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CIVIL RIGHTS

Skinner v. Total Petroleum, Inc., 859 F.2d 1439

Plaintiff appeals from the district court's denial of his motion for a new trial on the section 1981 claim because the jury's verdict was grossly inadequate. Defendant appeals from the district court's judgment in favor of the plaintiff on the Title VII claim, alleging that the district court was bound by the jury's determination of damages, and yet the court awarded damages in excess of that determination. Defendant also appeals from the district court's denial of its motion to dismiss the Title VII claim for untimely filing, and the plaintiff's section 1981 claim. Affirmed in part, reversed in part, and remanded.

Plaintiff brought suit against his employer, Total Petroleum, charging violations of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964. The charges arose out of the alleged unlawful termination of the plaintiff in retaliation for plaintiff's assistance with an Equal Employment Opportunity Commission (EEOC) claim brought by Mr. Skinner's black co-worker. Plaintiff demanded a jury trial on his section 1981 claim. His Title VII claim was tried to the court. The jury's findings are binding on all common issues. Therefore, the district court erred in awarding damages in excess of \$40,000 when the jury awarded damages of only \$3,945.48. However, the district court's denial of plaintiff's motion for a new trial is also reversed because the jury's award of damages was grossly inadequate and the result of jury compromise. This constituted an abuse of discretion on the part of the district court. Finally, the decision of the district court to deny the defendant's motion to dismiss is affirmed.

Huxall v. First State Bank, 842 F.2d 249

Appellee First State Bank had obtained a default judgment against appellant Huxall in a debt action. Following a sheriff's sale of property seized to satisfy the judgment, Huxall filed an action under § 1983 alleging that she had been deprived of her property without due process of law.

The Tenth Circuit found that Huxall had chosen not to take advantage of the opportunities available to invoke the state judicial procedure to protect her property; therefore, the facts did not support her claim. Affirming the district court's order, the court held that Huxall's failure to show a denial of due process was a proper basis for dismissing her action for failure to state a claim under § 1983.

Harris v. Maynard, 843 F.2d 414

The parents of an inmate killed in an Oklahoma prison brought an action under 42 U.S.C. § 1983 against three Oklahoma corrections offi-

cials. The officials appealed the district court's denial of their motion for summary judgment and protection from discovery, invoking qualified immunity from liability.

The Tenth Circuit stated that prison officials are not immune from suit for intentional wrongful conduct under the eighth amendment or the fourteenth amendment due process clause. The court found that the pleadings and affidavits fairly raise the possibility of a violation of a clearly established right under the eighth amendment. The record shows that the deceased plaintiff's mother had requested protection for her son from other inmates, that a separation order had been issued but ignored, and that access to evidence had been denied. The court held that the unique facts warrant denial of the motions for summary judgment and protection from discovery.

Mitchell v. City of Sapulpa, 857 F.2d 713

Plaintiff appeals the granting of summary judgment by the district court in favor of defendants pursuant to suit brought under 42 U.S.C. § 1983. Plaintiff, a conceded fleeing felon, alleged that defendant used deadly force, pursuant to a policy of defendant police chief and the City of Sapulpa. Defendants base their action on Okla. Stat. tit. 22, § 193 which in essence allows the officer to use all necessary means to effect the arrest of a fleeing felon. This cause of action arose *prior* to the decision of *Tennessee v. Garner*, 471 U.S. 1 (1985), where the Supreme Court held that the fourth amendment prohibits use of deadly force to arrest apparently unarmed felons unless there is probable cause for belief the suspect poses significant threat of death or serious injury to the officer or others and is necessary to prevent escape. Specifically challenged in this appeal is the district court's holding that *Garner* should not be applied retroactively.

The panel relied on the Supreme Court's three-prong *Chevron Oil* test in determining when a case should apply retroactively. *Chevron Oil v. Huson*, 404 U.S. 97 (1971). Additionally, the panel recognized the "clear break" test of *United States v. Johnson*, 457 U.S. 537 (1982), as the threshold test for making a decision. The panel held that while at times deterrence may be furthered by retroactive application, there was not such a case since the municipality acted pursuant to a state statute on whose legitimacy it had little reason to question. The panel also held that although compensation to victims is one of the purposes of 42 U.S.C. § 1983, it is not the primary purpose and where, as here, there would be compensation without any benefit from deterrence, retroactive application is unwarranted.

Since defendants relied on policies of police conduct which had been long established, retroactive application would be inappropriate. The panel also held the plaintiff lacked standing to have Oklahoma's statute declared unconstitutional and further that plaintiff failed to prove a case of excessive force under the "shocks the conscious" test. Affirmed.

Coen v. Runner, 854 F.2d 374

Plaintiff appeals the district court's granting of summary judgement based on defendants' qualified immunity. The court also dismissed plaintiff's pendant state claims since no valid action for 42 U.S.C. § 1983 claims existed. Affirmed.

Plaintiff's constitutional claims are threefold. He claims abridgement of his first, fourth, and fourteenth amendment rights. Additionally, plaintiff claims abrogation of a fifth amendment property right.

The panel held defendants are entitled to qualified immunity in defense of plaintiff's first, fourth, and fourteenth amendment claims since defendants' actions were objectively reasonable. To avoid summary judgment on his first amendment claim, plaintiff must with specificity demonstrate factual allegations that the defendants' actions were guided by impermissible motives, which he failed to do here. The panel also upheld the district court's finding that plaintiff failed to establish a property right in his § 1983 claim based on freedom from libel (this to be determined under Wyoming law) since, under that state's law, no property interest in freedom from libel exists. Lastly, the panel upheld the district court's dismissal of plaintiff's pendant state claims.

Setliff v. Memorial Hospital of Sheridan, 850 F.2d 1384

Plaintiff appeals the granting of summary judgement on his first amendment claim and also appeals dismissal of his numerous state claims. Plaintiff alleges defendant hospital's investigation of his medical practice and its ultimate decision that he obtain second opinions prior to performing certain surgeries was retaliation for plaintiff's exercise of protected first amendment speech. The Tenth Circuit found the record contained plaintiff's mere conclusory allegations which are insufficient to defeat a motion for summary judgement. Affirmed.

Plaintiff also alleges deprivation of due process regarding his hospital privileges. This court affirms the district court's finding that plaintiff failed to demonstrate the existence of a recognized property right, which the Tenth Circuit defined as an individual entitlement grounded in state law. While plaintiff may have such a property interest, the facts of this case establish that his privileges were not restricted nor modified until after plaintiff had received a formal hearing. Therefore, plaintiff suffered no deprivation of any property right without the requisite due process. The Tenth Circuit also held that despite the fact that plaintiff's reputation and attractiveness to their employers may have been diminished as a result of the hospital's investigation he had not been deprived of a liberty interest. The court upheld the district court's exercise of discretion in dismissal of the state law claims.

DeVargas v. Mason & Hanger-Silas Mason Co., 844 F.2d 714

Plaintiff, lacking vision in one eye, was denied a position as inspector by a private employer on grounds that a regulation governing their

federal contract specifically disqualified such persons from the position. Plaintiff sued alleging a violation of his constitutional rights under 42 U.S.C. § 1983. The lower court denied a motion for summary judgment.

The Tenth Circuit held that a private contractor acting under federal law was accorded qualified immunity for civil rights violations. When a private party acts in accordance with duties imposed by a governmental contract, performs a governmental function, and is sued solely on the basis of those acts performed pursuant to the contract, it is entitled to qualified immunity.

Procedurally, the court found that a private party acting solely pursuant to contractual duties and not in concert with government employees or pursuant to an unconstitutional law may bring an interlocutory appeal from a denial of qualified immunity. Neither the fact that plaintiff sought both legal and equitable relief from appellant nor the existence of a factual dispute barred the interlocutory appeal.

Montero v. Meyer, 861 F.2d 603

Meyer appeals from an order of the district court preliminarily enjoining the Secretary of State of Colorado from conducting an election on a proposed amendment to the state constitution initiated by members of the appellant Official English Committee. Reversed and remanded.

Appellants circulated petitions printed exclusively in English throughout counties designated as bilingual for purposes of the Voting Rights Act (Act). As a result, the district court invalidated the petitions by finding that the Voting Rights Act, which requires printed election material to be bilingual, applies to initiative petitions. The injunction thus ordered by the district court was reversed by this court on a number of grounds. First, the statutory language of the Voting Rights Act precludes inclusion of "petitions" as falling under its auspices since "petitions" are not synonymous with the statutory terms of "voting" and "electoral process." Therefore, the Act only applies to measures already qualified for placement on the ballot, and not efforts taken to initiate a measure for future placement on the ballot. Second, the view of the Attorney General relied upon by the district court to support its conclusion, was not authoritative since the administrative interpretation resulted in a construction of the statute beyond its limits. And third, the district court erred in qualifying this initiative action as "state action" because the Colorado Constitution specifically reserves this right of initiative to the people.

Watson v. The City of Kansas City, 857 F.2d 690

Plaintiff filed a federal civil rights action against Kansas City, its police chief, and a number of officers claiming failure to provide protection to a victim of domestic violence and her son. The district court granted

defendants' motion for summary judgment. Plaintiff appeals. To survive summary judgment, the plaintiff must go beyond her pleadings and show evidence of specific facts demonstrating that it is the policy or custom of the defendants to provide less police protection to victims of domestic assault than to other assault victims. Since the plaintiff presented sufficient evidence to support such a jury finding, this court overrules the lower court's grant of summary judgment. To the extent plaintiff's lawsuit asserted a claim of class-based discrimination based on sex, the district court's grant of summary judgment for the defendant is affirmed. Since the plaintiff failed to present any evidence that a policy which discriminated against victims of domestic violence adversely affected women, she failed to state a prima facie case for sex-based discrimination.

Facteau v. Sullivan, 843 F.2d 1318

Plaintiff brought a prison civil rights action, alleging poor conditions at the state prison. The district court dismissed the action, but referred it to a special master due to an existing consent decree rendered in a pending class action suit that involved the conditions at the same prison. The consent decree provided that an appointed special master would review all collateral actions and dismiss those that would be covered by the pending class action. The Tenth Circuit affirmed the dismissal and referral, holding that if the special master found that the plaintiff's case did not fit within the class action suit, the plaintiff's action should be transferred back to the district court.

Anderson v. Phillips Petroleum Co., 861 F.2d 631

Appellant Phillips Petroleum closed its Kansas City refinery and entered into a closure agreement with a union whereby Phillips agreed to consider qualified employees for employment at other refineries under a bidding procedure. During this bidding procedure, appellee Anderson, in his capacity as union president, filed age discrimination claims with the Equal Employment Opportunity Commission (EEOC) on behalf of certain union members. Later, Anderson was not transferred to any of the jobs on which he had bid. Alleging that Phillips had failed to transfer him as retaliation for his having filed the earlier age discrimination claims, Anderson sued under the Age Discrimination in Employment Act (ADEA). The district court found that Phillips had discriminated against Anderson and had willfully violated the ADEA. Affirmed in part, reversed in part.

The Tenth Circuit held that the evidence was sufficient to support the claim of retaliation but insufficient to establish a willful violation of the ADEA. A finding of "willfulness" requires evidence that age was the predominant factor in the employer's decision. Because there was evidence of legitimate, nondiscriminatory reasons for Phillips' failure to transfer Anderson, Phillips' actions were not "willful."

McAlester v. United Air Lines, Inc., 851 F.2d 1249

Defendant appeals from a jury verdict granting damages to plaintiff in a racially discriminatory discharge claim under 42 U.S.C. § 1981 and the district court's order reinstating plaintiff to his employment with United. Affirmed.

McAlester, an employee at United, was summoned for jury duty but was excused from duty for two days. He did not report for work either of those days. After following the grievance procedures, plaintiff was terminated. Plaintiff then filed a claim with the Equal Employment Opportunity Commission to no avail and subsequently filed the present complaint, asserting that United failed to apply its system of progressive discipline to him as it does with white employees. First, United asserts that the Railway Labor Act (RLA) precludes the district court's subject matter jurisdiction over plaintiff's § 1981 claim. This court disagreed and found that while courts have no jurisdiction to hear airline employee claims based solely upon a contract under the RLA, they do have jurisdiction over claims based on federal statutes. Further, the RLA does not repeal or preempt this § 1981 claim because the RLA cannot be construed as irreconcilable with § 1981, nor does it cover the "whole subject matter" in such manner so to be "clearly intended as a substitute." Second, United contends that the district court erred in admitting certain statistical evidence of the termination of minorities. But this court found that statistics alone may be used to establish a prima facie case of racial discrimination in a disparate treatment case. Third, United argued that the court erred in failing to admit certain exhibits into evidence as they were admissible as exceptions to the hearsay rule. Since the balancing of their probative value against their potential of prejudice is a discretionary decision for the trial judge, the decision will not be overturned absent clear error.

Schwenke v. Skaggs Alpha Beta, Inc., 858 F.2d 627

Schwenke appeals the district court's grant of summary judgment entered in favor of defendant. At issue is whether defendant demonstrated the absence of any genuine issue of material fact and its entitlement to judgment as a matter of law. Affirmed.

In January, 1985, Schwenke resigned from her position with the defendant and secured employment with one of the defendant's competitors, but reserved the right to confer with the defendant to determine if she would be considered for a supervisory position. During the subsequent selection process, Schwenke was among several applicants considered, but the position was awarded to Roy Baron based upon his performance review, recommendations, educational background, and a company policy to "promote from within" when possible. Schwenke, a Polynesian, brought a civil rights action claiming she was denied the job promotion because of her race. The district court concluded that the defendant had a valid business purpose for offering the supervisory po-

sition to Baron and did not discriminate against Schwenke. The court also held that summary judgment in Title VII actions is appropriate where the court identifies a suit as without merit.

