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## Civil Rights

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## CIVIL RIGHTS

*Dunn v. White*, 880 F.2d 1188

Per Curiam

Dissent: Judge McKay

Plaintiff, Dunn, appealed the dismissal of his civil rights claim under 42 U.S.C. § 1983, which alleged that prison officials forced him to submit to an AIDS blood test, without a due process hearing and against his religious beliefs.

The Tenth Circuit held that, because of the seriousness of AIDS and its transmissibility, the prison's interest in treating those infected and preventing the spread of AIDS outweighed Dunn's expectation of privacy under the fourth amendment. The prison's lack of a current medical program for AIDS-infected prisoners did not make the blood testing policy arbitrary or irrational. The court found Dunn's allegation that the AIDS test violated his religious beliefs too vague and conclusory to sustain a claim under the first amendment. Finally, the court held that Dunn was not entitled to a due process hearing prior to being threatened with disciplinary segregation. The court affirmed the district court's dismissal of the claim.

*Duran v. Carruthers*, 885 F.2d 1485

Author: Judge McWilliams

Plaintiffs, inmates of the Penitentiary of New Mexico, filed a class action suit against the defendant state officials alleging civil rights violations in the New Mexico prison system. The district court entered a consent decree, in full settlement of the claims, and a jury trial was waived. Defendants later attempted to have certain portions of the consent decree vacated, claiming that those portions were not directly related to plaintiffs' federal rights. The district court denied the defendants' motion to vacate.

The Tenth Circuit affirmed the district court order. The defendants' arguments that the eleventh amendment barred the federal court from enforcing the decree were unavailing, since the eleventh amendment does not bar a suit where the state official has allegedly violated federal law. This argument was particularly weak because the defendants conceded federal jurisdiction on the underlying complaint which was the basis for both the lawsuit and ensuing consent decree.

*Duran v. Carruthers*, 885 F.2d 1492

Author: Judge McWilliams

Plaintiffs brought a class action suit against the governor and other state officials, including the Warden of the Penitentiary of New Mexico, alleging abuses violating 42 U.S.C. § 1983. A consent decree in settle-

ment was entered into in 1980, setting forth rules and regulations which would govern the defendants in their operation of the prison. The consent decree itself has been the subsequent cause of further litigation between the parties in the form of motions to modify or vacate portions of the decree or motions to hold defendants in contempt for noncompliance. This appeal is from two orders of the district court granting attorneys' fees to plaintiffs.

The Tenth Circuit affirmed the orders, noting that an award of attorneys' fees will be upset only if it represents an abuse of discretion. The court held that defendants' arguments against the award of attorneys' fees were without merit.

*Durre v. Dempsey*, 869 F.2d 543  
Per Curiam

Durre, a state prison inmate, filed this action pursuant to 42 U.S.C. § 1983 against employees of the Colorado Department of Corrections. The district court dismissed all of Durre's claims.

Upholding all but one of the district court's dismissals, the Tenth Circuit held that Durre's allegations of conspiracy to deprive him of his constitutional rights were insufficient to state a claim under 42 U.S.C. § 1983. Durre's complaint alleging intentional taking and destruction of his property by a correction official also failed because the state provided an adequate post-deprivation remedy. Allegations of indigency, lack of counsel and confinement were not sufficient to show inadequate post-deprivation remedy. No facts were plead to show that Durre was unable, as a result of his *pro se* status, to follow the claim procedure or proceed to court. The court ruled that Durre's allegation that a corrections officer instigated and directed a beating of Durre by several other inmates in the presence of the officer did state a valid section 1983 claim, but against that officer only. The court reversed and remanded the district court's dismissal of Durre's claim against this correction officer, and affirmed the dismissal of all other claims.

*Edwards v. Rees*, 883 F.2d 882  
Author: Judge Seth

Charles Edwards, guardian of plaintiff Craig Edwards ("Craig"), brought suit under 42 U.S.C. § 1983, against defendants, Rees and Davis County School District ("Rees"). Craig argued that his fourth, fifth, and fourteenth amendment rights were violated when he was taken from class and interrogated by Rees. Craig complained that Rees questioned him about his participation in a bomb threat. The district court entered summary judgment in favor of Rees. The district court reasoned that Craig's constitutional rights were not violated.

The Tenth Circuit affirmed the district court decision. The court reasoned that the same relaxed fourth amendment standard involving school searches applies in cases involving seizures at schools. The re-

laxed standard is reasonableness under all the circumstances, rather than probable cause. Using this standard as a basis, the court found that Rees' conduct was justified at its inception. The court also stated that the interrogation was reasonably related in scope to determining whether Craig made the bomb threat. Consequently, the court held that Rees did not violate Craig's fourth amendment rights. The court also found that Craig was not deprived of liberty or property rights. In particular, the court stated that Craig's "right to be free from the restraints imposed by the criminal justice system," his right to a public education, and his right to his good reputation, without due process of law, were not violated. Moreover, the court determined that section 1983 is not available as a means for vindicating the honor of aggrieved plaintiffs. Rather, it is a means for compensating substantial losses occasioned by constitutional violations.

*Equal Employment Opportunity Commission v. General Lines, Inc.*, 865 F.2d 1555

Author: Judge Barrett

Plaintiff, Equal Employment Opportunity Commission ("EEOC"), brought a retaliatory discharge suit against defendants, General Lines and Bi-Rite Package ("Bi-Rite Liquor"), on behalf of two liquor store employees. The district court found for EEOC awarding back pay. However, reinstatement, front pay, and injunctive relief were not granted. Consequently, EEOC appealed.

The Tenth Circuit affirmed the district court's judgment refusing to grant reinstatement. The court reasoned that even though Bi-Rite Liquor did engage in unlawful employment practice, a preponderance of the evidence showed that the employees would have been terminated even if there had been no discrimination. The court also held that the back pay awarded fully compensated the employees so that the award of front pay was not necessary. Also, since the EEOC did not prove that there existed a cognizable danger of recurrent discriminatory violations, there was no need for a permanent injunction.

*Ewers v. Board of County Commissioners*, 874 F.2d 736  
Per Curiam

Plaintiff, Ewers, appealed the district court's summary judgment dismissing his claim under 42 U.S.C. § 1983. Ewers alleged that he had been deprived of a property interest in his continued employment without due process of law. Ewers was employed as a road superintendent by defendant, County Commissioners. Ewers could only be terminated if there were cause or if the position was abolished. Subsequently, the commissioners abolished the position of road superintendent and created a position of county manager. This position entailed accomplishing the same tasks that Ewers accomplished in his position as road superintendent.

The Tenth Circuit reversed the district court's summary judgment

and remanded the claim. The court reasoned that a property interest in continued employment may be grounded in the personnel policies of the employer that state an employee may not be discharged without cause. In addition, the court reversed the summary judgment holding that there remained sufficient facts in dispute concerning whether Ewers' position was terminated solely for the purpose of removing him without cause. The case was remanded for further proceedings on Ewers' property interest claim.

*Gillihan v. Shillinger*, 872 F.2d 935  
Per Curiam

Plaintiff, Gillihan, acting *pro se*, commenced this civil rights action pursuant to 42 U.S.C. § 1983 against defendants, Shillinger, Shantyfelt, and Bunch, who were warden, office manager, and central services unit manager at the Wyoming State Penitentiary. Gillihan alleged that he was deprived of his property without due process and was subjected to cruel and unusual punishment. The district court dismissed Gillihan's complaint for failure to state a claim and denied his motion to supplement his complaint and several procedural motions. Gillihan's claims arose from charges assessed by the prison for Gillihan's transportation and the prison's subsequent freezing of funds in his prison trust account.

The Tenth Circuit held that the district court erred in dismissing Gillihan's claim for deprivation of property without due process and in denying Gillihan leave to supplement his complaint. The court affirmed the district court's dismissal of Gillihan's claim for cruel and unusual punishment.

The court found that Gillihan had a protected property interest in his prison trust funds to the extent the monies were received from family and friends outside the prison or wages he had earned while in prison, and deprivation of property without due process gives rise to a claim under section 1983. When deprivation of protected property occurs under an affirmatively established or *de facto* policy, rather than random or unauthorized deprivation, the state must provide a predeprivation hearing. The availability of a postdeprivation remedy will not bar a section 1983 claim. Because the record did not reveal the necessity of quick action by the prison or the impracticality of providing predeprivation process, the district court erred in dismissing Gillihan's deprivation claim.

The court further opined that cruel and unusual punishment arises only upon deprivation of essential human needs. Gillihan's alleged deprivation of "what little luxury" he had did not trigger the constitutional proscription against cruel and unusual punishment, and the district court properly dismissed Gillihan's claim for cruel and unusual punishment.

*Jackson v. City of Albuquerque*, 890 F.2d 225  
Author: Judge Brown, sitting by designation

Defendants, the City of Albuquerque ("City") and certain city officials, appealed the jury verdict in favor of plaintiff, Jackson, in this employment civil rights action. Defendants contended that the evidence was insufficient to find that Jackson had been retaliated against or terminated because of his race. Jackson appealed the refusal to order reinstatement of his employment with the City.

Following a detailed examination of all the evidence, the Tenth Circuit found it sufficient to support the jury verdict in all respects. The court further concluded that denial of reinstatement was improper, finding that comparable positions were not easily found and those hostile to Jackson were no longer employed by the City.

*Melton v. City of Oklahoma City*, 879 F.2d 706  
Author: Judge McKay  
Dissent: Judge Baldock (dissenting in part)

Plaintiff, Melton, a police officer for Oklahoma City ("City"), brought a civil rights action against the City and members of a Disciplinary Review Board pursuant to 42 U.S.C. §§ 1983, 1985, and 1988, and 18 U.S.C. §§ 1961-68. Melton alleged that he was deprived of liberty and property without due process of law and that he was discharged in retaliation for exercise of his first amendment speech rights. Defendants entered six appeals on the judgment following a jury verdict and various post-trial orders.

The Tenth Circuit held the following: (1) Melton's testimony on behalf of a criminal defendant, Page, and statements to Page's counsel dealt with a matter of public concern, outweighed the state's interest in effective functioning of its public enterprise, and, as such, constituted protected speech under the first amendment. (2) The court could not affirm the jury's verdict against the defendants on the first amendment claim. Errors in jury instructions made it impossible to determine whether the discharge was properly based on Melton's statements to Page's counsel or Melton's trial testimony. The defendants had no immunity for retaliatory action based on the trial testimony, but did enjoy qualified immunity with regard to their recommendation of dismissal for Melton's communications to Page's counsel. (3) Melton was given adequate notice of the proceedings against him and therefore was not denied his property interest in continued employment without due process of law. (4) Melton received no due process before he was deprived of his property interest in his status as a retired police officer. (5) The publication of charges against Melton, even without including the reasons for his dismissal, impaired Melton's liberty interest in his good name and reputation. Moreover, even though he was discharged on grounds other than perjury, Melton should have been allowed to confront and cross-examine those who charged him with perjury.

The court affirmed in part, reversed in part, and remanded for a new trial on (1) the liability of the City and chief of police for the deprivation of Melton's property interest in his retired officer status without due process of law, and (2) the liability of the individual defendants for Melton's claim that his trial testimony was a substantial motivating factor for his dismissal.

*O'Rourke v. City of Norman*, 875 F. 2d 1465

Author: Judge Brorby

In an action arising from a nighttime search of a private residence, the plaintiffs alleged a violation of 42 U.S.C. § 1983 because the authorizing instrument was a daytime bench warrant for contempt. The Tenth Circuit reversed the district court on this issue, finding that a nighttime search without a nighttime endorsement on the warrant was unreasonable under the fourth amendment because contempt is not classified as a felony under Oklahoma law.

The Tenth Circuit then found the city and the police officers employed by the city jointly and severally liable to the plaintiffs. The court vacated sanctions that the district court had imposed on the plaintiffs, stating that the suit was not frivolous. After reversing on the issue of the constitutionality of the search, the court remanded on the issue of attorney's fees and costs for the plaintiffs pursuant to 42 U.S.C. § 1988.

*Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262

Author: Judge Ebel

Plaintiff, Phelps, brought suit alleging that defendants conspired to publish defamatory newspaper articles about him in violation of federal civil rights statutes, the first and fourteenth amendments, and the Racketeer Influenced and Corrupt Organizations Act. The district court dismissed all claims for failure to state a claim.

Although the Tenth Circuit affirmed the dismissal of the 42 U.S.C. § 1981 claim, the court stated that alleged discrimination of a white person because of an association with blacks could be a cause of action.

The court affirmed all other matters except Phelps' equal protection claim under 42 U.S.C. § 1983 because Phelps had sufficiently alleged racial animus in his amended complaint. Also, Phelps sufficiently alleged a conspiracy, a discriminatory animus against blacks, acts in furtherance of the conspiracy and deprivation of rights under the equal protection clause so that elements of 42 U.S.C. § 1985(3) were satisfied. The court reversed both of these matters.

Lastly, the court remanded the state action claim under 42 U.S.C. § 1983 with directions for the district court to further develop the factual record, particularly as to the precise nature of the state's involvement in the publication of the articles. Among the factors to be weighed are whether the actions of the former assistant attorney general reflected a discriminatory animus and whether he acted in concert with the de-

fendants. These claims, if false, could be grounds for sanctions as requested by the defendants.

*Rozek v. Topolnicki*, 865 F.2d 1154

Author: Judge Parker, sitting by designation

Plaintiff, Rozek, filed a civil rights claim under 42 U.S.C. § 1983. Rozek alleged violations arising from an investigation that he had been embezzling from his employer, defendant, University of Colorado (the "University"). The district court granted summary judgment for the University on the federal claims and dismissed the pendent state claims based on the University's immunity.

The Tenth Circuit found that the special prosecutor and the members of his investigative team were entitled to absolute immunity and qualified immunity, respectively. The court stated that this immunity applies in civil liability actions during investigation and prosecution of charges, provided the conduct did not violate clearly established statutory or constitutional rights. Moreover, the court held that the University and the Office of the District Attorney, were agencies of the State of Colorado entitled to claim immunity based on the eleventh amendment. The court explained that this amendment bars damage actions against a state in federal court. Consequently, the court disagreed with Rozek's contention that eleventh amendment immunity for states was abrogated by Congress in enacting § 1983. The court held that to negate claims to immunity, Rozek must prove: (1) the existence of "clearly established" constitutional or statutory law that could have been violated; and (2) the defendants' conduct violated that law. There was no clearly established constitutional violation, and Rozek did not establish the existence of genuine issues of material fact. Therefore, the district court's grant of summary judgment was affirmed.

*Sanchez v. Bond*, 875 F.2d 1488

Author: Judge Brown, sitting by designation.

This suit was filed under section 2 of Voting Rights Act, as amended, 42 U.S.C. § 1973, alleging that the at-large election procedure for county commissioners in Saguache County impermissibly dilutes hispanic votes in violation of section 2. The district court found that plaintiffs failed to meet the burden of proof for such a section 2 violation and entered judgment for defendants. On appeal, plaintiffs alleged that the district court applied erroneous standards and made erroneous factual findings.

The Tenth Circuit affirmed, however, saying that a high level of hispanic participation in the political process and the success of several hispanic-supported candidates weighed heavily against a finding of vote dilution, and that where there are two permissible views of evidence, the fact-finders choice between them cannot be erroneous.



*Starrett v. Wadley*, 876 F.2d 808

Author, Judge Ebel

The plaintiff, Starrett, a former county employee, alleged sexual harassment against her supervisor, defendant Wadley, and Creek County ("County"). The district court entered judgment for Starrett on some of her claims. Starrett, the County, and Wadley, in his official capacity, appealed.

Following sexual advances and sexually discriminating treatment of Starrett by Wadley, Starrett sought relief by speaking out about Wadley's improper advances and his alcohol problems. The Tenth Circuit upheld the finding that it was Starrett's exercise of her first amendment rights that led to her discharge and affirmed the district court's judgment that Wadley's conduct deprived Starrett of her constitutional rights and entitled her to remedy under 42 U.S.C. § 1983.

Finding that Wadley's termination of Starrett's employment was a policy decision for the County, the Tenth Circuit affirmed the judgment for Starrett on her section 1983 claim only to the extent that it imposed liability on the County for Starrett's termination; however, the court reversed the finding of the County's liability for Wadley's other acts of harassment, determining that those acts were not officially sanctioned and, thus, were not County "policy." The court therefore vacated the damage award against the County and remanded for a new trial on the issue of damages.

The Tenth Circuit reversed the district court's dismissal of Starrett's Title VII claims and remanded for further proceedings after finding that Starrett was not a member of Wadley's personal staff exempt from the definition of employee under Title VII. The court affirmed the district court's denial of reinstatement and front pay, and affirmed the award of attorney's fees to Starrett pursuant to 42 U.S.C. § 1988; however, the district court's award of interest on the attorney's fees was vacated and remanded for recalculation.

*Valdez v. City and County of Denver*, 878 F.2d 1285

Author: Judge Baldock

Plaintiff, Valdez, a spectator in state traffic court, was held in contempt of court, arrested, and detained in Denver County Jail for fourteen days. Valdez instituted this action for damages pursuant to 42 U.S.C. § 1983 against the City and County of Denver and various law enforcement officers. The district court denied two of the officers' motions for summary judgment on the grounds of either "quasi-judicial" or qualified immunity. The officers appealed.

The Tenth Circuit ruled that the extent of government officials' immunity depends on the likely effect their exposure to liability will have on the operation of effective government in a particular context, balanced against the potential for a deprivation of individual rights in that context. Enforcing a court order or judgment is intrinsically associated

with a judicial proceeding. The record indicated that every action of the officers to which Valdez objected was taken under the direction of a state court judge. The court reversed and remanded with instructions to dismiss the complaint as to the officers on the basis of absolute immunity.

*Wulf v. City of Wichita*, 883 F.2d 842

Author: Judge Anderson

Plaintiff, Wulf, was awarded damages for emotional distress, back pay, front pay in lieu of reinstatement, and attorneys' fees in an action grounded on 42 U.S.C. § 1983. Punitive damages were assessed against defendant, LaMunyon. Defendants, the City of Wichita ("City"), Denton, and LaMunyon, appealed the finding of liability, the amount of damages awarded, and the award of attorneys' fees.

The Tenth Circuit affirmed the district court's conclusion that Wulf's termination from the police department violated his first amendment rights, that LaMunyon was personally liable, and that he lacked qualified immunity. However, the court found insufficient evidence supporting the district court's award of punitive damages against LaMunyon and reversed on that issue. The court also reversed the district court's finding of liability on the part of Denton and the City. Denton's actions constituted simple negligence, which cannot form the basis for a first amendment claim. In addition, Denton, as an official policymaker of the City, did not ratify LaMunyon's unlawful actions and therefore created no liability for the City. The court found that LaMunyon was not an official policymaker and thus his actions created no liability for the City.

