

# Denver Law Review

---

Volume 68  
Issue 4 *Tenth Circuit Surveys*

Article 17

---

January 1991

## Civil Rights

Denver University Law Review

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

---

### Recommended Citation

Denver University Law Review, Civil Rights, 68 Denv. U. L. Rev. 555 (1991).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

---

## Civil Rights

## CIVIL RIGHTS

*Abercrombie v. City of Catoosa*, 896 F.2d 1228

Author: Judge Ebel

Plaintiff, Abercrombie, brought suit against defendants, City of Catoosa, Mayor Conley and Police Chief Dirck. Abercrombie argued that: (1) the mayor and police chief conspired, in violation of 42 U.S.C. §§ 1985(2) and 1986, to retaliate against him because of his testimony in an unrelated case; (2) he was deprived of a property interest without due process of law pursuant to 42 U.S.C. § 1983; and (3) his first amendment rights were violated when he was removed from the wrecker rotation logs used to make referrals. The district court granted summary judgment for the mayor and police chief, and Abercrombie appealed.

First, the Tenth Circuit held that there was no conspiracy. The court explained that Abercrombie failed to prove that the two isolated statements of the mayor and police chief satisfied the “meeting of the minds” requirement needed to prove a conspiracy. Accordingly, the district court properly dismissed Abercrombie’s conspiracy complaint. Second, the court ruled that Abercrombie was deprived of a property interest without due process of law when he was removed from the wrecker referral list. The court explained that an Oklahoma statute required the City of Catoosa to make wrecker referrals on an equal basis. Thus, a property interest was created in wrecker referrals. The court also reversed the judgment notwithstanding the verdict (“JNOV”) on Abercrombie’s first amendment claim. The court reasoned that the JNOV was based on the district court’s incorrect conclusion that Abercrombie had no property interest in wreck referrals. Moreover, the court noted that a benefit cannot be denied to a person on a basis that infringes a constitutionally protected interest. Thus, the court remanded for reinstatement of the jury award.

*DeLoach v. Bevers*, 922 F.2d 618

Author: Judge Logan

Defendant, Bevers, appealed a judgment entered in favor of plaintiff, DeLoach. After murder charges against DeLoach were withdrawn, DeLoach filed a civil rights action under 42 U.S.C. § 1983, claiming that Bevers, the detective assigned to investigate the murder, violated her constitutional rights. The district court found that Bevers unconstitutionally retaliated against DeLoach for exercising her right to retain counsel and caused her to be arrested pursuant to an intentionally false and misleading affidavit. Bevers argued on appeal that: (1) she could not be held responsible for DeLoach’s arrest because there were many intervening actors making independent determinations; (2) she was en-

titled to qualified immunity; (3) several jury instructions were prejudicial; and (4) the court should grant a remittitur.

The Tenth Circuit affirmed the decision of the district court. The court ruled that the alleged misstatements and omissions were material enough that the district court was justified in submitting the question of probable cause to the jury. Second, the court explained that since the arrest violated the fourteenth amendment and Bevers displayed a reckless disregard for the truth, she was not entitled to good faith immunity. Third, the court held that Bevers did not object to most of the jury instructions at trial, and there was no plain error as to those instructions. Finally, the court did not consider the remittitur claim since Bevers failed to make the appropriate argument.

*Bryson v. City of Edmond*, 905 F.2d 1386

Author: Judge Christensen, sitting by designation

Plaintiff, Bryson, individually and as administratrix of the estate of Husband, appealed the district court's dismissal of both her 42 U.S.C. § 1983 claim against the City of Edmond, its police chief, and members of the Oklahoma Air National Guard, and a *Bivens* action against the postmaster. Husband and others were killed or injured when they were shot by Sherrill, a fellow post office employee. The Edmond City police arrived at the scene within minutes of the outset of the shooting but classified the massacre as a hostage situation and did not attempt to enter the building for more than an hour and a half. Bryson alleged that in making this decision, the police deprived her husband of substantive due process and associational rights in violation of the fifth and fourteenth amendments.

The Tenth Circuit ruled that negligent conduct does not implicate the due process clause of the fourteenth amendment to afford § 1983 relief. In the case at hand, Bryson pleaded intentional, willful, and wanton disregard for Husband's rights or in the alternative, gross negligence. The court concluded that notwithstanding the pleading, there was no indication of culpability other than ordinary negligence. Furthermore, the court held that the city had no affirmative duty under the fourteenth amendment to protect Husband from another individual. Finally, the court stated that pursuant to § 1983, a claim for the deprivation of a right to familial association is shown when there is intent to interfere with a particular relationship. The court found that the postmaster's and Air National Guard's failure to train, supervise, examine or afford medical care to Sherrill did not show a specific intent to interfere with the specific relationship in question.

*Barnard v. Chamberlain*, 897 F.2d 1059

Author: Judge Brown, sitting by designation

Plaintiff, Barnard, contended that his civil rights were violated when the Utah State Bar refused to publish a letter he wrote. Specifically, Barnard claimed that under 42 U.S.C. § 1983, his constitutional right to

free speech and his right to due process of law were violated. The district court granted summary judgment in favor of defendant, Chamberlain, commissioner of the Utah State Bar. Barnard subsequently appealed.

The Tenth Circuit first considered Barnard's § 1983 claim. The court stated that for a successful claim under § 1983, a plaintiff must allege that a person acting under state law deprived him of a right secured by the Constitution. The court found sufficient facts supporting Barnard's conclusion that the refusal to publish his article was taken under color of state law. The court next considered whether Barnard was deprived of his first amendment rights; this depends on the nature of the forum to which he seeks access. The court ruled that the fact the government sponsors a medium of communication does not automatically render that means of communication a public forum. Moreover, the Utah Bar Association was unequivocal in its intent to close the *Bar Letter* to the public. Furthermore, the court rejected Barnard's argument that because the Utah Bar Association published three other articles, there was intent to create a public forum. The court explained that the articles were not randomly submitted, but were instead written at the request of the Utah Bar Association. Finally, there was no viewpoint discrimination when the Utah Bar refused to publish Barnard's article. The record clearly indicated that the *Bar Letter* refused to publish any randomly submitted opinion.

*Clark v. Poulton*, 914 F.2d 1426

Author: Judge Seymour

Dissent: Judge Anderson

Plaintiff, Clark, brought suit against defendant, Poulton, a parole officer for the Utah State Correction Department pursuant to 42 U.S.C. § 1983. Clark alleged that his constitutional rights were violated by two incidents of excessive force: by the denial of medical treatment, and by the denial of reasonable access to the mails. A magistrate recommended that Clark's claims be dismissed, and the district court entered judgment accordingly. On appeal, Clark asserted that the magistrate had no jurisdiction because the referral was not authorized by statute.

The Tenth Circuit ruled that the magistrate was without jurisdiction and consequently reversed the district court's decision. The court explained that 28 U.S.C. § 636(b)(3) allows a judge to appoint a magistrate to serve as a special master over dispositive motions, applications for post-conviction relief, and prisoner petitions challenging conditions of confinement. Since no dispositive motion was filed, and since Clark was not seeking post-conviction relief, the only applicable provision was the one challenging "conditions of confinement." The court ruled, however, that "conditions of confinement" do not encompass the use of excessive force alleged by Clark. This is because Clark's claims involved isolated events, and "conditions of confinement" include ongoing prison practices and regulations. Moreover, the court added that one of

the excessive force claims arose from an incident occurring before Clark was jailed. In addition, pursuant to § 636(c), the district court must make a special designation, and the consent of the parties must be communicated to the clerk of the court. Neither of these factors were satisfied. Second, Clark's failure to object to proceedings before the magistrate did not amount to a consent of jurisdiction. The court explained that parties, by their conduct, cannot extend the magistrate's jurisdiction.

*Crabtree v. Muchmore*, 904 F.2d 1475

Author: Judge Logan

Plaintiff, Crabtree, filed a 42 U.S.C. § 1983 suit, alleging a conspiracy between opposing attorneys and Oklahoma State District Judge Cook. The district court dismissed the conspiracy claims against the attorneys. Moreover, it granted the judge's motion to dismiss as a motion for summary judgment, based on absolute judicial immunity. Last, the district court awarded attorney's fees to the judge.

The Tenth Circuit, considering three companion appeals, upheld the dismissal of the conspiracy claims as to both the judge and the attorneys. The district court correctly construed the complaint as stating insufficient facts to show any evidence of a conspiracy between the judge and the attorneys. Also, the court ruled that absolute judicial immunity properly barred the action against the judge since he acted solely in his judicial capacity. The court further affirmed the award of attorneys' fees to the judge because no reasonable attorney could believe that absolute judicial immunity would not bar the action. Finally, the court reversed the denial of attorneys' fees to the attorneys. The court held that since Oklahoma state courts previously denied Crabtree's claims to the disputed property, no reasonable attorney would institute a conspiracy action under § 1983 to assert title claims.

*Dixon v. City of Lawton*, 898 F.2d 1443

Author: Judge Baldock

Plaintiff, Dixon, brought a civil rights action pursuant to 42 U.S.C. §§ 1983 and 1985(3) against the City of Lawton and several police officers regarding the shooting death of her son. The district court held in favor of the police officers and the City on the § 1983 claim, and in favor of the police officers on the § 1985(3) claim. Dixon subsequently appealed. On appeal, Dixon argued that: (1) the district court erred in instructing the jury that § 1983 liability was a condition precedent to § 1985(3) liability; and (2) the district court's admission of certain information contained in Dixon's medical records was erroneous because of evolving federal common law privilege.

The Tenth Circuit first held that § 1983 liability is not a condition precedent to liability under § 1985(3). The court reasoned that there are several important differences between the sections. In addition, in order to recover under a § 1983 conspiracy theory, Dixon must prove

not only a conspiracy, but also an actual deprivation of rights. Last, communications between psychotherapists and the son were admissible. The court explained that after the son's death, the privilege did not apply in the proceeding because Dixon relied upon the son's previous emotional condition as an element of her defense.

*Gulley v. Orr*, 905 F.2d 1383

Per Curiam

Plaintiff, Gulley, appealed the district court's verdict in favor of defendant, Orr, Secretary of the Air Force. Gulley brought suit against Orr under Title VII of the Civil Rights Act claiming that he was subjected to severe discipline and was not promoted because he was black and because he had complained of discrimination. On appeal, Gulley argued that: (1) the exhaustion of his individual administrative remedies was sufficient to enable him to assert class claims in federal court; (2) the district court erred in finding that the disciplinary actions instituted against him were not discriminatory; and (3) the district court erred in denying his motion for default judgment and in quashing two of his subpoenas.

The Tenth Circuit affirmed the district court's judgment. The court ruled that one of Gulley's class actions was barred from federal court because his class administrative remedies had not been exhausted. Moreover, the exhaustion of individual administrative remedies was insufficient. The court further found that Orr rebutted the unlawful discrimination charges by showing a legitimate, nondiscriminatory reason for its actions. Finally, the court concluded that the district court did not abuse its discretion in denying Gulley's motion for a default judgment or in quashing two of his subpoenas.

*Hannula v. City of Lakewood*, 907 F.2d 129

Author: Judge Tacha

Plaintiff, Hannula, sought damages under the Civil Rights Act of 1871, and 42 U.S.C. § 1983 for injuries allegedly sustained during an arrest by a police officer from the City of Lakewood. Defendant, Lively, moved for summary judgment based on a qualified immunity defense. The district court denied the motion, and Lively appealed.

The Tenth Circuit reversed the district court and granted summary judgment. The court reasoned that Hannula must prove that Lively's actions constituted an excessive use of force under a substantive due process standard. The court required Hannula to prove that: (1) the force used was excessive to the need presented; (2) the injury was excessive; and (3) Lively's motive was improper. After assessing the facts, the court found the evidence insufficient to clearly constitute a constitutional violation and, therefore, granted summary judgment.

*Reed v. Dunham*, 893 F.2d 285

Per Curiam

Plaintiffs, Maple and Reed, were attacked while in prison. Reed suffered serious knife wounds. Both Maple and Reed filed a *pro se* civil rights action, which was later dismissed by the district court. The district court reasoned that the complaint was legally frivolous pursuant to 28 U.S.C. § 1915(d). Maple and Reed appealed, arguing: (1) cruel and unusual punishment and denial of equal protection because a corrections officer displayed gross disregard in failing to promptly come to Reed's aid; (2) conspiracy to neglect and discriminate against Reed in violation of the eighth and fourteenth amendments; and (3) denial of proper and speedy medical assistance after the injury.

The Tenth Circuit first held that the district court was correct in dismissing the cruel and unusual punishment and equal protection claims. The court reasoned that there was no arguable basis for a constitutional claim based on a correctional officer's failure to prevent injury to a prisoner. Also, Reed failed to provide any evidence supporting denial of equal protection rights or due process rights. Moreover, the district court properly dismissed the conspiracy claim. The court held that Reed and Maple's claim alleging a general discriminatory conspiracy was unfocused, conclusory and deficient in showing elements of agreement and concerted action. Finally, Reed's deliberate indifference claim was incorrectly dismissed and was vacated and remanded for further proceedings. The court stated that the district court misread Reed's deliberate indifference claim as involving a mere difference of opinion with prison medical staff. The actual focus of the claim was not the character of the care provided, but the delay in furnishing it. There was nothing in the record to indicate Reed's two hour delay in receiving medical attention was based on any competent medical opinion. In light of the liberal substantive standard used for § 1915(d) allegations, the dismissal of the second cause of action was improper.

*Riggs v. City of Albuquerque*, 916 F.2d 582

Author: Judge Ebel

Plaintiffs, Riggs and others, filed a civil rights class action suit against defendant, City of Albuquerque ("Albuquerque"), seeking, *inter alia*, to prevent the destruction of certain intelligence documents. The documents were investigative files kept by the Intelligence Unit of the Albuquerque Police Department. The class alleged that the documents were retained without a proper police purpose. The class argued that this surveillance had a chilling effect on their first amendment rights, causing injury to their personal, political, and professional reputations. The district court dismissed the action for lack of standing. The class subsequently appealed.

The Tenth Circuit reversed the district court's dismissal of the case for lack of standing. The court ruled that the district court erroneously



construed the class' complaint as alleging only a general chilling of their rights because of a suspicion that police investigations were carried out improperly. The court found that the complaint did allege harm to personal, political, and professional reputations in the community. It also alleged that they were the actual targets of illegal investigations. Accordingly, the court reasoned that the class brought forth a cognizable, continuing injury which presented a case or controversy for the court to consider.

*Ware v. Unified School Dist.*, 902 F.2d 815

Author: Judge Seymour

Dissent: Judge Barrett

Plaintiff, Ware, brought suit against defendant, Unified School District No. 492 ("school board"), alleging that her first amendment rights were violated when the superintendent of schools fired her allegedly because she opposed a bond issue. The district court directed a verdict for the school board, and Ware subsequently appealed.

The Tenth Circuit held that a local governmental entity, such as a school board, may only be held liable for decisions made by final policy-makers. Under Kansas law, the school board, not the superintendent, has final decisionmaking authority. Accordingly, the school board cannot be liable for the superintendent's actions. The court, nonetheless, noted that there are circumstances in which a governmental entity will be liable for a subordinate's decisions due to a delegation of final decisionmaking power. This occurs, for example, when a subordinate's decision is couched as a policy statement, or when the decision manifests a custom or usage. In the case at hand, the court ruled that the subordinate's decision to terminate Ware's employment was not cast in terms of a policy statement, nor was there proof that the decision represented a custom or usage. Second, the court determined whether the school board could be held liable for constitutional deprivation arising from its own decision to fire Ware. The court stated that to find liability, a direct causal link must exist between the acts of the governing body sought to be held liable and the alleged constitutional deprivation. Such a link may be established when the governing body has exercised its decisionmaking authority with deliberate indifference to the constitutional rights of those affected by its decisions. In this case, the record contained sufficient evidence to create a jury question on whether the school board acted with deliberate indifference in approving Ware's dismissal. The court reversed and remanded to the district court.

