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EMPLOYMENT DISCRIMINATION

Brothers v. Custis, 886 F.2d 1282

Author: Judge Anderson

Plaintiff, Brothers, brought a *Bivens* action (*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)) against the defendants seeking damages for alleged interference with the exercise of Brothers's first amendment rights. Brothers was denied a permanent staff position at the Veterans Administration Medical Center, allegedly in retaliation for her "whistle-blowing" activities regarding certain practices at the medical center. The defendants appealed the jury verdict in favor of Brothers.

The Tenth Circuit reversed, concluding that a *Bivens* action was not a remedy available to Brothers. Brothers had the right to petition the Office of the Special Counsel in connection with her claim that she was denied permanent employment in violation of her constitutional rights. The court stated that it, along with other courts, is reading broadly *Schweiker v. Chilicky*, 487 U.S. 412 (1988) by cutting back significantly on the availability of *Bivens* actions.

Ebert v. Lamar Truck Plaza, 878 F.2d 338

Author: Judge McWilliams

Plaintiff, Ebert, and other former employees appealed a decision of the district court finding in favor of their employer, defendant Lamar Truck Plaza. The court found that there was (1) no discriminatory sexual harassment in violation of 42 U.S.C. § 2000(e) *et. seq.*; and (2) no violation of the Equal Pay Act, 29 U.S.C. § 206(d). The district court found that the evidence presented of sexual harassment was not sufficiently severe or pervasive to alter the conditions of employment and to create an abusive working environment. The issue on appeal was whether the critical findings of the district court were clearly erroneous.

The Tenth Circuit held that the district court's findings were not clearly erroneous. The court also found the district court's conclusion that the evidence supporting the employer's pay scale demonstrated non pretextual legitimate business reasons was not clearly erroneous.

Jackson v. Pool Mortgage Co., 868 F.2d 1178

Author: Judge Ebel

Plaintiff, Jackson, brought suit against defendant, Harmon, for sexual and racial discrimination in violation of Title VII of the Civil Rights Act ("Act"), 42 U.S.C. § 2000e and 42 U.S.C. § 1981. The jury awarded actual and punitive damages. The district court affirmed the judgment for Jackson, but vacated the award of punitive damages. On appeal, Harmon argued that the actual damages awarded were excessive as a matter

of law because they exceeded the limits of back pay liability applicable under Title VII and section 1981. In a cross-appeal, Jackson asserted that the district court erred in vacating the jury's punitive damage award.

The Tenth Circuit held that under section 1981, actual damages are not limited solely to back pay and that damages for pain, suffering, and physical and emotional distress are allowed. The court found sufficient evidence in the record for physical and emotional damages in addition to back pay and affirmed the total award. On the punitive damages issue, the court noted that even though the district court had inappropriately relied on Oklahoma law rather than federal standards to determine punitive damages, the district court's decision to vacate the punitive damages was appropriate.

Pitts v. Board of Education, 869 F.2d 555

Author: Judge Seymour

Defendant, Board of Education, passed a resolution not to renew plaintiff's, Pitts, contract as a tenured teacher. Pitts indicated that he wished to exercise his right to a pretermination hearing but proceeded to file suit prior to the hearing. Consequently, Pitts waived his right to a pretermination hearing, and the Board finalized its determination not to renew the contract. Pitts brought suit pursuant to 42 U.S.C. § 1983 alleging his property and liberty interests were violated when he was discharged without due process. The district court granted summary judgment, and Pitts appealed.

The Tenth Circuit upheld the district court's decision to dismiss the complaint. The court found that Kansas law provided adequate administrative due process in tenured teacher dismissal proceedings. By filing suit before exhausting these procedures, Pitts waived the right to argue that he was denied due process.

Smith v. Department of Human Services, 876 F.2d 832

Author: Judge Baldock

Plaintiff, Smith's, employment was terminated by defendant Department of Human Services ("DHS") when he was 59 years of age. Thereafter, Smith filed a state court action under the Age Discrimination Employment Act ("ADEA"), and was awarded reinstatement of his former position, all back pay, and benefits accruing since his discharge. Smith's federal district court action prayed for liquidated damages, available under ADEA if the evidence showed willfulness by the defendant employer. Smith died and his widow was substituted as plaintiff. The district court ruled in favor of the DHS.

On appeal, the Tenth Circuit did not reach the issue of willfulness. Instead, it held that Smith's action for liquidated damages was penal, such that it does not survive Smith's death. Under federal common law (barring a statutory expression to the contrary), a suit for damages

which is penal in nature will not survive the plaintiff's death. Although the ADEA is not primarily a penal statute, the damages prayed for in this case were penal. The court remanded to the district court for dismissal.

Wall v. United States, 871 F.2d 1540

Author: Judge McWilliams

Dissent: Judge Seymour

Plaintiff, Wall, filed an action in district court based on age discrimination and handicap discrimination following termination of his employment from the Department of Health and Human Services ("Department"). Wall sought review of the Merit Systems Protection Board's ("Board") holding that Wall "voluntarily" left his employment with the Department. The Board dismissed Wall's claim for lack of jurisdiction because voluntary retirement is not an adverse action which is appealable. Wall appealed the district court's subsequent dismissal of his action for lack of subject matter jurisdiction.

The Tenth Circuit found that Wall's voluntary retirement gave the court exclusive jurisdiction to review the Board's ruling, pursuant to 5 U.S.C. §§ 7702-7703(b)(1)-(2). Affirming the decree, the court found that the district court properly construed the statutes, and properly dismissed Wall's *de novo* action in the district court.

