment. As a governmental entity, the school board's damage awards will be assessed against the school board's treasury. The court of appeals evidently considered that the risk of depleting the board funds would not adversely affect the independent judgments of school board members to the same degree as would the threat of personal financial loss. The court of appeals emphasized

98. *Id.*
99. 436 U.S. 658 (1978).
100. *Id.* at 701, 713-14.
101. In the *Monell* decision, the Supreme Court noted that there was no distinction between municipalities and school boards for purposes of suit under section 1983. *Id.* at 696.
102. The court of appeals explained that an award of back pay is an element of equitable relief. The presence of good faith cannot preclude the grant of an equitable remedy. 613 F.2d at 250. Judge Barrett in his dissent, however, questioned the majority's labeling of back pay as a form of equitable relief instead of as compensatory damages. *Id.* at 255.
103. *Id.* at 248.
104. *Id.* at 249.
105. *Id.*
106. *Id.*

that when rights as important as those guaranteed by the first amendment are violated by the government, it is preferrable to have the costs of the violation spread among the taxpayers rather than to have the injured victim bear the total burden of the unconstitutional action.[107]

Chief Judge Seth and Judge Barrett, dissenting, expressed concern about the ramifications of the majority's decision. Chief Judge Seth reasoned that as the school board was merely a group of individual officials acting collectively, any immunities available to the board members as individuals should be available to them as a unit.[108] Because the majority's decision required the board to correctly predict judicial interpretation of constitutional rights, Chief Judge Seth argued that board members should not have been held to a standard higher than that of good faith in making such difficult predictions.[109] Judge Barrett expressed concern for the potential financial repercussions of the imposition of section 1983 liability on municipalities which have acted in good faith.[110]

The majority's reasoning in the *Bertot* decision was subsequently affirmed by the Supreme Court's opinion in *Owen v. City of Independence*.[111] In the *Owen* case, the Supreme Court reversed the Eighth Circuit[112] and held, as did the Tenth Circuit, that good faith is not available to municipalities as a defense in suits claiming constitutional violations under the Civil Rights Act of 1871.

In another case involving the good faith of the defendant, *Love v. Mayor of Cheyenne*,[113] the Tenth Circuit court held that the prevailing party in a civil rights action is entitled to an award of attorneys fees under section 1988 of the Civil Rights Act[114] unless there is a showing of special circumstance which would render the award unjust. The plaintiffs had successfully challenged the constitutionality of a city ordinance,[115] but they were denied attorneys fees. The trial court found that because the defendants had acted in good faith, an award of attorneys fees would be unjust.[116] The court of appeals reversed, holding that attorneys fees under section 1988 are not contingent upon a showing of good or bad faith. The reviewing court concluded that the presence of good faith is not a special circumstance rendering unjust an award of attorneys fees.[117]

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107. *Id.* at 252.
108. *Id.* at 253 (Seth, C.J., dissenting).
109. *Id.*
110. *Id.* at 254-56 (Barrett, J., dissenting).
111. 445 U.S. 622 (1980).
112. Owen v. City of Independence, 589 F.2d 335 (8th Cir. 1978). In its *Bertot* opinion, the Tenth Circuit court specifically rejected the reasoning of the Eighth Circuit's *Owen* decision. 613 F.2d at 250.
113. 620 F.2d 235 (10th Cir. 1980).
114. 42 U.S.C. § 1988 (1976).
115. The ordinance required that persons obtain a permit prior to distributing religious material from door to door. The permits were issued by the sheriff who had unbridled discretion in approving or disapproving the applications. 620 F.2d at 236.
116. *Id.*
117. *Id.* *See also* Hutto v. Finney, 437 U.S. 678 (1978).

B. *Acting Under Color of Law*

In *Brown v. Chaffee*,[118] the plaintiff brought a civil rights action against several attorneys who had defended him in a prior lawsuit and against Sheriff Chaffee, the plaintiff's co-defendant in the prior lawsuit. Brown and Chaffee, who was Brown's supervising officer, had been defendants in a civil rights action in which Brown was found liable for actual and punitive damages. Chaffee had been exonerated. Brown brought the subsequent action, claiming that he had received inadequate representation of counsel at the previous trial. Brown alleged that although his interests had conflicted with Chaffee's, the two police officers were represented by the same attorneys until three months before trial.[119] Brown alleged that he was not informed of the conflict, that evidence favorable to his defense was suppressed, and that the attorneys and Chaffee had conspired to deprive him of a fair trial.[120]

The Tenth Circuit Court of Appeals affirmed the trial court's dismissal of the defendants, holding that attorneys do not act under color of law merely by representing public officials in private litigation. The appellate court also ruled that Sheriff Chaffee's defense of his personal lawsuit did not constitute state action. Brown, therefore, had no cause of action against defendants under section 1983.[121]

In *Norton v. Liddel*,[122] the court of appeals considered whether a private individual had acted under color of law in conspiring with a state official who was immune from section 1983 liability. Sheriff Liddel and an assistant district attorney filed an information charging that the plaintiffs had unlawfully incited to riot.[123] Plaintiffs alleged that Sheriff Liddel and the assistant district attorney had conspired to bring the charges in retaliation for plaintiff's lawful exercise of constitutional rights.

In an opinion written by Judge Barrett, the Tenth Circuit court held that an assistant district attorney is absolutely immune from lawsuits challenging the exercise of his prosecutorial discretion, even if his official actions were "undertaken maliciously, intentionally, and in bad faith."[124] The court of appeals found that Sheriff Liddel, although a public official, had acted in his capacity as a private citizen when he provided the district attorney's office with facts to support the charges filed against the plaintiffs. Judge Barrett determined, however, that Sheriff Liddel's status as a private citizen did not put an end to the section 1983 inquiry. A private citizen who conspires with a government official to violate another citizen's constitutional rights may be deemed to be acting under color of law so as to make him liable under section 1983.[125] The conspiracy may implicate the private citizen even if the official coconspirator is immune from suit under section

118. 612 F.2d 497 (10th Cir. 1979).
119. *Id.* at 500.
120. *Id.* at 500-01.
121. *Id.* at 501.
122. 620 F.2d 1375 (10th Cir. 1980).
123. *Id.* at 1377.
124. *Id.* at 1379 (citing Imbler v. Pachtman, 424 U.S. 409 (1976) and Atkins v. Lanning, 556 F.2d 485 (10th Cir. 1977)).
125. *Id.* at 1381.

1983.[126] A sufficient nexus between the immune state official and the private citizen must be established, however, by an examination of their concerted action in the advancement of the conspiracy.[127] Applying this test, the appellate court ruled that the plaintiffs had established a sufficient nexus between Sheriff Liddel and the assistant district attorney so as to warrant a conclusion that Sheriff Liddel acted under color of law in advising the district attorney about plaintiffs' activities. Judge Barrett concluded, therefore, that the trial court's grant of defendant's motion for summary judgment was incorrect.[128]

C. *Basis for Liability*

In actions under section 1983, public officials cannot be held liable, on the basis of *respondeat superior*, for the constitutional torts of inferiors. They can, however, be held liable for the failure to properly train and supervise their subordinates when such failure results in constitutional violations. In *McClelland v. Facteau*,[129] the plaintiff brought suit under section 1983, claiming to be the victim of an illegal arrest. The defendants included the chief of the New Mexico State Police and the police chief of Farmington, New Mexico. The trial court granted summary judgment as to the two police chiefs, and the plaintiff appealed.[130]

McClelland claimed that the police chiefs had breached their duty to adequately train and supervise the officers within their control. In an opinion written by Judge Logan, the Tenth Circuit court recognized that a breach of duty could form the basis of a section 1983 action provided that there is an affirmative link between the omission or act of the official charged and the misconduct of subordinates which precipitated the complaint. The appellate court noted that, at trial, there had been no disputed issues of fact regarding the training of the offending police officers,[131] but there were issues of fact concerning the performance of the defendant police chiefs in supervising their subordinates.[132] The judgment of the district court was reversed, and the case was remanded to the trial court for further proceedings on the issue of supervision.[133]

In *Serna v. Manzano*,[134] two deputy sheriffs filed a section 1983 civil rights action against their employer, the sheriff, claiming that he had discharged them in retaliation for the exercise of their first and fourteenth

126. *Id.* at 1380.
127. *Id.*
128. *Id.* at 1380-82.
129. 610 F.2d 693 (10th Cir. 1979).
130. *Id.* at 695. The three other defendants, the arresting officers, reached a settlement with the plaintiff.
131. Both defendant police chiefs presented evidence demonstrating that the training afforded the arresting officers was proper. This evidence was not contested by the plaintiff. *Id.* at 697.
132. *Id.*
133. *Id.* at 698.
134. 616 F.2d 1165 (10th Cir. 1980).

amendment rights to engage in political activities.[135] The Tenth Circuit court affirmed the district court's finding that the discharge was proper. The court of appeals reasoned that the dismissal was not based on the political behavior of the deputies, but rather it was grounded upon the fact that the accompanying activities[136] had disrupted the efficient operation of the sheriff's office.[137]

D. *Effect of State Law on Section 1983 Actions*

A Wyoming school teacher, seeking an award of damages under section 1983, was barred by Wyoming's two year statute of limitations.[138] In *Spiegel v. School District No. 1.*,[139] the plaintiff alleged that the statute of limitations was inapplicable because: 1) his claim was for a penalty, and the statute created an express exception for penalty or forfeiture actions; 2) his action was not based on a federal statute; and 3) the two year period had not run because his action was originally commenced in state court within the two year period, which tolled the running of the state statute of limitations.[140]

In an opinion written by Judge McKay, the Tenth Circuit court briefly considered and then dismissed the plaintiff's first two assertions. The appeals court found that the action was indeed based on a federal statute, section 1983. Judge McKay further explained that a claim for punitive damages does not transform a civil suit into a penalty claim. The court of appeals also rejected plaintiff's claim that his action in state court tolled the running of the statute. The plaintiff had argued that the statute should toll because he was required by law to exhaust state remedies prior to bringing the section 1983 action.

Relying on two Supreme Court decisions, *McNeese v. Board of Education*[141] and *Monroe v. Pape*,[142] the Tenth Circuit court reasoned that because section 1983 actions supplement the remedies available under state law, a plaintiff is not required to exhaust all possible state remedies prior to bring-

135. Deputy Sturdevant had decided to challenge Sheriff Manzano in the next election, and Deputy Serna was acting as Sturdevant's campaign manager. *Id.* at 1166.

136. *Id.* The deputies had taped conversations which occurred in the sheriff's office for use in the political campaign. Other employees were aware of the taping which created an atmosphere of tension and distrust in the office.

137. The Tenth Circuit court applied the balancing test enunciated by the Supreme Court in Pickering v. Board of Educ., 391 U.S. 563 (1968). The appeals court weighed the right of a public employee to freedom of expression in matters of public concern against the right of the state to supervise its employees so as to provide efficient public service.

138. 2 WYO. STAT. ANN. § 1-3-115 (1977) provides that "[a]ll actions upon a liability created by a federal statute, other than a forfeiture or penalty, for which no period of limitations is provided in such statute, shall be commenced within two (2) years after the cause of action has accrued."

139. 600 F.2d 264 (10th Cir. 1979).

140. Spiegel had successfully challenged his discharge in a state administrative proceeding which was affirmed by the Wyoming Supreme Court. The plaintiff was reinstated to his former position and he was in federal court only to seek damages under 40 U.S.C. § 1983 and 28 U.S.C. § 1331(a). *Id.* at 265.

141. 373 U.S. 668 (1963).

142. 365 U.S. 167 (1961), *overruled on other grounds*, Monell v. Department of Social Servs., 436 U.S. 658 (1978).

ing the federal action.[143] The court of appeals recognized that the *McNeese* and *Monroe* decisions were limited to some extent by *Huffman v. Pursue, Ltd.*,[144] a case wherein the Supreme Court expressed concern for the comity principle. Judge McKay stated, however, that in this case the court need not determine the applicability of the *Huffman* rule because Spiegel did not bring his federal action until after the state proceedings were terminated.[145] *Huffman* bars a federal 1983 action only where there is a pending state proceeding which concerns the same matter that is the subject of the federal action.

The reasoning of the court avoided the issue presented. Spiegel argued that if he had brought his section 1983 action while the state proceedings were pending, his action would have been barred by *Huffman*. Yet, by waiting until the state proceedings terminated, Spiegel's suit was barred by the statute of limitations. The court refused to decide the hypothetical situation, stating that Spiegel should have attempted to bring the federal action earlier which would have allowed the court to decide the applicability of the *Huffman* rule.[146]

In *Clappier v. Flynn*,[147] the district court awarded the plaintiff damages under two theories of liability, one theory based upon common law negligence, the other theory based upon a deprivation of rights under section 1983. The Tenth Circuit court disallowed the double recovery because the legal theories alleged were merely alternative theories providing for identical relief.[148]

The plaintiff in the *Clappier* case had been arrested and placed in the Laramie County jail in Wyoming, where he was mistreated by the other prisoners.[149] Clappier brought suit against the local sheriff, alleging common law negligence for the sheriff's failure to operate the jail in accordance with the Wyoming Constitution and statutes.[150] Plaintiff's second claim, based on section 1983, alleged that the sheriff was guilty of cruel and unusual treatment in violation of the eighth amendment.[151] The trial court submitted two verdict forms to the jury, authorizing recovery on each of the claims.

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143. 600 F.2d at 266.

144. 420 U.S. 592 (1975). The *Huffman* Court required claimants to exhaust previously initiated state proceedings prior to bringing a section 1983 action. *See also* Juidice v. Vail, 430 U.S. 327 (1977); Trainor v. Hernandez, 431 U.S. 434 (1977); Younger v. Harris, 401 U.S. 37 (1971).

145. 600 F.2d at 267.

146. *Id.* at 267 n.7.

147. 605 F.2d 519 (10th Cir. 1979).

148. *Id.* at 529. *See also* Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963).

149. Clappier was arrested on the evening of May 13, 1975, and it was not until May 16, 1975, that he was brought from his cell for photographing and fingerprinting. During the period between May 13 and May 16, he suffered repeated beatings and rapes inflicted by other prisoners. Clappier was released on May 16, after the suspension of his $25.00 fine for breach of the peace. He was taken to Fitzsimmons Army Hospital in Denver where he remained for over four weeks receiving treatment for his injuries, which included a broken jaw. 605 F.2d at 522-24.

150. *Id.* at 524. Since Clappier was a resident of Minnesota, federal jurisdiction was based on diversity of citizenship. His claim for relief was $75,000.

151. *Id.* at 524-25.

While the Tenth Circuit had previously decided,[152] and reaffirmed, that double recovery, for both negligence and constitutional torts, could not be permitted, the more difficult problem presented by this case was how the appellate court should amend the trial court's jury instructions. Wyoming follows the comparative negligence doctrine[153] in determining the amount of a defendant's liability whereas comparative negligence is not to be considered in section 1983 actions. The Tenth Circuit court recommended that special interrogatories be submitted to the jury. If the jury should find the defendant liable solely on the negligence claim, then the award should be reduced in proportion to the plaintiff's contributory negligence. If the liability should be based solely on the section 1983 claim, then the full amount of the assessed damages should be awarded to the plaintiff regardless of the plaintiff's contributory negligence. Finally, if liability was found to be based on both theories, the section 1983 action would prevail, and the plaintiff would receive the total award of damages.[154]

The court of appeals reversed the district court's decision concerning the degree of proof required to establish a section 1983 violation. The trial court had instructed the jury that the test of whether the plaintiff suffered cruel and unusual punishment in violation of the eighth amendment was "whether the assault, as determined by you, is sufficiently severe in the circumstances to shock the conscience of a reasonable person."[155] The Tenth Circuit court held that the proper instruction for a jury considering a claim of cruel and unusual punishment, where there is an act of omission, is that there must be a showing of "exceptional circumstances and conduct so grossly incompetent, inadequate or excessive as to shock the conscience or to be intolerable to basic fairness."[156]

III. INDIAN RIGHTS

A. *Preferential Treatment Is Not Reverse Discrimination*

In *Livingston v. Ewing*,[157] the Tenth Circuit Court of Appeals held that a New Mexico policy which permitted Indians to display and sell arts and crafts on the grounds of designated public buildings, but which prohibited non-Indians from doing the same, was constitutionally valid. The plaintiffs, non-Indians seeking to sell jewelry in the restricted area, challenged a policy of the Board of Regents of the New Mexico Museum at Sante Fe[158] and a resolution of the city of Sante Fe[159] which authorized the exclusionary practices.

152. Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963).

153. Defendant had charged that Clappier was negligent for failing to report his beatings to the authorities at the jail. 605 F.2d at 524.

154. *Id.* at 530.

155. *Id.* at 533.

156. *Id. See also* Dewell v. Lawson, 489 F.2d 877 (10th Cir. 1974).

157. 601 F.2d 1110 (10th Cir. 1979).

158. *Id.* at 1111. The state policy allowed the area under the museum portal to be used for merchandise display for arts and crafts handmade by Indians.

159. *Id.* at 1111-12. The city resolution prohibited sales by persons other than Indians within 50 feet of any established business which sold Indian handcrafted jewelry.

The aggrieved merchants' claim was based on the equal protection clause of the fourteenth amendment. The New Mexico officials, and the intervening Indians, responded that there was a rational basis for the preferential treatment. Defendants noted that the state and city officials knew of the unique historical and cultural aspects of the city and of the Indian heritage. In affirming the district court, the Tenth Circuit court found that the classification was permissible under the preferential treatment of Indians section of the Civil Rights Act of 1964.[160] The court of appeals concluded that because the business area was "on or near an Indian reservation" within the meaning of the statute, the state action giving preferential treatment to Indians was lawful.[161]

B. *Tribal Sovereignty*

In *Joe v. Marcum*,[162] the Tenth Circuit court held that the Navajo Indian Tribe is a sovereign entity possessing the right of self-government, including the right to prohibit garnishment of Indians who live and work on reservations. The wages of Tom Joe, a Navajo living and working on a reservation in New Mexico, were garnished because of Joe's failure to repay a loan from the United States Life Credit Corporation.[163] A writ of garnishment, seeking twenty-five percent of Joe's weekly salary, was served on Joe's employer.

Joe sought declaratory and injunctive relief in the United States District Court for the District of New Mexico claiming that the local court lacked the jurisdictional authority to garnish Indian wages and that the garnishment was a deprivation of property without due process of law.[164] Writing for the Tenth Circuit court, Judge McWilliams noted that the Navajo Tribe has an extensive system of self-government, including a judicial system consisting of district courts, a court of appeals, and a supreme court.[165] The judge recognized that the tribal code provides a means for enforcing judgments, a means other than garnishment. As garnishment is a statutory remedy permitted in some jurisdictions and prohibited in others, the appeals court reasoned that the Navajo Tribe, like any other independent state, had the right to accept or reject garnishment as a post-judgment remedy.[166]

160. 42 U.S.C. § 2000e-2(i) (1976) provides that nothing in the 1964 Civil Rights Act should be seen as applying to any business or enterprise on or near an Indian reservation because of preferential treatment given to a person because he or she is an Indian living on or near a reservation.

161. 601 F.2d at 1115-16. The appeals court also found that claimants had failed to establish reverse discrimination within the meaning of *Bakke*, 438 U.S. 265 (1978). *Id.*

162. 621 F.2d 358 (10th Cir. 1980).

163. *Id.* at 360.

164. On appeal, the defendant claimed that the federal court did not have jurisdiction, but the Tenth Circuit court disagreed, finding that Joe had several bases for invoking federal jurisdiction, including 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1343, 42 U.S.C. § 1983, the commerce clause and the treaty clause. *Id.* at 361.

165. *Id.*

166. *Id.* at 361-62.

IV. CASE DIGESTS

A. *Laetrile Availability*

The case of *Rutherford v. United States*[167] appeared, for the third time,[168] before the Tenth Circuit Court of Appeals this term, after a reversal and remand by the Supreme Court.[169] The final issues before the Tenth Circuit court were: 1) whether terminally ill cancer patients have a constitutional right to privacy which allows them to take whatever treatment they desire, regardless of the Food and Drug Administration (FDA) classification; 2) whether the proponents of laetrile had met the necessary premarketing procedures of the FDA; and 3) whether laetrile comes under the grandfather provisions of the FDA legislation.[170] Chief Judge Seth, writing for the appeals court, answered each of these questions in the negative, apparently finalizing the protracted litigation.[171]

B. *The Commerce Clause*

The State of Oklahoma, in its second attempt,[172] failed to convince the Tenth Circuit Court of Appeals to uphold a section of the Oklahoma Waste Disposal Act[173] in *Hardage v. Atkins*.[174] The Oklahoma law prohibited the shipment of controlled industrial waste into Oklahoma unless the state of origin had standards for the disposal of industrial waste which were substantially similar to those of Oklahoma. A further requirement was that the state of origin must have entered into a reciprocity agreement with Oklahoma.

The Tenth Circuit Court of Appeals previously had held that the mandatory reciprocity clause of the statute violated the commerce clause.[175] On subsequent appeal, Oklahoma argued that the provision requiring the state of origin to have standards similar to those of Oklahoma differed from the mandatory reciprocity requirement and should, therefore, be held constitutional. Judge Doyle, writing for the court, disagreed. Reasoning that

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167. 616 F.2d 455 (10th Cir.), *cert. denied*, 101 S. Ct. 336 (1980).

168. *See* Rutherford v. United States, 582 F.2d 1234 (10th Cir. 1978); Rutherford v. United States, 542 F.2d 1137 (10th Cir. 1976).

169. United States v. Rutherford, 442 U.S. 544 (1979). For a discussion of the Supreme Court decision see *United States Supreme Court Review of Tenth Circuit Decisions, Sixth Annual Tenth Circuit Survey*, 57 DEN. L.J. 337, 341-43 (1980).

170. 21 U.S.C. § 321(p)(1) (1976).

171. 616 F.2d at 457. The case was remanded to the district court without directions or any indication as to what issues remained to be decided.

172. Oklahoma originally sought to have the statute validated in Hardage v. Atkins, 582 F.2d 1264 (10th Cir. 1978).

173. OKLA. STAT. tit. 63, § 2764 (Supp. 1978) states:

> The [Controlled Industrial Waste Management Section] shall disapprove any plan which entails the shipping of controlled industrial waste into the State of Oklahoma, unless the state of origin has enacted substantially similar standards for controlled industrial waste disposal as, and has entered into a reciprocity agreement with, the State of Oklahoma. The determination as to whether or not the state of origin has substantially similar standards for controlled industrial waste disposal is to be made by the Director of the [Controlled Industrial Waste Management Section], and all reciprocity agreements must be approved and signed by the Governor of Oklahoma.

174. 619 F.2d 871 (10th Cir. 1980).

175. Hardage v. Atkins, 582 F.2d 1264 (10th Cir. 1978).

Oklahoma may not force other states to enact legislation as a means of avoiding economic isolation, the judge found that both statutory provisions imposed a mandatory scheme in violation of the commerce clause.[176]

C. *Abortion Funding*

A Utah statute,[177] which permitted public assistance funds to be used for abortions only if the life of the mother was endangered, was ruled unconstitutional in *D.R. v. Mitchell*.[178] The trial court found that the Utah statute was constitutional, reasoning that the law merely articulated the standard for determining whether an abortion was therapeutic or nontherapeutic.[179] The trial court noted that such classifications had been upheld in several Supreme Court cases.[180] The Tenth Circuit Court of Appeals, in an opinion written by Chief Judge Seth, disagreed with the district court, stating that "therapeutic" must be equated with "medically necessary" and that there may be any number of circumstances which, although not life endangering, may be medically necessary to preserve the health of the mother.[181]

In view of the recent Supreme Court decision of *Harris v. McCrae*,[182] however, the *Mitchell* decision is of questionable precedential value. In the *Harris* decision, the Supreme Court upheld the federal Hyde Amendment,[183] which is similar in language to the Utah statute, except that the Hyde Amendment permits federal funds to be used for abortions in cases of rape as well as when the life of the mother is endangered. The Supreme Court held also that states are not required by the constitution to provide public funding for abortions.[184]

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176. 619 F.2d at 873.

177. UTAH CODE ANN. § 55-15a-3 (Supp. 1979) provides:

> The department shall not provide any public assistance for medical, hospital or other medical expenditures or medical services to otherwise eligible persons where the purpose of such assistance is for the performance of an abortion, unless the life of the mother would be endangered if an abortion is not performed.

178. 617 F.2d 203 (10th Cir. 1980).

179. 456 F. Supp. 609 (D. Utah 1978).

180. Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977); Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

181. 617 F.2d at 205.

182. 100 S. Ct. 2671 (1980).

183. Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979). *See also* Pub. L. No. 96-86, § 118, 93 Stat. 662 (1979).

184. 100 S. Ct. at 2685.