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Daniel Grossman

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EMPLOYMENT LAW SURVEY

I. INTRODUCTION

The Tenth Circuit Court of Appeals grappled with several difficult issues in 1992. The employment cases decided by the court mostly dealt with procedural due process in public employment. The court continued its narrow construction of the procedural rights of government employees. It applied a high standard necessary for plaintiffs to establish a protected property interest and established a low standard for defendants to meet to comply with Fourteenth Amendment requirements. In *Brown v. Independent School District No. I-06*,[1] the court narrowly construed the word "termination" in a statute protecting school employees from arbitrary discharge so as to exclude employees with contracts not renewed by the school district. In *Driggins v. City of Oklahoma City*,[2] the court held personnel policies enacted by city officials protecting city employees did not override employment-at-will provisions of the Oklahoma City Charter. Similarly, in *Phillips v. Calhoun*[3] the court held a section of the city code which transferred the plaintiff into a protected classification did not override the at-will provisions of the city charter. But in *Patrick v. Miller*,[4] a merit clause of the city charter was found to take precedence over other at-will language of the charter.

In 1992 the Tenth Circuit also considered using a Title VII analogy to resolve issues arising under the Age Discrimination in Employment Act in both the substantive and procedural context. In *Oestman v. National Farmers Union Insurance Co.*,[5] the court applied the same test used in Title VII discrimination cases to determine whether a plaintiff is an employee protected by the Act or an unprotected independent contractor. The court rejected the Title VII analogy in the statute of limitations context in *Aronson v. Gressly*.[6]

II. GOVERNMENT EMPLOYMENT AND DUE PROCESS

Government employees found the Tenth Circuit unreceptive to their claims in 1992. It narrowly defined "property interest" and relaxed its standard of procedural due process to restrict governmental employee rights in the termination context.

A. *Defining Property Interest*

Through the use of Section 1983,[7] government employees have

1. 974 F.2d 1237 (10th Cir. 1992).
2. 954 F.2d 1511 (10th Cir. 1992).
3. 956 F.2d 949 (10th Cir. 1992).
4. 953 F.2d 1240 (10th Cir. 1992).
5. 958 F.2d 303 (10th Cir. 1992).
6. 961 F.2d 907 (10th Cir. 1992).
7. 42 U.S.C. § 1983 (1988). Section 1983 states:

availed themselves of the protections in the Due Process Clause of the Fourteenth Amendment as a weapon against workplace discrimination. Under the Supreme Court's rulings in *Cleveland Board of Education v. Loudermill*,[8] and *Board of Regents v. Roth*,[9] plaintiffs must show (1) that they had a protected property interest in continued employment[10] and (2) that they were deprived of such interest without due process of law as defined in *Mathews v. Eldridge*.[11] In 1992 the Tenth Circuit used a literal interpretation of the standard set forth in *Loudermill*, *Roth* and *Matthews* in establishing a property interest protected by the Fourteenth Amendment.

1. Tenth Circuit Case Law

The classic case where the courts are unwilling to find a protected property interest in continued employment is a complaining employee under a definite-term contract that is not renewed by the government entity. In that situation, the employee has no reasonable expectation of continued employment and is unprotected from non-renewal. This principle guided the court's analysis in *Brown v. Independent School District No. I-06*.[12]Outside of the classic scenario, the court used a formalistic interpretation of municipal and state law to reject constitutional claims in *Driggins v. City of Oklahoma City*[13] and *Phillips v. Calhoun*.[14] But in *Patrick v. Miller*,[15] the court resolved a conflict among city charter provisions in favor of a complaining employee.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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.

8. 470 U.S. 532 (1985). Loudermill was hired as a security guard by the Cleveland Board of Education. On his application he indicated that he had never been convicted of a felony. The Board subsequently discovered that he had been convicted of larceny, a felony under Ohio law, and terminated him. Loudermill filed suit complaining that the Board's summary dismissal of him without any pre-termination hearing or procedure violated his due process rights. Because he was a classified civil servant under Ohio law, the Court held that he could only be terminated for cause and was entitled to a pre-termination opportunity to respond and a post-termination administrative review.

9. 408 U.S. 564 (1972). The Court held that Roth, a teacher employed under a one-year contract by a state college, failed to establish a protected property interest because he had not acquired tenure according to Wisconsin law. The Court also held that the Fourteenth Amendment does not require an opportunity for a hearing prior to the non-renewal of a nontenured teacher's contract, where, as here, the teacher fails to come forward with evidence of stigma or disability foreclosing other employment or terms of his employment conferring a protected property interest.

10. Employees often assert state statutes, city ordinances, city charters or employment contracts as a source of protected property interest in procedural due process cases. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 513-21 (4th ed. 1991).

11. 424 U.S. 319, 343 (1976). In *Eldridge*, the Court held that the interests of the government in obtaining a summary decision in the dispute must be balanced against the dangers of arbitrary or erroneous decisions inherent in a summary proceeding in determining whether Due Process requirements have been met.

12. 974 F.2d 1237 (10th Cir. 1992).

13. 954 F.2d 1511 (10th Cir. 1992).

14. 956 F.2d 949 (10th Cir. 1992).

15. 953 F.2d 1240 (10th Cir. 1992).

a. *Brown v. Independent School District No. I-065*

The plaintiffs were employed as secretaries of an Oklahoma school district.[16] Both worked in that capacity for many years and were parties to a series of one-year employment contracts.[17] In June of 1989, the school board voted not to enter into new contracts with the employees.[18] The employees sought a hearing with the board to discuss the reasons for its decision not to renew their contracts and were refused. The board also refused to offer any reasons for their decision.[19] The employees then sued and the district court granted the board's motion for summary judgment, holding that plaintiffs had no protected property interest in continued employment with the school district.[20]

On appeal, the employees argued that Oklahoma statutes as well as the school board's policy created a sufficient basis to assert a constitutionally protected property interest. The statutory provision prohibited the suspension, demotion or termination of certain employees the plaintiffs except "for cause."[21] The court held that termination, for the purposes of the statute, does not include the natural death of the contract.[22] Therefore, the "for cause" language did not apply to the decision not to renew the employees' contract and the employees could not claim a property right on that basis.[23]

The employees then asserted a property right based on the school board policy contained in an employee handbook. "The continuation of employment shall be based on the quality of work, ethical conduct, necessity of the work and the availability of district funds."[24] The Tenth Circuit held that the handbook only restated the termination requirements in the statute and did not apply to the natural death of the contract.[25] The handbook was not sufficient to create a property interest protected by procedural due process.

b. *Driggins v. City of Oklahoma City*

In *Driggins v. City of Oklahoma City*,[26] the Tenth Circuit held that city personnel policies requiring employees be discharged only "for cause" do not negate contradictory city charter provisions.[27] The Oklahoma

16. *Brown*, 974 F.2d at 1238.
17. *Id.*
18. *Id.* at 1239.
19. *Id.*
20. *Id.*
21. OKLA. STAT. tit. 70, § 6-101.40 (Supp. 1993). The statute reads:
A support employee who has been employed by a local board of education for more than one (1) year shall be subject to suspension, demotion or termination only for cause, as designated by the policy of the local board of education . . . . This section shall not be construed to prevent layoffs for lack of funds or work.
22. *Brown*, 974 F.2d at 1240.
23. *Id.*
24. *Id.*
25. *Id.* at 1240-41. "[W]e interpret the provision to refer to termination of an existing contract rather than to a failure to renew a contract."
26. 954 F.2d 1511 (10th Cir. 1992).
27. *Id.* at 1514-15.

City Charter provided that city employees could be terminated for any reason construed to be in the interest of the service.[28] The Oklahoma Supreme Court had previously held that city employees working under the "interest of service" provisions of a city charter did not have a property interest subject to due process protection.[29] In *Driggins*, the Tenth Circuit agreed that such provisions in the charter precluded the plaintiff from claiming a protected property interest in continued employment.[30]

The plaintiff in *Driggins* was an employee of the City of Oklahoma City as a human resources specialist. At the time of termination, the plaintiff was a six-year employee of the city.[31] Driggins argued three factual bases for constitutional protection from termination without procedural due process: (1) City Council regulations suggest that city employees could only be discharged "for cause;" (2) an informal but mutual understanding existed between Driggins and the city that she was a permanent employee and could only be terminated for cause; and (3) as an employee of a federally funded Comprehensive Employment and Training Act (CETA) program,[32] Driggins had a protected property interest "by virtue of CETA's mandate that participating state and local governments adopt a merit[-based] personnel system."[33]

The trial judge submitted the question of Driggins's possible constitutionally protected property interest in continued employment with the city to the jury, which found in the affirmative.[34] The Tenth Circuit reversed, holding that when a city charter contains a provision empowering the city manager to terminate employees "for the good of the service," the existence of a protected property interest should be determined by the court as a matter of law.[35] The Tenth Circuit then reviewed the issue *de novo* and held that, given the city charter provisions, Driggins did not have a protected property interest in continued employment with the city.[36]

The court reasoned that, with the aforementioned city charter provisions and the charter's grant of all authority in employment decisions to the city manager, the city council resolution establishing a "for cause" personnel policy did not bind the city and did not establish a property interest for due process purposes.[37]

The court also rejected the plaintiff's second argument for the existence of a mutual understanding that she would only be terminated

28. *Id.* at 1514. The court noted that Article III, Sec. 1 of the Oklahoma City Charter states that "removals and demotions shall be made solely for the good of the service."

29. Hall v. O'Keefe, 617 P.2d 196 (Okla. 1980).

30. *Driggins*, 954 F.2d at 1514-15.

31. *Id.* at 1512.

32. 29 U.S.C. §§ 802-992 (1975). CETA has since been repealed, Pub. L. No. 97-300, § 184(a)(1), 96 Stat. 1357 (1982), but the plaintiff was employed while the Act was still in effect. *See Driggins*, 954 F.2d at 1515.

33. *Driggins*, 954 F.2d at 1515.

34. The reported opinion does not cite to the district court opinion nor does it delve into the reasoning of the jurors in finding that such a property interest existed.

35. *Driggins*, 954 F.2d at 1513.

36. *Id.*

37. *Id.* at 1514.

for just cause that would establish a protected property interest.[38] The court recognized the fact that mutual understandings can be the source of a property interest,[39] but refused to recognize such an interest here:

> Driggins points to no authority, however, for the proposition that mutually explicit understandings can give rise to a protected property interest where an express city charter provision allows employees to be discharged "solely for the good of the service."[40]

Finally, the court held that Driggins failed to point to any provision of CETA which imposed substantive restrictions on city officials in terminating employees. The court reasoned that even if CETA conferred additional rights on employees after its repeal, it did not confer a protected property interest in continued employment to city employees.[41]

c. *Phillips v. Calhoun*

Under a similar fact situation, the court found no protected property interest in continued employment in *Phillips v. Calhoun*.[42] In *Phillips*, the city charter of Sand Springs, Oklahoma contained language identical to that found in the Oklahoma City Charter in *Driggins*. A city attorney

38. *Id.* at 1515.

39. *Id.* The court cited Vinyard v. King, 728 F.2d 428, 430 (10th Cir. 1984), for the proposition that mutual understanding "can create a property interest in continued employment by means of an implied contract." In *Vinyard*, a hospital's director of volunteer services successfully argued that a protected property interest in continued employment had been created by the hospital when it distributed an employee handbook. *Id.*

40. *Driggins*, 954 F.2d at 1515.

41. *Id.* at 1516.

42. 956 F.2d 949 (10th Cir. 1992). An interesting variation on this theme was set out by the court in Farnsworth v. Town of Pinedale, 968 F.2d 1054 (10th Cir. 1992). In *Farnsworth* the court affirmed the district court's granting of defendant's motion for summary judgment.

Farnsworth and other city employees claimed that they were discharged without any procedure after a municipal election. *Id.* Immediately following the election, the new mayor and two new councilmen voted to repeal certain personnel policies and not to reappoint plaintiffs. *Id.* Plaintiffs objected claiming that they had a protected property interest in continued employment with the city that could not be revoked without due process of law. *Id.*

While the Tenth Circuit agreed that the plaintiffs had established a constitutionally protected property interest, the court found that such interest did not extend beyond the term of the political officials who appointed them. In construing several provisions of the Wyoming statutes to preclude town councilmen and mayors from making appointments which are for a duration longer than their own terms of office, the court rejected plaintiffs' § 1981 claims:

> Appellants . . . possessed a constitutionally protected property right in continued employment. However, that right extended only until the end of their term of office, at which time the incoming mayor and town council had the option to replace them by the authority granted by Wyoming Statute § 15-2-102(a).

Id. at 1057.

As in *Driggins* and *Phillips*, the court in this case concentrated on the formalistic municipal procedures to determine the extent of the protected property interest. There were several ambiguities and contradictions in the Wyoming statutory scheme. To affirm summary judgment in this case seems to imply that the existence and the extent of a constitutionally protected property interest in continued employment will always be a question of law to be decided by the judge, completely taking the expectations, no matter how reasonable, of the plaintiff/government employee out of the due process analysis. This is an unfortunate result. *See* discussion *infra* section I.A.2.

filed a § 1983 claim for wrongful discharge claiming that some procedural safeguards granted by the charter to classified employees created a protected property interest in continued employment.

The district court held as a matter of law that the plaintiff was an unclassified employee and, therefore, granted defendant's motion for summary judgment. On appeal, the plaintiff argued that even if he was an unclassified employee under the charter, § 2-617 of the city code, "subsequently effected his transfer into the classified service."[43] However, the Tenth Circuit held that such a classification was contrary to the city charter and was therefore a nullity, leaving plaintiff with no protected property interest in that the "for the good of the service" language of the charter "[did] not create a cognizable interest in employment."[44]

d. *Patrick v. Miller*

In *Patrick v. Miller*,[45] a Tenth Circuit panel headed by Judge Brorby held that an at-will city charter provision did not defeat the plaintiff's claim to a protected property interest when another provision of the charter required employment decisions be made on merit alone.[46]

The trial judge denied Miller's motion for summary judgment on Patrick's § 1983 claim and the defendants appealed.[47] Judge Brorby reasoned that if precedent allowed city charter provisions confer complete discretion in employee discharges that would necessarily defeat any claims of protection from wrongful discharge, the converse must also be true:

> Where a city charter restricts a city manager's authority to terminate employees, Oklahoma courts would not allow city officials to alter those terms so as to expand their authority to the detriment of employees. City employees therefore have a legitimate expectation of continued employment to the extent that a city charter limits its officials' power to terminate such employment.[48]

The panel upheld the district court's refusal to grant summary judgment on plaintiff's section 1983 claim.[49]

2. Analysis

In rejecting the protected property claims in *Brown* and *Driggins*, the Tenth Circuit went to great lengths to trammel government employees' due process rights. The court held that when there is an at-will or equivalent provision in a city charter, the question of the existence of a protected property interest is a matter of law to be decided by the court.

43. *Phillips*, 956 F.2d at 952.
44. *Id.* at 953.
45. 953 F.2d 1240 (10th Cir. 1992).
46. *Id.* at 1245.
47. *Id.* at 1242.
48. *Id.* at 1244-45.
49. *Id.* at 1246.

The court in *Driggins* relied primarily on city charter provisions and a restrictive Oklahoma Supreme Court decision interpreting those provisions[50] permitting the termination of employees for the good of the service. The court elevated these obscure city charter "at-will" and "good of the service" caveats to complete disclaimer status revoking any due process rights granted by the city to its employees.

The court ruled this way despite the fact that the Supreme Court cases in this area turn on the mutual expectations of the government and its employees, rather than the formal authority of city officials.[51] While the court correctly addressed the issue of whether Oklahoma state law conferred a property right upon the plaintiffs in *Driggins* and *Phillips*, it ignored the fact that such a protected interest may also be created by contract or mutual understanding.[52]

The Supreme Court has afforded the circuits the opportunity to broadly interpret property interests for due process purposes and it is troubling that the Tenth Circuit discarded the logic and spirit of the mutual understanding doctrine in favor of a formalistic interpretation of municipal authority. State cases within the Tenth Circuit that have addressed the issue of at-will employees' enforcement of procedural benefits promised subsequent to the commencement of employment have held that the expectations of the employee create the procedural rights.[53] Such a rule is as logical as it is equitable and should be adopted by the Tenth Circuit.

Although the court used the same analysis in *Patrick* that it used in *Driggins* and *Phillips* (that the provisions of the city charter are controlling), the decision was different. The court found that, unlike the charter in *Driggins*, the Norman City Charter in *Patrick* provided that

50. *O'Keefe*, *supra* note 29. It should also be noted that the Tenth Circuit previously held that the "for the good of the service" language found in city charters does not confer a property interest to city employees. *See* Campbell v. Mercer, 926 F.2d 990 (10th Cir. 1991); Lane v. Town of Dover, 761 F. Supp. 768 (W.D. Okla. 1991), *aff'd*, 951 F.2d 291 (10th Cir. 1991).

51. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 577 (1972), Bishop v. Wood, 426 U.S. 341, 344 n.6 (1976), Perry v. Sinderman, 408 U.S. 593, 601 (1972) ("[a] person's interest in a benefit is a 'property interest' if there are . . . mutually explicit understandings that support his claim of entitlement").

Commentators argue that "[i]f the government gives the employee assurances of continual employment or dismissal . . . then there must be a fair procedure to protect the employee's interests when the government seeks to discharge him [or her] from the position." NOWAK & ROTUNDA, *supra* note 10, at 519.

52. NOWAK & ROTUNDA, *supra* note 10, at 519 (protected interest may also "come from statutory law, formal contract terms, or the actions of a supervisory person with authority to establish terms of employment"). Whether apparent authority, as the term is used in the common law of agency, is sufficient to establish a protected interest was not addressed in *Driggins* but would probably not find a receptive audience in the Tenth Circuit given its formalistic approach to the powers of the municipal entities and the relationship of ordinances to organic charters.

53. *See e.g.*, Continental Air Lines v. Keenan, 731 P.2d 708 (Colo. 1987). Keenan was hired by Continental for an indefinite term and was an at-will employee. Keenan was summarily discharged and sued claiming that an employee manual created reasonable expectations of procedural due process prior to termination. The trial court granted Continental's motion for summary judgment based on the at-will rule but the Supreme Court of Colorado reversed and remanded.

employment decisions "shall be made upon the basis of merit and fitness alone."[54] Because the "for cause" language asserted by the plaintiff in *Driggins* appeared only in a city council resolution, the at-will language of the charter in that case was dispositive. This distinction's helpfulness is questionable. In the aggregate, the rule implied by these cases appears to be that the quantum of protection to be afforded public employees is to be determined solely by the source of the interest. Under this rule, expectations created by a municipal authority are meaningless unless supported by city charter provisions. A rule that excludes property interests in continued employment as a matter of law for the sole reason that an "at-will" or similar provision exists in the city charter is unduly harsh and lacks logical justification. A better rule would be to allow the question to be submitted to a jury if the plaintiff comes forth with some evidence of a protected interest (e.g., a handbook, municipal ordinance, policy or resolution). A *per se* finding of no protected interest in any case where there is an "at-will" charter provision significantly undermines the Due Process protections of the Fourteenth Amendment.

B. The Sufficiency of the Process

Once a plaintiff establishes a protected property interest, the issue becomes whether the government actor provided sufficient procedural redress to protect that property interest. The Supreme Court has provided three primary factors to be used in determining what process is due:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[55]

Establishing a plaintiff's deprivation of a protected property interest does not automatically entitle that plaintiff to a formal hearing. "What is required is procedure, not necessarily a hearing."[56] The courts must balance the three factors set forth in *Matthews* to determine what process is due.

1. Tenth Circuit Case Law

The Tenth Circuit considered the sufficiency of process in two cases in 1992, *West v. Grand County*[57] and *Aronson v. Gressly*.[58] In both cases, the court held that although the employees successfully established a

54. *Patrick*, 953 F.2d at 1245.
55. Matthews v. Eldridge, 424 U.S. 319, 335 (1976).
56. NOWAK & ROTUNDA, *supra* note 10, at 530.
57. 967 F.2d 362 (10th Cir. 1992).
58. 961 F.2d 907 (10th Cir. 1992).

protected property right, the limited procedure afforded them by the governmental entities sufficiently satisfied due process requirements.

a. *West v. Grand County*

The Tenth Circuit had no trouble finding a protected property interest in *West v. Grand County*. The county provided employee handbooks which prohibited the discharge of permanent employees except for cause, for reasons of curtailment of work or for lack of county funds. The court held that, given these provisions, plaintiff West possessed a protected property interest in continued employment.[59] "The record and the case law clearly establish that West had a protected property interest [and] was thereby entitled to due process."[60]

West's primary contention was the denial of her procedural protections as required by the Fourteenth Amendment. Her supervisor, just elected to County Attorney, cited a reduction in force as the sole reason for her discharge. West claimed that she was the victim of subterfuge aimed at discharging her solely because of her ties to the previous administration.[61] Prior to her termination, West met with the incoming County Attorney, Coates, to discuss the reasons for her probable termination. At that time, she had an opportunity to respond to Coates as well as to the County Commissioners concerning the proffered reasons for her discharge.[62] This procedure, the court held, was sufficient to satisfy due process requirements.

Citing *Cleveland Board of Education v. Loudermill*,[63] and the Tenth Circuit cases which applied the *Loudermill* rule,[64] the court held that a full evidentiary hearing was not required prior to termination in order to comply with procedural due process.[65] Rather, the court held:

> A full evidentiary hearing is not required prior to an adverse employment action. The individual entitled to due process protection needs only to be given notice and an opportunity to respond. We have held that pretermination warnings and an opportunity for a face-to-face meeting with supervisors, and a conversation between an employee and his supervisor immediately prior to the employee's termination were sufficient to satisfy constitutional requirements.[66]

West argued that her post-termination hearing was constitutionally insufficient in that: (1) she was not given the opportunity to challenge the evidence of those seeking to terminate her; (2) the Commissioners presiding over the hearing were not impartial; and (3) the Commission-

59. *West*, 967 F.2d at 366.
60. *Id.*
61. *Id.* at 367-68.
62. *Id.* at 368.
63. 470 U.S. 532 (1985).
64. Powell v. Mikulecky, 891 F.2d 1454 (10th Cir. 1989); Seibert v. Oklahoma *ex rel.* Univ. of Okla. Health Sciences Ctr., 867 F.2d 591 (10th Cir. 1989).
65. *West*, 967 F.2d at 367.
66. *Id.* (citations omitted).

ers based their decision on *ex parte* communications.[67] In rejecting West's arguments, the court held that the post-termination hearing afforded the plaintiff was sufficient to protect her property interest.

The court further held that because West did not seek to have Coates present at the hearing, she could not complain of her inability to confront him at that time.[68] West's attorney objected at the time of the hearing to the fact that commissioners who were involved in the decision to terminate West were conducting the hearing, but because the attorney agreed to go forward with the hearing, the court held that he expressly waived West's right to object to the lack of impartiality of the hearing officers.[69] Finally, the court held that West's allegation that the decision was a result of *ex parte* communication was unsubstantiated speculation.[70]

b. *Aronson v. Gressly*

The Tenth Circuit had less difficulty in considering the issue of what quantum of process is due public employees in *Aronson v. Gressly*.[71]

In that case Aronson, a biographical specialist at the American Heritage Center at the University of Wyoming, was terminated.[72] After being turned down for a promotion, allegedly because of her age, and after having a succeeding Director of the Center redefine her position, Aronson refused to report to work.[73] She was warned on multiple occasions by mail that her continued insubordination would result in termination and she continued to refuse to report for work. She was terminated on April 25, 1988.[74] Aronson was reinstated as a full-time library employee with back pay and benefits after going through the established grievance procedures.[75] She filed suit in federal court, however, alleging deprivation of her protected property interest in continued employment without due process of law.[76] The trial court granted the defendant's motion for summary judgment and Aronson appealed.[77]

Applying the notice and opportunity to be heard standard of *Loudermill*, the Tenth Circuit held that Aronson had been afforded adequate procedure to comply with the Fourteenth Amendment:

> In short, Aronson received ample opportunity to return to work or to respond to the University's charges. Aronson

67. *Id.* at 369.
68. *Id.*
69. *Id.* at 370.
70. *Id.*
71. 961 F.2d 907 (10th Cir. 1992).
72. *Id.* at 908.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 909. Plaintiff alleged that the treatment she received from the University violated the Age Discrimination in Employment Act and the Due Process Clause of the Fifth and Fourteenth Amendments. The trial court granted the University's motion for summary judgment on both of these claims. *Id.*
77. *Id.*

> clearly had an opportunity to present her side of the story. Certainly, the Due Process Clause requires no more prior to termination.[78]

2. Analysis

The court's opinion in *West* represents the faults in the Tenth Circuit's application of the procedural due process doctrine. Requiring only notice and an opportunity to respond prior to termination leaves government employees far too vulnerable to arbitrary or discriminatory treatment, especially those who are terminated for reasons of patronage rather than merit. Under the rule set forth in *West*, a reviewing court need not delve into the substance of the process provided, but may satisfy itself with the fact that some basic notice and an opportunity to respond was provided prior to termination. A better rule requires courts to make an initial inquiry into the fairness and sincerity of the proceedings, making it more difficult for government employers to immunize themselves from due process challenges by simply promulgating procedures consisting more of form than substance.

In *West* the court's failure to consider the bias of the post-termination hearing commission is especially troubling. Plaintiff's counsel raised the issue at the hearing and objected for the record. The court held that the attorney's choice to proceed despite the possible bias of the hearing officials "expressly waived" the plaintiff's right to object.[79] Again, the court used unduly formalistic rules in defeating the rights of an aggrieved government employee. If the Due Process Clause of the Fourteenth Amendment does not require a full evidentiary hearing, but something less formal,[80] it is unclear why the court insisted on holding the plaintiff to a strict procedural standard for objection and waiver. Clearly, if the court is not willing to require a formal hearing concerning the property interests of government employees, then it should follow that such employees should not be held to the strict evidentiary and procedural standards of the judicial process. West's attorney made the objection to the potential bias of the Commissioners for the record.[81]

78. *Id.* at 910.

79. *West*, 967 F.2d at 370.

"West's attorney expressed his misgivings regarding the neutrality of the commissioners on the panel at the grievance hearing, but then stated that he was willing to proceed:

> If the three of you were involved in the process of the decision to terminate Trish it might be appropriate if there was a neutral arbitrator or neutral hearing officer appointed to hear this grievance instead of having the commission hear it. . . . We're prepared to present testimony. . . . I just wanted to raise that for the record — That is a concern that we have. I'm not suggesting that the three of you would be in any way biased or anything — it just might be an easier situation. If you want to proceed, we're prepared.

He then proceeded without either requesting or obtaining a ruling form the Commissioners on his suggestion that they might not be impartial. In doing so, he expressly waived West's right to object to the partiality of the decisionmakers at the grievance hearing." *Id.* (quoting record of the grievance hearing).

80. *See supra* notes 53-54 and accompanying text.

81. *West*, 967 F.2d at 370.

Given the informality of the required proceeding, the mere fact that the attorney did not refuse to proceed with the hearing should not have precluded West from raising the bias issue on appeal.

Although the court in *Aronson* used the same low sufficiency of process standard as it used in *West*, the result is more palatable. Here, Aronson, through her own conduct, affirmatively rejected opportunities to appear to answer the charges of the director of the American Heritage Center.[82] The several and explicit offers at procedure and reconciliation were rebuffed by Aronson and for her to then sue based on the failure of the University to provide her with pre-deprivation due process was properly recognized by the court as groundless.

II. THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)

The Age Discrimination in Employment Act[83] prohibits employment discrimination against individuals over 40 years of age. The act prohibits discrimination in hiring, discharge and other acts affecting the terms and conditions of employment based on an individual's age. Also, retaliatory action taken by an employer against an employee who opposes a discriminatory practice is prohibited by the act.[84]

In 1992 the Tenth Circuit addressed two issues affecting ADEA claims. In *Oestman v. National Farmers Union Insurance Co.*,[85] the court clarified the analysis to be used in making the employee/independent contractor distinction in the ADEA context. In *Aronson v. Gressly*,[86] it considered whether the 240-day statute of limitation for filing a claim under Title VII[87] also applies to ADEA cases.

A. Oestman v. National Farmers Union Insurance Co.: *Employee/ Independent Contractor Distinction*

Like Title VII, the Age Discrimination in Employment Act (ADEA) only protects *employees* from discriminatory treatment.[88] The statute de-

82. Aronson v. Gressly, 961 F.2d 907, 910 (10th Cir. 1992).

83. 29 U.S.C. § 621-634 (1988).

84. BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION, 485 (2d ed. 1983).

85. 958 F.2d 303 (10th Cir. 1992).

86. 961 F.2d 907 (10th Cir. 1992).

87. 42 U.S.C. Secs. 2000e to 2000e-17 (1988). Specifically, the Title VII statute of limitation is found in section 2000e-5(e).

88. Regarding prohibited employer practices, the ADEA states:

> 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; . . . .

29 U.S.C. § 623(a) (1988). Almost identical language is found in Title VII:

> 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; . . . .

42 U.S.C. § 2000e-2(a) (1988).

fines "employee" as "an individual employed by an 'employer'."[89] Due to the ambiguity and circularity of this definition, the issue determining whether or not a plaintiff is an employee entitled to the protection of the act or is an unprotected independent contractor is a source of much litigation.[90]

In *Oestman* the Tenth Circuit tried to answer this question in the ADEA context. Plaintiff Oestman was an insurance agent with National Farmers[91] who filed suit in federal district court claiming a violation of the ADEA.[92] The trial court granted defendant's motion for summary judgment, ruling that the plaintiff was an independent contractor not subject to the protection of the Act.[93] On appeal, plaintiff argued that the trial court erred. Had the court applied the common law control doctrine in determining the plaintiff's employment status, it certainly would have denied defendant's summary judgment motion.[94]

The Tenth Circuit held that the proper test to evaluate the employment status of an ADEA plaintiff is not the common law control doctrine but the "hybrid test."[95] Although the hybrid test focuses on the employer's right to control the means and matter of the employment, similar to the common law "right to control" test, the hybrid test also takes into account the economic realities of the relationship.[96] The court relied upon the hybrid factors enumerated by the District of Columbia Circuit Court of Appeals in *Spirides v. Reinhardt*, a Title VII case:[97]

> (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of

89. 29 U.S.C. § 630(f) (1988).

90. *See, e.g.*, Fields v. Hallsville Indep. Sch. Dist., 906 F.2d 1017 (5th Cir. 1990), *cert. denied*, — U.S. —, 111 S. Ct 676 (1991).

91. *Oestman*, 958 F.2d at 304.

92. *Id.* at 303.

93. *Id.* at 303-04.

94. *Id.* at 304. The common law control doctrine is best described by section 2 the Restatement of Agency which distinguishes servants from independent contractors:

> (1) A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.
>
> (2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is *controlled or is subject to the right to control* by the master.
>
> (3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent.

RESTATEMENT (SECOND) OF AGENCY § 2 (1958) (emphasis added).

95. *Oestman*, 958 F. 2d at 305.

96. *Id.*

97. 613 F.2d 826 (D.C. Cir. 1979). In *Spirides*, a Title VII sex discrimination case, the plaintiff worked intermittently as a foreign language broadcaster for the Voice of America. Her contract stipulated that she was to work as an independent contractor. She was paid per assignment. She filed suit when her contract was not renewed. The trial court found that the plaintiff was an independent contractor and granted defendant's motion for summary judgment. The D.C. Circuit reversed and remanded. *Id.*

> work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; (11) the intention of the parties.[98]

The Tenth Circuit, following the Third Circuit in *E.E.O.C. v. Zippo Manufacturing Co.*,[99] reasoned that because the substantive provisions of the ADEA mirrored those of Title VII, the hybrid test used in Title VII cases should be used to resolve the substantive question of what constitutes an employee as opposed to an independent contractor under the ADEA.[100] The court affirmed the summary judgment granted by the trial court holding that even under the hybrid test, the plaintiff was an independent contractor and therefore ineligible for ADEA protection.

B. Aronson v. Gressly:[101] *Filing Periods*

The Tenth Circuit refused to extend the Title VII analogy to the procedural aspects of the ADEA. In *Aronson* the court held that the 240-day limitation provision for Title VII actions in deferral states[102] does not apply to ADEA cases.[103]

As in Title VII cases, ADEA charges must be filed with the Equal Employment Opportunity Commission within 180 days of the alleged discriminatory action.[104] Cases that arise in states that have similar statutes and agencies equipped to investigate age discrimination claims—

98. *Oestman*, 958 F.2d at 305 (quoting *Spirides*, 613 F.2d at 832).

99. 713 F.2d 32 (3d Cir. 1983).

100. *Oestman*, 958 F.2d at 305.

101. 961 F.2d 907 (10th Cir. 1992).

102. A deferral state is one which has enacted anti-discrimination legislation similar to Title VII which sets up a state equivalent of the EEOC charged with investigating unlawful employment practices. Title VII requires claimants under that statute to allow 60 days for the state equivalent agencies to attempt to resolve the dispute before it will receive a charge. 42 U.S.C. § 2000e-5(f)(1) (1988).

103. *Aronson*, 961 F.2d at 912. The *Aronson* court failed to recognize a recent step taken by Congress to draw a closer parallel between Title VII and the ADEA. Under the statute as originally enacted, ADEA actions had to be filled within two years of the adverse employment action except charges of willful violation of the act could be commenced within three years. 29 U.S.C. §§ 626(e), 255(a) (1988). However, in 1991, Congress amended the Act's limitation provision, making it substantially similar to the statute of limitation of Title VII. 29 U.S.C.A. § 626 (e) (West Supp. 1992); *see also Administration & Enforcement: ADEA suits*, 8 Fair Empl. Prac. Manual (BNA) 431:172 (1991).

104. The relevant section of ADEA states:

> (d) Filing of charge
> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrinmination has been filed with the Equal Employment Oppurtunity Commission. Such a charge shall be filed—
> (1) within 180 days after the alleged unlawful practice occurred; or. . . (2). . . within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

29 U.S.C. Sec. 626(d) (1988).

known as deferral states—allow plaintiffs 300 days in which to file with the EEOC in order to provide the state agencies ample time to investigate and seek conciliation.[105] Once the administrative proceedings have terminated and the plaintiff is so notified, the plaintiff then has 90 days to file a civil action.[106]

The United States Supreme Court held in *Mohasco Corp. v. Silver*,[107] that in deferral states Title VII requires claimants to wait 60 days after the discriminatory practice before commencing their federal course of redress.[108] In effect, this 60-day window decreases the 300-day limit prescribed under Title VII to 240 days.[109] Because the ADEA also prescribed a 300-day limit for cases arising in deferral states, the court in *Aronson* was faced with the issue of whether or not the 60-day reduction imposed in *Mohasco* applied to ADEA cases as well.

In *Aronson*, the court noted the numerous similarities between Title VII and the ADEA. It reasoned that because the ADEA allowed claimants to file with the state before or after filing with the EEOC,[110] the 60-day waiting period of Title VII could not deducted from the 300-day statute of limitations of the ADEA.[111] Therefore, the 300-day limit set forth in the Act controlled the actions and Plaintiff's ADEA claim filed on day 246 was not time barred.[112]

C. *Analysis*

Title VII and the ADEA are substantially similar in their substantive prohibitions of discrimination and the Tenth Circuit has joined other courts in holding that substantive ADEA issues can be resolved by analogy to Title VII precedent. The Tenth Circuit has adopted the Title VII framework to determine the method of proof required under the ADEA.[113] It is therefore logical that the analogy be used to determine other substantive questions, including how to make the employee/independent contractor distinction. It is sound judicial policy to utilize

105. *Id.* § 626(d)(2).

106. *Administartion & Enforcement: ADEA suits*, 8 Fair Empl. Prac. Manual (BNA) 431:172 (1991).

107. 447 U.S. 807 (1980).

108. *Mohasco Corp.*, 447 U.S. at 816-17 (citing 42 U.S.C. § 706(c)).

109. *Id.* at 814 n. 16; *see* SCHLEI & GROSSMAN, *supra* note 82, at 490.

110. *Aronson*, 461 F.2d at 911 (quoting Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 n.4 (1979)).

The court in *Aronson* took notice of the fact that under the ADEA the federal EEOC and the state equivalents are to exercise concurrent jurisdiction over age discrimination claims. In Title VII cases the state is granted a 60-day period of exclusive jurisdiction and, therefore, the claimants are prohibited from filing with the EEOC during such time. ADEA claimants, conversely, may file with the EEOC before or after the state has investigated the claim. Therefore, because claimants are not required to wait 60 days before filing with the federal agency, the 300-day limitation should not be reduced to 240 days as it is in Title VII deferral cases. *Id.*

111. *Id.*

112. *Id.* at 911-12

113. The court adopted the Title VII McDonnel Douglas/Burdine test of disparate treatment in the ADEA context in Branson v. Price River Coal Co., 853 F.2d 768 (10th Cir. 1988).

the substantive similarity of the statutes in order to avoid the accumulation of an entirely separate and often duplicative body of case law in order to interpret the ADEA.

There are, however, significant disparities between the procedural provisions of Title VII and the ADEA. Because the procedural aspects of the acts differ substantially, the analogy is less helpful in that area. The Supreme Court in *Oscar Mayer & Co. v. Evans*,[114] recognized that the concurrent administrative jurisdiction provisions were intentionally included by Congress to expedite the processing of age discrimination suits. Congress intended to give older Americans faster access to redress than was available under the sequential procedure of Title VII. "The premise for this difference is that the delay inherent in sequential jurisdiction is particularly prejudicial to the rights of 'older citizens to whom, by definition, relatively few productive years are left.' "[115]

Given the intentional differences in procedures, binding ADEA plaintiffs to the 240-day limitation period to which Title VII plaintiffs are bound would ignore the clear intent of the Congress.

IV. CONCLUSION

In 1992, the Tenth Circuit Court of Appeals continued to erode public employees' rights by strictly interpreting the "property" provision of the Due Process Clause and creating a rudimentary baseline procedural requirement to satisfy constitutional demands. The court continued to delineate the analytical process to be used by courts in interpreting and applying the ADEA, borrowing the substantive case law of Title VII but correctly refusing to impose that statute's rigid procedural requirements on ADEA plaintiffs.

Daniel Grossman

114. 441 U.S. 750 (1979).
115. *Id.* at 757 (quoting 113 CONG. REC. 7076 (1967)(remarks of Sen. Javits)).