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Overview

Five decisions rendered by the Tenth Circuit during the 1986-1987 survey period in the area of civil rights addressed a number of important issues arising from the context of employment discrimination. In deciding these rather diverse issues, the Tenth Circuit Court of Appeals generally relied on cautious, conservative interpretations of statutory, regulatory, and case law resulting in largely predictable conclusions.

Sex discrimination was examined in two distinct contexts: "no-spouse" rules under Title VII of the Civil Rights Act of 1964[1] (Title VII) and parental or marital status under Title IX of the Education Amendments of 1972[2] (Title IX). The court affirmed a ruling of no discrimination based on sex under a company "no-spouse" rule in *Thomas v. Metroflight, Inc.*[3] In so ruling, the court reviewed the efficacy of statistical analysis of the disparate impact standard. The dismissal of a claim of sex discrimination arising from a termination based in part on the employee's parental or marital status brought under Title IX was affirmed under the principal of issue preclusion in *Mabry v. State Board of Community Colleges and Occupational Education*.[4] In addition, the court established the application of Title VII substantive standards to Title IX employment discrimination claims.

Age discrimination was examined in the application of mitigation principles to the Age Discrimination in Employment Act[5] (ADEA) in *Giandonato v. Sybron Corporation*.[6] In that case, an employee's rejection of reinstatement offers made by the employer was held to end the accrual of back pay damages.

Freedom of speech under the first amendment was considered in *Wren v. Spurlock*[7] in which the court, employing a classic balancing of interests, affirmed a damages award to a public school teacher arising from a violation of her first amendment rights. In another first amendment case, the court reversed a damages award to a county employee in *Ewers v. Board of County Commissioners of the County of Curry*.[8] Applying basic due process principles, the *Ewers* court also reversed damages based on deprivation of a liberty interest in reputation.

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1. 42 U.S.C. §§ 2000e to 2000e-17 (1982).
2. 20 U.S.C. §§ 1681-1686 (1982).
3. 814 F.2d 1506 (10th Cir. 1987); *see infra* notes 19-37 and accompanying text.
4. 813 F.2d 311 (10th Cir.), *cert. denied*, 108 S. Ct. 148 (1987); *see infra* notes 38-69 and accompanying text.
5. 29 U.S.C. §§ 621-634 (1982).
6. 804 F.2d 120 (10th Cir. 1986); *see infra* notes 70-98 and accompanying text.
7. 798 F.2d 1313 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 1287 (1987); *see infra* notes 99-137 and accompanying text.
8. 802 F.2d 1242 (10th Cir. 1986), *reh'g granted in part*, 813 F.2d 1583 (1987), *cert. denied*, 56 U.S.L.W. 3460 (1988); *see infra* notes 138-72 and accompanying text.

I. SEX DISCRIMINATION

A. *No-Spouse Rules*

1. Background

No-spouse rules are a common means by which employers seek to avoid nepotism in their employment practices. Typically, no-spouse rules prohibit hiring spouses of employees or retaining both spouses after co-workers have married. Most no-spouse rules are facially neutral, often allowing co-workers who marry to choose who will quit or terminating the spouse with less seniority in the absence of a choice.[9] No-spouse rules exist throughout the employment spectrum, affecting blue-collar, white-collar, and professional employees alike, as well as all sizes of employers. Several reasons are given for the necessity of no-spouse rules: (1) spousal problems are brought into the workplace; (2) spousal morale is affected when one spouse is dissatisfied; (3) fairness is questioned when one spouse supervises the other; (4) spouses may be favored during lay-offs; (5) scheduling of shifts, vacations, and leaves creates problems; (6) discipline of a spouse may create problems; (7) tardiness and absenteeism may be compounded by spouses commuting together and; (8) spouses may disregard the safety of others in emergencies.[10] With the reasonable exception of supervisory situations, commentators question the validity of these reasons in the face of discrimination based on marriage which prevents the employment of qualified workers.[11]

Despite their facial neutrality, no-spouse rules frequently discriminate against women.[12] Challenges to no-spouse rules have generally been brought under Title VII of the Civil Rights Act of 1964[13] (Title VII), which prohibits discrimination based on sex in employment.[14] Although the United States Supreme Court has yet to consider no-spouse rules, the circuit courts have encountered no-spouse rules in a

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9. Wexler, *Husbands and Wives: The Uneasy Care for Antinepotism Rules*, 62 B.U.L. REV. 75 (1982); Comment, *(Mrs.) Alice Doesn't Work Here Anymore: No-Spouse Rules and the American Working Woman*, 29 UCLA L. REV. 199 (1981).

10. Kovarsky and Hauck, *The No-Spouse Rule, Title VII, and Arbitration*, 32 LAB. L.J. 366, 368-69 (1981).

11. Bierman and Fisher, *Antinepotism Rules Applied to Spouses: Business and Legal Viewpoints*, 35 LAB. L.J. 634, 636 (1984); Kovarsky and Hauck, *supra* note 10, at 368.

12. Wexler, *supra* note 9, at 92; Comment, *supra* note 9, at 202; Kovarsky and Hauck, *supra* note 10, at 369; *see also* Yuhas v. Libby-Owens Ford Co., 562 F.2d 496, 498 (7th Cir. 1977) ("substantial discriminatory impact" established when 71 of 74 applicants excluded by no-spouse hire rule were women), *cert. denied*, 435 U.S. 934 (1978); EEOC Dec. 75-239, EEOC Dec. 1983 (CCH), Par. 6492, at 4260-61 (March 2, 1976) (discrimination established where 65 of 66 women applicants were rejected because of no-spouse rule); World Airways, 74-2 Lab. Arb. Awards (CCH) Par. 8655, at 5471 (1975) (in all cases where employer applied its no-spouse rule, except present case, the women had resigned).

13. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

14. 42 U.S.C. § 2000e-(2)(a) (1982) provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin. . . .

handful of cases. In *Harper v. Trans World Airlines*,[15] the Eighth Circuit ruled that the plaintiff had insufficient proof to establish discrimination under a no-spouse rule where four out of five applications of the rule resulted in job losses to women. However, in *Yuhas v. Libby-Owens Ford Co.*,[16] the Seventh Circuit held that "substantial discriminatory impact" was established where seventy-one out of seventy-four applicants excluded by a no-spouse rule were women.

Discrimination under Title VII can be proved by a showing of either disparate treatment, where an employer intentionally treats employees or applicants differently, or by a showing of disparate impact, where facially neutral employment practices result in adverse effects. The United States Supreme Court ruled in *Griggs v. Duke Power Co.*[17] that a showing of disparate impact alone was sufficient to establish a prima facie case of discrimination. Once the plaintiff has established a prima facie case, the burden of proof shifts to the employer to show that the employment regulation or practice in question is justified by business necessity.[18]

2. Disparate Impact: *Thomas v. Metroflight, Inc.*

In a case of first impression, the Tenth Circuit held in *Thomas v. Metroflight, Inc.*,[19] the plaintiff had provided insufficient evidence to establish prima facie sex discrimination under Metroflight's no-spouse rule. The holding demonstrates the difficulty of proving the discriminatory nature of no-spouse rules, particularly in small business settings.

Metroflight, Inc. is a small commercial airline with about 500 employees. Thomas was a secretary at Metroflight working twenty-five percent in the flight operations department and seventy-five percent in the maintenance department when she married a Metroflight pilot working in flight operations. Metroflight's no-spouse rule prohibits spouses from working in the same department and allows affected employees to choose which spouse will quit. If no choice is made, Metroflight then fires the spouse with less seniority. Neither Thomas nor her husband quit, so Metroflight fired Thomas since she had less seniority.[20] Prior to Thomas' firing, co-workers at Metroflight had married eight other times. In seven instances, the no-spouse rule was not violated because the employees worked in different departments or the company accommodated them by either allowing one to transfer departments or simply ignoring enforcement. In the remaining instance, the female employee was fired.[21]

15. 525 F.2d 409 (8th Cir. 1975).
16. 562 F.2d 496, 498 (7th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978).
17. 401 U.S. 424 (1971).
18. International Bd. of Teamsters v. United States, 431 U.S. 324, 335-36 n. 15 (1977).
19. 814 F.2d 1506 (10th Cir. 1987).
20. *Id.* at 1507-08.
21. *Id.*

a. *Analysis*

Since the challenged practices or regulations characterizing most no-spouse rules are facially neutral, disparate impact must be demonstrated by statistics.[22] In the context of a large business or institution, a no-spouse rule may be shown to be discriminatory simply by examining the actual number of women versus men affected by application of the rule.[23] However, no-spouse rules may be infrequently applied by smaller businesses, resulting in statistically insignificant numbers of employees affected.[24] This was precisely the circumstances under which *Thomas* was brought. In such a situation, the plaintiff must rely on other forms of statistical proof to establish a prima facie case. For instance, the plaintiff can compare the number of employees affected to a larger relevant population such as the analogous population of the surrounding metropolitan area.[25] In *Thomas*, since the sample of two women fired in two applications of the no-spouse rule was too small to be statistically significant, the plaintiff employed a statistics expert to analyze potential applications of the no-spouse rule to the entire employee population of Metroflight.[26] Despite the expert's testimony, the court ruled that Thomas had only presented evidence sufficient to prove that salary or seniority were controlling factors in a couple's decision as to who would quit, but that Thomas had not established that salary or seniority were in fact the predominantly controlling factors.[27]

In light of the United States Supreme Court decision in *Dothard v. Rawlinson*[28] and the Eighth Circuit's decision in *Harper v. Trans World Airlines, Inc.*,[29] it is unfortunate that the Tenth Circuit demanded a higher standard than the simple existence of disparate impact. The Supreme Court first applied the *Griggs* disparate impact analysis to sex discrimination in *Dothard*,[30] holding that the disparate impact of a height/weight regulation on the general female population was sufficient to show discriminatory impact.[31] Addressing a no-spouse rule, the *Harper* court required that the plaintiff prove disparate income potentials to establish disparate impact.[32] The *Thomas* court, however, additionally demanded that the plaintiff prove that salary or seniority actually controlled the decisions of affected employees. The bottom line of a no-

22. *See generally* Wexler, *supra* note 9, at 98-110; Comment, *supra* note 9, at 217-24.
23. *See* Yuhas v. Libby-Owens Ford Co., 562 F.2d 496, 497 (7th Cir. 1977); EEOC Dec. 75-239; EEOC Dec. 1983, at 4260.
24. *See* Harper v. Trans World Airlines, Inc., 525 F.2d 409, 412 (8th Cir. 1975).
25. *See* Wexler, *supra* note 9, at 101-02; Comment, *supra* note 9, at 222-24.
26. 814 F.2d at 1510. Thomas established statistically that considering all possible marriages between employees in the same departments, more women than men would terminate on the basis of preserving the higher salary and seniority. Based on a universe of 3687 possible marriages, women had lower salaries in 62.1% and less seniority in 52.4% of the possibilities.
27. *Id.* at 1510-11.
28. 433 U.S. 321 (1977).
29. 525 F.2d 409 (8th Cir. 1975).
30. 433 U.S. at 328.
31. 525 F.2d at 413.
32. *Id.*

spouse rule is the criteria by which one spouse is terminated by the employer. In the instant case, the deciding factor was lower seniority. Thomas made a successful showing that a significantly higher number of women had lower seniority in the universe of possible interdepartmental marriages, thus establishing potential disparate impact.[33] That showing should have been sufficient for a prima facie case of discrimination under the standard of *Griggs* and *Dothard*.

b. *Implications*

The decision in *Thomas* is a clear example of the difficulty plaintiffs will continue to encounter when trying to demonstrate the disparate impact of no-spouse rules, particularly in small business settings. This is unfortunate because no-spouse rules not only discriminate in their own right against women, but also tend to perpetuate other forms of sexual inequality as well. Where couples choose which spouse will terminate, the choice will most often be the woman because men tend to have higher seniority, higher salaries, and better advancement potential, all of which would be considered significant factors.[34] Also, many couples will choose for the woman to terminate regardless of their relative status because they prefer the husband to support the family.[35] Thus, by denying women the chance to advance their employment status, no-spouse rules tend to reinforce the stereotypical roles of women as unequal in the working place.

The court claimed it affirmed on the issue "reluctantly because we suspect . . . that 'no-spouse' rules in practice often result in discrimination against women . . . . "[36] This observation was perhaps a veiled implication that a legislative solution would be a superior method of dealing with no-spouse rules, particularly in view of the small business context. An amendment to Title VII proscribing no-spouse rules by prohibiting discrimination based on marital status is one viable solution which would still allow employers to control supervisory circumstances.[37] However, until such legislation becomes reality, women discriminated against under no-spouse rules will bear difficult burdens of statistical proof when seeking judicial relief in the Tenth Circuit and elsewhere.

B. *Title IX*

1. Background

Title IX of the Education Amendments of 1972[38] (Title IX) was en-

33. 814 F.2d at 1510 n. 4. Although the court disputed "whether a statistically significant disparate impact is in all cases legally significant," it conceded that a showing of 52.4% women having lower seniority was statistically significant under Hazelwood School Dist. v. United States, 433 U.S. 299, 308 n. 14 (1977).

34. Comment, *supra* note 9, at 224.

35. *Id.*

36. 814 F.2d at 1509.

37. *See, e.g.*, Comment, *supra* note 9, at 237.

38. 20 U.S.C. §§ 1681-1686 (1982).

acted for the purpose of eliminating discrimination on the basis of sex in educational institutions receiving financial assistance from the federal government.[39] It was patterned after Title VI of the Civil Rights Act of 1964[40] (Title VI), which prohibits discrimination on the basis of race, color, religion, and national origin in programs receiving federal funding. Both Title VI and Title IX are enforced through the ultimate sanction of funding termination.[41] Under Title IX, however, any agency providing federal financial assistance to an educational institution is also authorized to promulgate regulations designed to insure adherence to Title IX's non-discrimination goals.[42] Pursuant to Title IX's authorization of such regulatory power, the Department of Education (ED) in 1975 issued regulations governing the operation of federally funded educational institutions.[43] Included were regulations which specifically addressed employment discrimination, an area not expressly provided for in the implementing legislation.[44]

Six United States courts of appeals subsequently handed down conflicting decisions on the validity of the ED's Title IX employment regulations.[45] The Second Circuit alone ruled that the ED's regulations were valid as promulgated and within the scope of Title IX in *North Haven Board of Education v. Hufstedler*.[46] In order to resolve the conflict among the circuits, the United States Supreme Court granted certiorari and ruled that the ED does have authority to regulate employment and pro-

39. 20 U.S.C. § 1681(a) (1982) provides in pertinent part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ."

40. 42 U.S.C. § 2000d (1982).

41. 42 U.S.C. §§ 2000d to 2000d-4 (1981); 20 U.S.C. § 1682 (1982).

42. 20 U.S.C. § 1682 (1982).

43. The regulations were actually issued by the Department of Health, Education and Welfare (HEW). However, in 1979, the Department of Education (ED) assumed the functions of HEW relating to Title IX. 20 U.S.C. § 3441(a)(3) (1982).

44. *Contra* Title VI, which expressly excludes employment from its coverage. 42 U.S.C. §§ 2000d to 2000d-4 (1982). For text of the regulations relevant to the instant case, *see infra* note 56 and accompanying text.

45. Four of the federal courts of appeals ruled that employment regulation was not within the scope of Title IX. *See* Seattle Univ. v. United States Dept. of Health, Educ. and Welfare, 621 F.2d 992 (9th Cir. 1980) (gender discrimination in salaries paid to faculty members in School of Nursing), *vacated sub. nom.*, Bell v. Dougherty County School Sys., 456 U.S. 986 (1982); Romeo Community Schools v. United States Dept. of Health, Educ. and Welfare, 600 F.2d 581 (6th Cir.) (school refuses to alter maternity leave policy to conform to ED's regulations), *cert. denied* 444 U.S. 972 (1979); Junior College Dist. v. Califano, 597 F.2d 119 (8th Cir.) (discrimination in salaries), *cert. denied*, 444 U.S. 972 (1979); Islesboro School Committee v. Califano, 593 F.2d 424 (lst Cir.) (pregnancy not treated in same manner as other temporary disabilities by school's leave of absence policy), *cert. denied*, 444 U.S. 972 (1979). The Fifth Circuit ruled that although employment could be regulated under Title IX, ED's regulations were invalid because they did not limit the regulated employment to positions directly funded by federal monies. *See* Dougherty County School Sys. v. Harris, 622 F.2d 735 (5th Cir. 1980) (salary supplement paid to industrial arts teachers, but not to home economics teachers), *vacated sub. nom.*, Bell v. Dougherty County School Sys., 456 U.S. 986 (1982).

46. 629 F.2d 773 (2d Cir. 1980), *aff'd sub. nom.*, North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982). Two Connecticut school systems challenged ED's regulatory authority in *North Haven*. Alleged discrimination related to maternity leave policy, job assignments, working conditions, and renewal of employment contracts.

hibit discrimination based on sex by educational institutions receiving federal funding under Title IX.[47]

2. Interaction of Title IX and Title VII: *Mabry v. State Board of Community Colleges and Occupational Education*

The Tenth Circuit held in *Mabry*[48] that a claim of discrimination based on sex was not actionable under Title IX where brought in addition to a claim under Title VII which was unsuccessful at the trial level.[49] The holding ultimately strengthens and clarifies Title IX's application to employment.[50]

The plaintiff, Patricia Mabry, was employed as a physical education instructor and coach at Trinidad State Junior College (Trinidad) from 1974 to 1982. She was terminated from her position at Trinidad due to a reduction in force necessitated by declining enrollment at the college. Two other instructors in the department, both male and with greater seniority than Mabry, were retained. The President of Trinidad, Thomas Sullivan, conceded that one factor in his decision to terminate Mabry was that the other two instructors were married and had families.[51] After exhausting all administrative remedies available to her, Mabry brought suit under Title VII, Title IX, and 42 U.S.C. § 1983 against Sullivan, the State Board of Community Colleges and Occupational Education, and its individual members. She sought damages, reinstatement with back pay and benefits, attorney's fees, and costs.[52] On defendants' motion for partial summary judgment, the district court dismissed the Title IX and § 1983 claims on the grounds that the areas in which Mabry taught were not federally funded programs within the meaning of Title IX, and that the sufficiency of remedies under Title IX precluded suit under § 1983.[53] Subsequently, in deciding the Title VII claim, the district court found that Mabry's termination was not based on discriminatory consideration of her sex, regardless of any consideration given to marital or familial status. Mabry chose to appeal only the dismissal of the Title IX claim.[54]

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47. North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982). For discussion of *North Haven*, *see* Note, *Title IX Applies to Employees*, 5 CAMPBELL L. REV. 249 (1982); Comment, *Title IV as a Tool for Eliminating Gender-based Employment Discrimination at Educational Institutions*, 14 N.C. CENT. L.J. 215 (1983); Note, *Title IX Proscribes Sex-based Employment Discrimination in Federally Funded Education Programs*, 17 SUFFOLK U.L. REV. 117 (1983); Comment, *"Person" in Title IX of the 1972 Education Amendments Includes Employees of Federally Funded Programs—HEW Regulations to Enforce Title IX are Valid*, 12 U. BALT. L. REV. 548 (1983); Comment, *Title IX and Employment Discrimination: North Haven Board of Education v. Bell*, 17 U. RICH. L. REV. 589 (1983); Comment, *Employment Included in Title IX*, 22 WASHBURN L.J. 131 (1982).

48. 813 F.2d 311 (10th Cir. 1987).

49. *Id.* at 314.

50. *See infra* notes 67-69 and accompanying text.

51. 813 F.2d at 313.

52. *Id.*

53. Mabry v. State Bd. for Community Colleges and Occupational Educ., 597 F. Supp. 1235 (D. Colo. 1984).

54. 813 F.2d at 313.

a. *Analysis*

The Tenth Circuit Court of Appeals, affirming the trial court, based its decision on three primary factors: (1) that the discrimination claim based on marital status was actionable under Title VII; (2) that the regulation under Title IX prohibiting discrimination based on marital status was overbroad; and (3) that the finding of no discrimination under Title VII by the trial court precluded the litigation of the same issue under Title IX. In her appeal on the dismissal of the Title IX claim, Mabry argued that her allegation of discrimination based on marital, familial, or wage earner status was not actionable under Title VII according to an EEOC guideline which stated that such policies were relevant only where discrimination was ultimately based on sex.[55] Mabry then relied on the Title IX regulation relating to marital, familial, parental, or wage earner status to support the viability of her discrimination claim under Title IX. The regulation states:

> (a) General. A recipient shall not apply any policy or take any employment action:
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> (1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex;
>
> (2) Which is based upon whether an employee or applicant for employment is the head of a household or principal wage earner in such employee's or applicant's family unit.[56]

The court rejected her argument, reasoning that subsection (1) treats discrimination based on marital, parental, or family status precisely the same as Title VII because discrimination is ultimately based on sex. Thus, if Mabry based her claim on subsection (1), the claim would necessarily be actionable under Title VII.[57] If, however, Mabry based her claim on subsection (2), it would at first appear that a distinct right of action based solely on head of household or principal wage earner status was available. The court foreclosed this argument, however, by holding that Mabry's interpretation of subsection (2) was overbroad.[58]

In reaching that decision, the court began with the principle that in order for a regulation to be valid, it must be "reasonably related to the enabling legislation."[59] The court then pointed out that Title IX prohibited discrimination on the basis of sex, but that the regulation prohibited conduct that did not necessarily result in sex discrimination.

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55. *Id.* at 314. The guidelines referred to appears at 29 C.F.R. § 1604.4(a) (1986), which states:

> The Commission has determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by Title VII of the Civil Rights Act. It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex.

56. 34 C.F.R. § 106.57 (1986).

57. 813 F.2d at 315.

58. *Id.* at 315-16.

59. *Id.* (quoting Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 369 (1973)).

The court thus concluded that Mabry could not rely on her interpretation of subsection (2) because it imposed a standard broader than that of the enabling statute.[60]

According to the court, then, the only claim available to Mabry under Title IX was that she was discriminated against on the basis of her sex, a claim clearly actionable under Title VII. Since the district court found no sex discrimination under the Title VII claim actually brought by Mabry, she was therefore precluded from raising the identical issue under Title IX by fundamental preclusion principles.[61] In order to come to that conclusion, however, the court stated that the substantive standards used to determine discrimination must be the same under both Title VII and Title IX.[62] The question of applicable substantive standards under Title IX has scarcely been discussed by the courts.[63] The Tenth Circuit reasoned that since Title IX's application to employment essentially duplicates the purpose of Title VII, and since a well-developed body of case law exists concerning Title VII, the substantive standards of Title VII logically apply to Title IX.[64] Thus, the court concluded that "Title IX certainly sweeps no broader than Title VII."[65] Consequently, it held that Mabry was not entitled to an additional opportunity to prove discrimination under Title IX based on the identical facts of her Title VII claim.[66]

b. *Implications*

Discrimination claims brought under Title IX, particularly those involving employment, represent a confusing and evolving area of civil rights law. The Tenth Circuit's decision in *Mabry* provides both clarification and orientation for Title IX claims. Germane to the impact of *Mabry* is the court's adoption of Title VII substantive standards to Title IX claims.[67] At first blush this development appears to thwart the application of Title IX to employment discrimination claims; however, sex discrimination is actually more easily established with the express adoption of Title VII substantive standards. This is so because the plaintiff need only show disparate impact to establish discrimination and need

60. *Id.* at 316.

61. *Id.*

62. *Id.*

63. Although under Title VII discrimination need only be proved by disparate impact, *see supra* notes 17-18 and accompanying text, the Seventh Circuit ruled in Cannon v. University of Chicago, 648 F.2d 1104 (7th Cir.), *cert. denied*, 454 U.S. 1128 (1981), that disparate intent must be shown in a Title IX claim. However, the Supreme Court upheld a showing of disparate impact under Title VI, on which Title IX is patterned, in Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983). Additionally, EEOC regulations state that agencies shall "consider Title VII case law . . . in determining whether a recipient of Federal financial assistance has engaged in an unlawful employment practice." 28 C.F.R. § 42.604 (1986).

64. 813 F.2d at 317.

65. *Id.* at 318.

66. *Id.*

67. *See supra* notes 62-64 and accompanying text.

not show disparate intent.[68] Once discrimination is successfully established, Title IX's powerful sanction of funding termination may be invoked in addition to Title VII's equitable remedies.[69] Thus, by allowing a plaintiff to employ the same substantive standards under both Title VII and Title IX, the *Mabry* decision more effectively discourages employment discrimination based on sex in federally funded educational institutions. Although the plaintiff in *Mabry* did not successfully establish sex discrimination, future plaintiffs will have a more clearly defined task of how to do so and, ultimately, easier access to Title IX's powerful remedies.

II. MITIGATION AND THE ADEA

A. *Background*

The Age Discrimination in Employment Act[70] (ADEA) was adopted by Congress in 1967 for the purpose of eliminating discrimination by employers on the basis of age. Passed only three years after Title VII of the Civil Rights Act of 1964[71] (Title VII), the prohibitory provisions of the ADEA parallel those of Title VII, and the primary goal of both acts is to end discriminatory employment practices.[72] A major difference between the two acts, however, is the way in which the acts are enforced. Whereas Title VII provides only for equitable "relief,"[73] the ADEA provides for "such legal or equitable relief as will effectuate the purposes of this Chapter."[74] Furthermore, the ADEA expressly incorporates the remedies and procedures of the Fair Labor Standards Act of 1938[75]

68. *See supra* notes 17-18 and accompanying text.
69. *See supra* note 41 and accompanying text.
70. 29 U.S.C. §§ 621-634 (1982).
71. 42 U.S.C. §§ 2000e to 2000e-17 (1982).
72. 29 U.S.C. § 623 (1982). In pertinent part, the legislation states:
(a) Employer practices. It shall be unlawful for an employer
(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age;
(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
(3) to reduce the wage rate of any employee in order to comply with this chapter.
73. 42 U.S.C. § 2000e-5(g) (1982).
74. 29 U.S.C. § 626(c)(l) (1982).
75. 29 U.S.C. § 626(b) (1982). In pertinent part the legislation states:
The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, [sections 11(b), 16 and 17 of the Fair Labor Standards Act of 1938] and subsection (c) of this section.
For general discussion of ADEA remedies, *see* Marion, *Legal and Equitable Remedies Under the Age Discrimination in Employment Act*, 45 MD. L. REV. 298 (1986); Nosler and Wing, *Remedies under the Federal Age Discrimination in Employment Act*, 62 DEN. U.L. REV. 469 (1985); Richards, *Monetary Awards for Age Discrimination in Employment*, 30 ARK. L. REV. 305 (1976); Comment, *Coming of Age: Unique and Independent Treatment of the ADEA*, 7 AM. J. TRIAL ADVOC. 583 (1984); Note, *Damage Remedies under the Age Discrimination in Employment Act*, 43 BROOKLYN L. REV. 47 (1976); Comment, *Age Discrimination: Monetary Damages Under the Federal Age Discrimination in Employment Act*, 58 NEB. L. REV. 214 (1979); Comment, *Damages in Age Discrimination Cases—The Need for a Closer Look*, 17 U. RICH. L. REV. 573 (1983). For a discus-

(FLSA).

Although the ADEA officially adopts the FLSA remedies,[76] many courts have chosen to follow Title VII precedent due to the similarities of the non-discrimination goals of the two acts. While this practice causes considerable confusion in some areas, it is not illogical. Since the FLSA primarily addresses problems related to unfair wage and hour practices, its remedial procedures are at times poorly suited to discriminatory practices. Mitigation of damages by the plaintiff is not addressed by either the provisions of the ADEA or the incorporated provisions of the FLSA. Title VII, however, explicitly states that back pay be set off by amounts "earnable with reasonable diligence."[77] Therefore, the courts have been forced to turn to Title VII precedent in considering mitigation issues.[78]

The United States Supreme Court held in *Ford Motor Co. v. Equal Employment Opportunity Commission*[79] (EEOC) that, absent special circumstances, the rejection by the claimant of an employer's unconditional offer of the job previously denied ends the accrual of back pay liability. The Court reasoned that tolling back pay upon such a rejection was in keeping with Title VII's primary goal of ending employment discrimination by encouraging employers to compromise with claimants by making unconditional job offers.[80] Since the ADEA's primary goal is likewise to end discrimination through compromise wherever possible, *Ford* has been the basis for a number of subsequent ADEA decisions.[81]

B. *Title VII Standard of Mitigation*: Giandonato v. Sybron Corporation

Relying on *Ford Motor Co. v. EEOC*, the Tenth Circuit held in *Giandonato v. Sybron Corp.*[82] that the plaintiff's rejection of reinstatement offers made by the employer ended the accrual of back pay damages.[83] By so holding, the Tenth Circuit reinforced the ADEA's primary goal of

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sion of the legislative history of ADEA remedies, *see* Note, *Set-offs Against Back Pay Awards Under the Federal Age Discrimination in Employment Act*, 79 MICH. L. REV. 1113 (1981).

76. The Supreme Court confirmed the adoption of FLSA remedies by the ADEA in Lorillard v. Pons, 434 U.S. 575 (1978), holding that the ADEA provided for a jury trial via its express incorporation of FLSA remedies.

77. 42 U.S.C. § 2000e-5(g) (1982).

78. *See, e.g.*, O'Donnell v. Georgia Osteopathic Hosp., Inc., 748 F.2d 1543 (11th Cir. 1984); Dickerson v. DeLuxe Check Printers, Inc., 703 F.2d 276 (8th Cir. 1983); Cowan v. Standard Brands, Inc., 572 F. Supp. 1576 (N.D. Al. S.D. 1983); Fiedler v. Indianhead Truck Line, 670 F.2d 806 (8th Cir. 1982); EEOC v. Sandia Corp., 639 F.2d 600 (10th Cir. 1980); Coates v. National Cash Register Co., 433 F. Supp. 655 (W.D. Va. 1977); *see also* Note, *Set-Offs Against Back Pay Awards Under the Federal Age Discrimination in Employment Act*, 79 MICH. L. REV. 1113 (1981).

79. 458 U.S. 219, 241 (1982).

80. *Id.* at 228. For criticism of *Ford*, *see* Note, *Ford Motor Company v. EEOC: A Setback for Victims of Discrimination*, 44 U. PITT. L. REV. 707 (1983).

81. *See, e.g.*, Cowan v. Standard Brands, Inc., 572 F. Supp. 1576 (N.D. Al. S.D. 1983) (employee's refusal of reinstatement offer ended accrual of back pay); Dickerson v. DeLuxe Check Printers, Inc., 703 F.2d 276 (8th Cir. 1983) (employer's job offer did not toll accrual of back pay where job not substantially equivalent to job originally sought).

82. 804 F.2d 120 (10th Cir. 1986).

83. *Id.* at 125.

ending discrimination through compromise. As stated in *Ford*, "the victims of job discrimination want jobs, not lawsuits."[84] Thus damages are a secondary remedy intended to compensate victims of discrimination when employers are unwilling to eliminate discriminatory practices.

The plaintiff in *Giandonato* worked as a salesman for Sybron for over fourteen years when, due to a slow period in the industry, Sybron offered Giandonato his choice of early retirement or a three month probation. Giandonato resigned and filed suit under the ADEA complaining he had been harassed and constructively fired by Sybron based on his age.[85] Following Giandonato's resignation, Sybron paid him severance pay, commenced pension benefits, and extended his insurance coverage in order to allow coverage for his terminally ill wife. After the filing of the complaint, Sybron offered to reinstate Giandonato three times, ultimately offering to reinstate him without loss of service time, without a probationary period, under a different supervisor, and without Giandonato's repayment of severance pay.[86] Sybron argued that Giandonato's rejection of their reinstatement offers forfeited his right to back pay under the ruling of *Ford Motor Co. v. EEOC*. Giandonato argued, however, that he was entitled to reject the offers of reinstatement due to special circumstances. The circumstances claimed by Giandonato were that the offers contained uncertainties, his wife was terminally ill, and his supervisor was unsatisfactory.[87] After a jury verdict awarded Giandonato $327,357.00 in damages, the Tenth Circuit of Appeals reversed.

1. Analysis

In deciding *Giandonato*, the Tenth Circuit relied exclusively on Title VII precedent, presumably due to the absence of mitigation provisions in both the ADEA and the FLSA. Furthermore, the court characterized *Ford* as a "mandate" requiring ADEA claimants to minimize damages by accepting reinstatement offers that are "substantially equivalent" to the previous job.[88] It was undisputed that Sybron had made bona fide, unconditional reinstatement offers to Giandonato which were substantially equivalent to his former job and that he had rejected them.

Under the Title VII standard, then, the ultimate issue resolved by the court was whether Giandonato rightfully rejected Sybron's offers based on special circumstances. The court relied on two ADEA cases in holding that Giandonato's circumstances did not comply with the Title VII standard and did not justify his refusal of Sybron's offers.[89] In *Fiedler v. Indianhead Truck Line, Inc.*,[90] the Eighth Circuit held that an employee was not entitled to reject a reinstatement offer because he wanted

84. 458 U.S. at 230.
85. 804 F.2d at 121.
86. *Id.*
87. *Id.* at 122.
88. *Id.* at 124.
89. *Id.*
90. 670 F.2d 806 (8th Cir. 1982).

EEOC investigations to continue, was grieving over the death of his wife, and did not want to give up a new job.[91] Likewise, the South Dakota District Court held in *Cowan v. Standard Brands, Inc.*[92] that an employee was not entitled to refuse an offer because he did not believe it bona fide and his feelings were hurt.[93] The Tenth Circuit further reasoned that since Sybron agreed at Giandonato's request to additional conditions, the negative effect of Giandonato's refusal was "magnified."[94] Significantly, Sybron's offer included no loss of seniority, a condition which the Supreme Court expressly excluded under *Ford*.[95]

2. Implications

Giandonato demonstrates that the Tenth Circuit will apply Title VII standards of mitigation in cases brought under the ADEA. Considering the lack of guidance provided by either the ADEA itself or the FLSA concerning mitigation of damages by plaintiffs, this is the logical course to take; however, an explanation to that effect would have been helpful in clarifying why application of Title VII is necessary in the face of the ADEA's explicit adoption of the FLSA remedies. Although the court correctly applied Title VII, the reliance on *Ford Motor Co. v. EEOC* may prove to be a mixed blessing for victims of age discrimination in the Tenth Circuit. The basic rationale of *Ford* is that Title VII's primary goal of eliminating discrimination is best met by encouraging employers to compromise by offering unconditional reinstatement or employment as often as possible. Damages are considered a secondary remedy applicable only when employers refuse to comply.[96] An analogous application to the ADEA would likewise further the goal of getting and keeping people employed. However, the question is whether plaintiffs who must rely on damages for relief will be fairly compensated under *Ford's* holding that seniority need not be included in a job offer. In situations where a claimant has begun another job before the defendant employer makes an offer of reinstatement not including retroactive seniority, the claimant may be forced to choose between refusing the offer to retain some measure of seniority at the new job thereby cutting off damages from the defendant, and accepting the defendant's offer thereby sacrificing seniority.[97] Particularly because claimants in ADEA cases are more likely to have built up considerable seniority, such sacrifices could be extreme. Finally, allowing employers to make reinstatement offers lacking retroactive seniority could affect the deterrent aspect of the ADEA

91. *Id.* at 808-09.

92. 572 F. Supp 1576 (N.D. Al. 1983).

93. *Id.* at 1581.

94. 804 F.2d at 124-25. Sybron agreed to: fully reinstate Giandonato with no reduction in salary or loss of service; hire a new district manager; make no changes in Giandonato's territory, accounts, or sales quotas except by written agreement; and require no repayment of severance pay Giandonato had received.

95. 458 U.S. at 232.

96. *Id.* at 230.

97. *See* Note, *supra* note 80, at 726-27.

because potential damages to employers are greatly reduced.[98] Thus, employers who chose to take a "wait and see" attitude would not be as effectively discouraged from discriminating against employees on the basis of age.

III. First Amendment in Public Employment

A. *Background*

Public employees are guaranteed freedom of speech under the first amendment of the United States Constitution[99] and its application to the states through the fourteenth amendment.[100] This guarantee was not recognized by the Supreme Court until relatively recently, however. Under the "right-privilege doctrine," the courts formerly considered public employment a privilege that the government could withhold regardless of first amendment rights.[101] In a series of cases beginning with *Pickering v. Board of Education*[102] the United States Supreme Court has defined the application of first amendment rights to public employees.[103] Under *Pickering*, an employee's exercise of the right to speak on issues of public concern could not be the basis of dismissal.[104] The Court also adopted the defamation standard established in *New York Times Co. v. Sullivan*,[105] holding that when an employee made statements with knowledge of their falsity or reckless disregard for their truth or falsity, the adverse action would be upheld.[106] The most pervasive aspect of the Court's holding in *Pickering*, however, was the emphasis on a

98. *Id.* at 719.

99. The first amendment states in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . ." U.S. CONST. amend. I.

100. The fourteenth amendment states:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, § 1.

101. *See* Justice Holme's discussion of the doctrine in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892), and the rejection of the doctrine in Keyishian v. Board of Regents, 385 U.S. 589 (1967). For general discussions of the right-privilege doctrine, *see* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1741-44 (1984).

102. 391 U.S. 563 (1968). In *Pickering*, a public school teacher was dismissed after writing a letter to the editor of the local newspaper criticizing the allocation of school funds and the concealment of information regarding tax revenues by the school board.

103. *See Developments in the Law—Public Employment*, *supra* note 101; Eagle, *First Amendment Protection for Teachers Who Criticize Academic Policy: Biting the Hand that Feeds You*, 68 CHI.[-]KENT L. REV. 229 (1984); Lieberwitz, *Freedom of Speech in Public Sector Employment: The Deconstitutionalization of the Public Sector Workplace*, 19 U.C. DAVIS L. REV. 597 (1986).

104. 391 U.S. at 574.

105. 376 U.S. 254 (1964).

106. 391 U.S. at 574. For discussion of *Pickering*, *see* Recent Decisions, *Constitutional Law: Balancing Test Applied to Teacher's Criticism of School Board*, 35 BROOKLYN L. REV. 270 (1969); Comment, *Free Speech: Dismissal of Teacher for Public Statements*, 53 MINN. L. REV. 864 (1969).

balancing of interests between the employee and the state.[107]

The Supreme Court refined the requirements set forth in *Pickering* in *Mt. Healthy City School District Board of Education v. Doyle*.[108] Since the teacher in *Mt. Healthy* had a controversial record of prior behavior, the Court sought to avoid placing the teacher in a better position simply by virtue of his exercise of first amendment rights. Therefore, the Court held that once the employee has established that the disputed speech was both constitutionally protected and a motivating factor in the employer's action, the burden of proof then shifts to the employer to show that the action would have been taken as a result of other factors regardless of the protected speech.[109] Two years later, the Supreme Court increased the first amendment protection afforded public employees in *Givhan v. Western Line Consolidated School District*[110] by holding that private as well as public communications between employee and employer are protected.[111] In so holding, however, the Court required that when private speech is at issue, the time, place, and manner of its delivery are relevant.[112]

Connick v. Myers[113] represented a significant narrowing of first amendment protection for public employees. In a frequently criticized decision, the Supreme Court strictly construed the meaning of the "matters of public concern" standard announced in *Pickering*.[114] The Court held that a questionnaire about working conditions in the office distributed by a district attorney was not involved with matters of public concern, but was an extension of an internal dispute not entitled to protection under the first amendment.[115] The Court reasoned that the issue of whether an employee's speech was a matter of public concern should be determined as a matter of law by its "content, form and con-

107. 391 U.S. at 568. The Court stated, "[t]he problem in any case is to arrive at 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." The Court noted that the need for confidentiality and the effectiveness of working relationships were two factors which could be considered relative to the state interest. *Id.* at 570 n. 3.

108. 429 U.S. 274 (1977). In *Mt. Healthy* a teacher called a local radio station and divulged information from an administrative memorandum concerning teacher dress and appearance which was then broadcast as a news item. The teacher was subsequently reprimanded and not recommended for rehiring.

109. *Id.* at 285-87. For discussion of *Mt. Healthy*, *see* Lane, *The Effect of Mt. Healthy City School District v. Doyle Upon Public Sector Labor Law: An Employer's Perspective*, 10 J.L. & EDUC. 509 (1981); Wolly, *What Hath Mt. Healthy Wrought?*, 41 OHIO ST. L. J. 385 (1980).

110. 439 U.S. 410 (1979).

111. *Id.* at 415-16.

112. *Id.* at 415 n. 4. For discussion on *Givhan*, *see* Comment, *Private Expression is Subject to Constitutional Protection*, 30 MERCER L. REV. 1079 (1979); Comment, *First Amendment Rights—Public Employees May Speak a Little Evil*, 3 W. NEW ENGL. L. REV. 289 (1980).

113. 461 U.S. 138 (1983).

114. 391 U.S. at 568; *see supra* note 107.

115. 461 U.S. at 147, 149-50. Matters addressed by the questionnaire included: confidence and trust in supervisors, office morale, need for a grievance committee, and pressure to work in political campaigns. In a single exception to their holding, the Court stated that the issue of pressure to work in political campaigns was a matter of public concern, but declined to give the entire questionnaire constitutional protection solely on that basis.

text . . . as revealed by the whole record."[116] The Court then concluded that, balanced against the state's interest in the efficient operation of the district attorney's office, the plaintiff's "limited First Amendment interest" did not require that her employer tolerate expressions which he reasonably felt would disrupt office functions and working relationships.[117] Thus, *Connick* effectively shifted the balance of interests in favor of public employers by demanding that the "matters of public concern" standard be strictly construed.

Tenth Circuit decisions on first amendment issues have relied on the landmark decisions of *Pickering* and *Mt. Healthy*, focusing primarily on the *Pickering* balancing test. In *Childers v. Independent School District No. 1 of Bryan County*,[118] *National Gay Task Force v. Board of Education of the City of Oklahoma City*,[119] and *Saye v. St. Vrain Valley School District RE-1J*,[120] the Tenth Circuit balanced the need to protect public employees' first amendment rights against the disruptive effect of first amendment expressions on official functions. In addition, the Tenth Circuit considered *Connick* when establishing whether expressions were matters of public concern in *Saye*[121] and *Wilson v. City of Littleton*.[122]

B. *Balancing of Interests*

1. *Wren v. Spurlock*

Chiefly following the balancing of interests standard set forth in *Pickering*, the Tenth Circuit held in *Wren v. Spurlock*[123] that a public school teacher's first amendment rights were violated by her principal when he harassed her in retaliation for her statements to the Wyoming

116. *Id.* at 147-48.

117. *Id.* at 154.

118. 676 F.2d 1338 (10th Cir. 1982). *Childers* involved the claim of a teacher that the School Board had reassigned him in retaliation for his support of a candidate for the Board and his activity involving union organization. The court stated in dictum that altered employment conditions could be considered an unconstitutional infringement of protected first amendment activity. *Id.* at 1342.

119. 729 F.2d 1270 (10th Cir. 1984). *National Gay Task Force* involved the challenge of certain Oklahoma statutes proscribing homosexual activity and advocacy by public school teachers. The court held that Okla. Stat. tit. 70, § 6-103.25 prohibiting the advocacy, encouragement, or promotion of homosexual activity was unconstitutionally overbroad. *Id.* at 1274.

120. 785 F.2d 862 (10th Cir. 1986). *Saye* involved the claim of a teacher that the school district had not renewed her teaching contract in retaliation for her criticism of the allocation of teacher aide time and her activities as a union representative. The court held that the criticism was "tangential to a matter of public concern" and sufficiently disruptive to foreclose first amendment protection. *Id.* at 866. The court held further that the plaintiff's union activities were entitled to protection and that a question of fact had been raised as to whether the union activities were a motivating factor in her non-renewal. *Id.* at 867.

121. *Id.* at 866.

122. 732 F.2d 765 (10th Cir. 1984). *Wilson* involved the claim of a policeman that his termination for refusal to obey an order to remove a black shroud on his badge was an unconstitutional infringement of his first amendment rights. The court held that the wearing of the shroud to express grief and solidarity over the death of a police officer from another town was an expression of a "personal feeling of grief" which was not a matter of public concern. Furthermore, the court stated that unless the expression is a matter of public concern, the *Pickering* balancing test is not reached. *Id.* at 769.

123. 798 F.2d 1313 (10th Cir. 1986).

Education Association. The decision demonstrates the ability of this Tenth Circuit panel of Judges McKay, McWilliams and Logan, to apply accurately and fairly the precedents of the major Supreme Court cases in this area to date: *Pickering*, *Mt. Healthy* and *Connick*.

The plaintiff, Lois Wren, taught for several years at the only public school in Baggs, Wyoming, where the defendant, Nyles Spurlock, was the principal. Although their professional relationship over the years was at best strained, it deteriorated significantly in April of 1980 when Wren and nine other teachers requested in a letter containing some thirty-five separate issues that the Wyoming Education Association (WEA) investigate Spurlock.[124] Following the district teachers' association's endorsement of the request for investigation, Wren was suspended with pay for a half day, and following the WEA investigation of Spurlock, which resulted in a reprimand, Spurlock recommended that Wren's contract not be renewed. The school board rejected Spurlock's recommendation and granted Wren's request for a leave of absence without pay on the advice of her psychiatrist. Subsequently, the school board denied an extension of the leave, but never formally acted on Wren's status even though she did not return to teach.[125] Wren then brought a civil rights action under 42 U.S.C. § 1983[126] against Spurlock, the school district, and the superintendent alleging they retaliated against her for her exercise of first amendment rights. The school district and the superintendent settled with Wren for $125,000 and were dismissed from the action, and a jury awarded Wren $113,000 compensatory and $7,500 punitive damages against Spurlock.[127] The Tenth Circuit Court of Appeals affirmed the trial court's decision.

a. *Analysis*

In affirming the district court decision, the Tenth Circuit faithfully followed both its own precedent[128] and that of the Supreme Court. The court expressed its standard as a basic two-step process derived from *Mt. Healthy* and *Pickering* under which the plaintiff must show (1) the speech was protected under the first amendment, and (2) the speech was a motivating factor in the employer's negative action.[129] Under the first step, which the court emphasized must be decided as a matter of law,[130] protection under the first amendment applies only if the speech is a mat-

124. *Id.* at 1316.
125. *Id.*
126. The statute states in pertinent part:
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983 (1982).
127. 798 F.2d at 1315-16.
128. *See supra* notes 118-22 and accompanying text.
129. 798 F.2d at 1317.
130. *Id.* (citing *Connick v. Myers*, 461 U.S. at 148 n. 7, 150 n. 10). The Supreme Court

ter of public concern and if the constitutional right outweighs the employer's right to control official functions.[131] The court reasoned that under *Connick* the contents of the teachers' letter to the WEA were matters of public concern due to the small size of the town and the relative importance of the public school.[132] The court then applied the basic balancing test of *Pickering* and reasoned that since school officials were apparently satisfied with Wren's teaching performance, her statements did not sufficiently disrupt official functions to preclude their protection under the first amendment.[133] Although this issue erroneously went to the jury at the trial level, the court of appeals ruled no reversible error had occurred because they agreed with the outcome as decided by the jury.[134]

Having established that Wren's statements were constitutionally protected, the court went on to examine whether the speech was a motivating factor in Wren's adverse treatment. The court stated that Wren presented sufficient evidence on the issue for the jury to reasonably conclude that her first amendment activity was at least a substantial motivating factor in Spurlock's actions.[135] Unlike the first step, the court pointed out that the motivation issue was properly one of fact for the jury.[136] The remaining issue under *Mt. Healthy* of whether the employer would have reached the same result due to factors other than the protected speech[137] was not litigated in this case presumably because the defendants disagreed over Wren's quality of teaching performance.

b. *Implications*

The decision in *Wren v. Spurlock* indicates that the Tenth Circuit is capable of applying the *Connick* limitations to "matters of public concern" without emasculating the first amendment rights of public employees. Particularly in situations where views of public employment may still conjure up remnants of the "right-privilege" doctrine and first amendment rights may consequently receive less than full consideration, a cautious interpretation of *Connick* is critical to their survival. Thus, to assure the future relative security of first amendment rights for public employees in the Tenth Circuit, the court should continue to pursue the prudent, well-crafted reasoning of *Wren v. Spurlock*.

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stated explicitly that both elements of the first step should be decided as a matter of law and that the second step should be decided as a matter of fact.

131. *Id.*

132. *Id.* at 1317-18. The issues presented in the WEA letter included complaints of high teacher turnover and sexual harassment of students and teachers. Furthermore, the letter was signed by a majority of the school's teachers.

133. *Id.* at 1318.

134. *Id.*

135. The facts pointed to several connections between Wren's conduct and Spurlock's actions. Wren was suspended the day after the district association endorsed the WEA investigation; she was recommended for non-renewal approximately two months after Spurlock's reprimand; and she was more frequently remanded by Spurlock after the WEA letter.

136. *See supra* note 130.

137. *See supra* notes 108-09 and accompanying text.

2. *Ewers v. Board of County Commissioners of the County of Curry*

a. *Summary*

Since the Tenth Circuit Court of Appeals addressed both a first amendment issue and a deprivation of liberty issue in *Ewers v. Board of County Commissioners of the County of Curry*,[138] the facts of the case will be presented first. The plaintiff, Walter Ewers, was employed from 1977 to 1981 by Curry County, New Mexico, as road superintendent to supervise road maintenance and advise the Commission on related matters. Two members of the three member Board of County Commissioners, Gattis and Merrill, were elected in November of 1980 after campaigning for increased efficiency of county government, improved roads, and the elimination of the road superintendent position. Consequently, after Gattis and Merrill assumed office on January 1, 1981, the Board declined to rehire Ewers and subsequently eliminated the position of road superintendent, effective March 1, 1981.[139] At the following meeting of February 2, 1981, the Board told Ewers that it was concerned with the amount of time taken to complete certain "co-op" projects with the State Highway Department, and agreed to meet with officials from the State Department at its next meeting to discuss the issue. Thereafter, at the February 10, 1981 meeting, Merrill stated that "someone was 'dragging out' the co-op projects and 'padding the books.' "[140] Ewers replied that the statement was false, and a State Highway Department employee stated that "he did not believe that anyone had been dishonest."[141]

Following his termination as road superintendent, Ewers was unsuccessful at finding employment after considerable effort. He acknowledged that poor health, a limited education, and age were contributing factors in his inability to find a job.[142] Ewers subsequently brought an action under 42 U.S.C. § 1983[143] against the Board of County Commissioners, and Gattis and Merrill individually, alleging that he was terminated in retaliation for his exercise of speech under the first amendment, that he had been deprived of equal protection by a conspiracy of the Board, that he had been deprived of a liberty interest in his reputation by the Board, and that he had been deprived of a property interest without due process by the Board.[144] Only the first amendment and liberty interest issues went to trial; Ewers was awarded general damages of $160,000 by the jury and attorneys' fees of $39,500 by the court. On appeal, the Tenth Circuit reversed the general verdict and judgment

138. 802 F.2d 1242 (10th Cir. 1986).

139. *Id.* at 1244. The Board refused to rehire Ewers at the January 5, 1981 meeting and abolished the road superintendent position at the January 19, 1981 meeting. County employees could only be terminated for good cause or due to the elimination of a position.

140. *Id.*

141. *Id.* at 1245.

142. *Id.*

143. *See supra* note 126.

144. 802 F.2d at 1245. The defendants were granted summary judgment by the trial court on the claims of conspiracy and deprivation of a property interest.

of the jury as well as the court order for attorneys' fees.[145]

b. *The First Amendment Claim*

i. Analysis

The Tenth Circuit held that the first amendment instruction submitted to the jury by the trial court was overbroad in that it did not specifically identify the speech at issue. Thus, the court concluded that the jury had insufficient facts for a damage award based on the first amendment.[146] The court reasoned that in order for the jury to determine whether the protected speech was a motivating factor in Ewer's termination as required by *Mt. Healthy*[147] the jury must have precise knowledge of the nature of the protected speech.[148] The court based this conclusion on the appropriate jury instruction, but pointed out that the relevant evidentiary materials were not considered because they were not included in the record on appeal.[149] Thus, the court concluded that there was insufficient evidence for an award of damages based solely on the instruction, not on the record as a whole which would indicate the complete basis for the jury's decision.

An error in jury instructions distinct from the question of overbreadth was not addressed by the Tenth Circuit. Under *Connick*, the issue of whether the plaintiff's interest in protected speech outweighs the employer's interest in efficiency of operation is to be decided as a matter of law by the court, not as a matter of fact by the jury.[150] In the instant case, the court failed to point out that the trial court erroneously submitted that element to the jury.[151] Although the trial court's error was a possible basis for reversal at the appellate level, the Tenth Circuit's failure to address the error resulted in an inconsistent application of first amendment precedent.

ii. Implications

The opinion in *Ewers* demonstrates that adjudication of first amendment rights is a vastly inconsistent area in the Tenth Circuit. Whereas the panel deciding *Wren v. Spurlock*[152] gave careful, step-by-step consideration to applicable precedent in reaching a well-reasoned decision, the panel in *Ewers*[153] gave cursory, inaccurate consideration to precedent

145. *Id.* at 1245, 1250.
146. *Id.* at 1247.
147. *See supra* notes 108-09 and accompanying text.
148. 802 F.2d at 1246.
149. *Id.*
150. *See supra* notes 130-31 and accompanying text.
151. 802 F.2d at 1246. Jury instruction number three read: "[the Plaintiff must establish] . . . [t]hat Plaintiff's interest in commenting upon matters of public concern outweighed the Defendants' interest in restricting Plaintiff's expression of his views because such expression hampered or obstructed the efficient operation of the Road Department." *Id.*
152. 798 F.2d 1313 (10th Cir. 1986). The panel consisted of McKay, McWilliams, and Logan, Circuit Judges.
153. 802 F.2d 1242. The panel consisted of Holloway, Chief Judge, Barrett, Circuit

and the record in reaching a decision which is at best questionable as to its fairness. Remand would have been a far more thoughtful and equitable solution to the poor record and improper instructions which were the basis of the trial court's decision. The public employees residing and working in the Tenth Circuit deserve as much.

c. *Liberty Interest*

i. Analysis

The court held that there was insufficient evidence to support the jury verdict awarding damages for the deprivation of a liberty interest in reputation and accordingly reversed the trial court's denial of a directed verdict. In reaching this decision, the court followed the two-part standard of *McGhee v. Draper*[154] to determine what constitutes deprivation of a liberty interest. First, the complained of action must have stigmatized or otherwise damaged the plaintiff's reputation, and second, such damage must have been involved with a tangible interest such as employment.[155] Once reputational damage associated with employment has been established, the plaintiff must be afforded a hearing to clear his name.[156] Under *McGhee*, the constitutional sufficiency of such a hearing is to be determined by the court as a matter of law.[157] Once again, the *Ewers* court failed to point out that the trial court erroneously submitted this issue to the jury.[158]

The court of appeals then analyzed the liberty issue in terms of the five-part jury instruction given by the trial court.[159] No precise authority for the jury instruction was stated although in a general sense the elements could be extrapolated from *McGhee*. After determining that Ewers had satisfied the first two elements of the jury instruction, the court stated that he had failed to prove, under the third element, a connection between the Board's accusations and the elimination of the position, because the accusations came after the official elimination of the job.[160] Contrary to the court's holding, time sequence of such a connec-

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Judge, and Sam, United States District Judge for the District of Utah, sitting by designation.

154. 639 F.2d at 639, 643 (10th Cir. 1981).

155. 802 F.2d at 1247.

156. *See* Curry, *Name Clearing Hearings: Two Wrongs Make a Right*, 14 URB. LAW. 303 (1982); Price, *Name-Clearing Hearings: Public Interest Versus Personal Liberty*, 16 COLO. LAW. 253 (1987); Toman, *Practical Considerations for Liberty Interest Hearings in Public Employee Dismissals*, 14 URB. LAW. 325 (1982).

157. 639 F.2d at 643.

158. 802 F.2d at 1248. *See also supra* notes 150-51 and accompanying text.

159. 802 F.2d at 1248. The instruction read:

> Ewers . . . must prove . . . that: (1) defendants falsely accused him of padding time records and dragging out cooperative road projects; (2) the accusations were made in public; (3) the accusations were made in connection with the abolition of his job; (4) the accusations stigmatized him and effected [sic] his future employment opportunities; and, (5) the defendants deprived him of an opportunity for a hearing at which he could defend against the stigma which added injury to his good name, reputation, honor and integrity.

Id.

160. *Id.*

tion is irrelevant, and the jury had sufficient facts to believe such a connection existed.[161]

Under the fourth element, the court ruled that Ewers had not proved that the statements stigmatized him and affected his ability to obtain employment. For the concept of stigmatization, the court relied on *Asbill v. Housing Authority of Choctaw Nation*[162] stating that in order for statements to be stigmatizing, "they must rise to such a serious level as to place the employee's good name, reputation, honor, or integrity at stake."[163] The court then conceded that the Board's false accusations that Ewers had been "padding the books" and "dragging out" cooperative projects were stigmatizing under the *Asbill* standard, but held that the statements did not have the "general effect of curtailing" his employment opportunities under the trial court's instruction.[164] It is difficult indeed to understand how such clearly damaging and stigmatizing statements could fail to have, at the very least, a "curtailing" effect on future employment in a predominantly rural area where job opportunities tend to be scarce in the first place.[165] Furthermore, there is no requirement under *Asbill* or *McGhee* that stigmatizing statements be the exclusive factor affecting employment opportunities; the *McGhee* court, relying on the *Board of Regents v. Roth*,[166] stated that a liberty interest had been violated where employment opportunities were "diminished."[167] Thus, the Tenth Circuit failed to properly consider the effect of statements it agreed were stigmatizing on the plaintiff's employment opportunities.

Finally, the court concluded that Ewers had not proved that he was denied an opportunity for a hearing to clear his name.[168] Although the court reasoned that Ewers had sufficient notice of the accusations and an adequate opportunity to respond to them, this failed to meet the standards set under the precedent of *McGhee*. The *McGhee* court affirmed as law of the case an earlier court of appeals decision holding that the plaintiff had not been given a sufficient opportunity for a hearing to clear her name.[169] Under *McGhee I* the necessary due process factors for a name-clearing hearing include reasonable notice of the substance of the charges, opportunity to confront and cross-examine the accusers, and indication of the proof relied on by the accusers.[170] Although Ewers had an opportunity to confront and cross-examine his accusers at the Board meeting of February 10, 1981, there was no adequate notice of

161. *See supra* notes 139-42 and accompanying text.
162. 726 F.2d 1499 (10th Cir. 1984).
163. 802 F.2d at 1249 (citing Board of Regents v. Roth, 408 U.S. 564, 573 (1972)). The case actually quoted language from Asbill v. Housing Authority of Choctaw Nation, 726 F.2d 1499, 1503 (10th Cir. 1984).
164. 802 F.2d at 1249.
165. Curry County is located in eastern New Mexico, on the Texas border. Its county seat is Clovis, population 31,000.
166. 408 U.S. 564 (1972).
167. 639 F.2d at 643.
168. 802 F.2d at 1249.
169. 639 F.2d at 643, *aff'd in part*, 564 F.2d 902 (10th Cir. 1977).
170. 564 F.2d at 911-12.

the substance of the charges because the accusations of "padding the books" and "dragging out" the cooperative projects were made at the same meeting. Thus, Ewers had no opportunity to prepare a response or consult counsel regarding the statements.[171] Additionally, there is no indication that any evidence was offered by the Board supporting its charges. Thus, the Board's meeting of February 10, 1981, failed to meet the due process requirements of reasonable notice and indication of proof. Furthermore, the sufficiency of the February 10th meeting as a name-clearing hearing should have been decided as a matter of law by the trial court.

ii. Implications

The Tenth Circuit's conclusion that there was no violation of a liberty interest in reputation was based on an inaccurate application of the Tenth Circuit precedent of *Asbill* and *McGhee*. The court effectively ignored the facts of the case and affirmed the dismissal of an employee which occurred under circumstances smacking of personal or political vendetta.[172] The decision amounts to a deplorable abuse of the very due process liberty rights of which public employees in the plaintiff's position are so desperately in need.

CONCLUSION

The Court of Appeals for the Tenth Circuit addressed a variety of civil rights issues during the survey period. The task of applying and reconciling the myriad federal civil rights statutes is often complex due to their interdependence and overlap. The affirmation of no discrimination in *Thomas* set a precedent in the Tenth Circuit concerning no-spouse rules, but the court left the door open for further challenge. The effectiveness of Title IX employment claims was potentially strengthened by the *Mabry* court's decision to allow the application of Title VII substantive standards to such claims. No other court of appeals to date has so clearly endorsed that approach, and the decision represents the Tenth Circuit's boldest effort of the survey period.

On the other hand, the court held a predictable and conservative

171. No further Board meetings are reported to have addressed the matters relevant to the instant case. Although the plaintiff did not request further hearings, the court stated that "[n]one were necessary under these facts." 802 F.2d at 1249. In *McGhee I*, the plaintiff was similarly aware of rumors against her, but had no notice of specific allegations prior to the hearing in front of the school board where the accusations were made. The court stated that "[a] hearing where the plaintiff was faced with such a blast of complaints, and not knowing which incidents she needed to discuss, did not satisfy due process." 564 F.2d at 911.

172. In addition to the fact that Commissioner Merrill stated in her campaign that the county did not need a road superintendent, Commissioner Stockton informed Ewers that he thought Merrill did not like Ewers. 802 F.2d at 1244. Furthermore, the duties of the road superintendent were included in the newly created job of county manager, which required a college degree, and in the jobs of the district crew foremen. *Id.* at 1245. Thus, it is questionable whether abolishing the position of road superintendent actually saved the county money.

course in examining the role of mitigation in ADEA claims in *Giandonato* by closely following the Supreme Court's ruling in *Ford Motor Co. v. EEOC*. Although the opinion followed precedent logically, it also demonstrated the Tenth Circuit's unwillingness to question or limit the holding in *Ford*.

The *Ewers* court turned out a disappointing decision in its reversal of both a deprivation of a liberty interest in a reputation claim and a first amendment claim by basing its poorly crafted decision on the inaccurate application of important principles of case law. In contrast, the court in *Wren* produced a conservative but careful and protective application of precedent to a first amendment issue. As a result, first amendment claimants are justified in approaching the Tenth Circuit with extreme prudence.

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