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Civil Rights

Hugh S. Pixler

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CIVIL RIGHTS

OVERVIEW

During the past survey period, the Tenth Circuit Court of Appeals addressed several important civil rights issues. In the area of age discrimination, it reviewed the level of evidence necessary for a jury to decide by inference whether age discrimination had occurred. Also, it examined the availability of front pay and liquidated damages under the Age Discrimination in Employment Act (the Act or ADEA). Further, the court reiterated its policy of liberal construction of civil rights complaints. The Tenth Circuit also held a governmental representative liable for injuries to an individual's reputation. Despite its consistent liberal position on these civil rights issues, however, the Tenth Circuit narrowed its view on the availability of attorneys' fees awards under section 1988.

I. AGE DISCRIMINATION IN EMPLOYMENT

A. *ADEA Litigation: Sufficiency and Structure of a Disparate Treatment Suit*[1]

The Age Discrimination in Employment Act (the Act or ADEA)[2] generally prohibits employers from discriminating against individuals between the ages of forty and seventy[3] with respect to their employment based on age.[4] The broad language of the Act has provided wide latitude for judicial determination of the elements of an ADEA prima facie case. Substantively, the ADEA is similar to Title VII of the Civil Rights Act of 1964 (Title VII)[5] which prohibits employment practices that discriminate on the basis of race, color, religion, sex, or national origin.[6] Thus, for guidance in ADEA litigation, the courts have looked to the body of Title VII case law.

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1. Disparate treatment should be distinguished from disparate impact. The former occurs when some individuals are treated less favorably because of a trait upon which such different treatment may not be lawfully based. The latter occurs when facially neutral conduct falls more harshly on one group than another. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).

2. 29 U.S.C. §§ 621-34 (1982).

3. 29 U.S.C. § 631(a) (1982).

4. 29 U.S.C. § 623(a) (1982) provides in pertinent part:

(a) 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;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

5. 42 U.S.C. §§ 2000e-2000e-17 (1982).

6. 42 U.S.C. §§ 2000e-2(a) (1982). The Supreme Court has noted that the substantive provisions of the ADEA "were derived *in haec verba* from Title VII." Lorillard v. Pons, 434 U.S. 575, 584 (1978); *see also* Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 820 (5th Cir. 1972) (ADEA terms are essentially identical to those of Title VII).

1. The Prima Facie Case[7]

The Title VII case which has influenced ADEA litigation most significantly is *McDonnell Douglas Corp. v. Green*,[8] in which the Supreme Court set forth guidelines sufficient to establish a prima facie case of employment discrimination based on race.[9] A typical ADEA application of these guidelines for a claim of wrongful discharge requires that a plaintiff show: (1) membership in the protected age group; (2) satisfactory job performance; (3) discharge; and, (4) after discharge, that the plaintiff's position was filled by a younger worker.[10]

The moderate initial burden of the *McDonnell Douglas* model[11] is meant to assure "the plaintiff his day in court despite the unavailability of direct evidence."[12] Discrimination is usually a covert process and the employer is in the best position to explain why an individual has been adversely affected by work-related decisions.[13]

The Supreme Court, however, has made clear that the *McDonnell Douglas* model is not a rigid or mechanical method to be applied in all discrimination cases.[14] It is merely one method particularly suited to establishing a claim based on circumstantial evidence.[15] It should be noted that where direct evidence is available, the model has been found

7. In Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), the Court made clear in what sense the term "prima facie case" is used in Title VII cases: "the establishment of a legally mandatory, rebuttable presumption" as opposed to a plaintiff's burden of producing evidence sufficient to permit the trier of fact to make inferences. *Id.* at 254 n.7.

8. 411 U.S. 792 (1973).

9. These guidelines require a plaintiff to assert: (1) racial minority status; (2) application and qualification for a position for which the employer was seeking applicants; (3) rejection, despite qualification; and, (4) after rejection, the employer's continued search for applicants with plaintiff's qualifications. *Id.* at 802.

10. *See, e.g.*, Schwager v. Sun Oil Co., 591 F.2d 58, 61 (10th Cir. 1979); *accord* Haskell v. Kamon Corp., 743 F.2d 113, 122 (2d Cir. 1984) (although replacement need not be less than 40 years old, he should be substantially younger); *cf.* Maxfield v. Sinclair Int'l, 766 F.2d 788, 793 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 796 (1986) (substantial age difference may be sufficient for inference of age discrimination).

11. *See Burdine*, 450 U.S. at 253; *see also* Player, *Proof of Disparate Treatment Under the Age Discrimination in Employment Act: Variations on a Title VII Theme*, 17 GA. L. REV. 621 (1983) (stating that a prima facie ADEA case is so easy to establish that most plaintiffs will need stronger evidence to get case to jury on issue of illegal motivation).

12. Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979).

13. International Bhd. of Teamsters v. United States, 431 U.S. 324, 359 n.45 (1977). The model effects its purpose by immediately establishing that a plaintiff's rejection was not based on "the two most common legitimate reasons:" lack of job qualifications or lack of a job vacancy. *Id.* at 358 n.44.

14. *See Burdine*, 450 U.S. at 253 n.6; Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575-76 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973); *see also Loeb*, 600 F.2d at 1014 (rejecting defendant's objection to the use of the *McDonnell Douglas* formulation as a "strict analysis" only suited to "more invidious" forms of discrimination such as race or gender). *But cf.* Laugesen v. Anaconda Co., 510 F.2d 307, 312 n.4 (6th Cir. 1975) (finding that the *McDonnell Douglas* model is suited only for bench trial; because of the natural progression of younger workers replacing older ones, the model is too strict to account for differences in age and Title VII-type discrimination). *See generally* Comment, *Adjudicating ADEA Disparate Treatment Claims Within the Evidentiary Framework of Title VII: An Order of Proof for Age Discrimination Cases*, 32 CATH. U.L. REV. 865 (1983).

15. *See Furnco Constr. Corp.*, 438 U.S. at 577; *Loeb*, 600 F.2d at 1014 n.12, 1017. The

inapplicable.[16]

Establishment of a prima facie case is the initial step in an employment discrimination action. The plaintiff continues to bear the burden of persuading the trier of fact that age was a determinative factor in his rejection.[17] By establishing a prima facie case the plaintiff can withstand the defendant's motion for directed verdict[18] and the burden of production shifts to the defendant.[19]

2. Shifting Burdens: Order of Proof

The general structure of Title VII disparate treatment cases as set forth in *McDonnell Douglas* has been uniformly adopted in ADEA litigation. The format involves three basic trial stages with stage one being the showing of a prima facie case.[20] If the plaintiff succeeds in such proof, stage two shifts the burden of production, requiring the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[21] Should the defendant meet this requirement, stage three shifts the burden back to the plaintiff to prove that the employer's reasons were not true, but a pretext for discrimination.[22]

The requirements of the employer's stage two burden were made clear by the Supreme Court in *Texas Department of Community Affairs v.*

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flexible and pragmatic nature of the model is exemplified by its various forms, designed for differing fact situations.

For cases supporting a finding that when a discharge is the result of a reduction in work force, a showing of replacement is unnecessary, see Caldwell v. National Ass'n of Home Builders, 771 F.2d 1051 (7th Cir. 1985); Stumph v. Thomas & Skinner, Inc., 770 F.2d 93 (7th Cir. 1985); McCuen v. Home Ins. Co., 633 F.2d 1150 (5th Cir. 1981); McCorstin v. United States Steel Corp., 621 F.2d 749 (5th Cir. 1980); *cf.* Holley v. Sanyo Mfg., Inc., 771 F.2d 1161, 1165-66 (8th Cir. 1985) (in reorganization case plaintiff must show more than mere termination; for example, statistical or circumstantial evidence of preference for younger employees).

For examples of other variations, see Garner v. Boorstin, 690 F.2d 1034 (D.C. Cir. 1982) (where claimant seeks and is denied employment, it is sufficient that available positions were filled by individuals with comparable qualifications who were not members of the protected class); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730 (5th Cir. 1977) (evidence of job qualification may be unnecessary where strong evidence of improper reliance on age criterion exists).

16. *See, e.g.*, Trans World Airlines v. Thurston, 469 U.S. 111 (1985); Lindsey v. American Cast Iron Pipe Co., 772 F.2d 799 (11th Cir. 1985); Hagelthorn v. Kennecott Corp., 710 F.2d 76 (2d Cir. 1983); *see also* Stanojev v. Ebasco Serv., Inc., 643 F.2d 914, 921 (2d Cir. 1981) (direct proof of discrimination, statistical evidence, or other circumstantial evidence can obviate need to rely on *McDonnell Douglas* model).

17. *See, e.g.*, United States Postal Serv. v. Aikens, 460 U.S. 711, 715 (1983); *Burdine*, 450 U.S. at 253; EEOC v. Prudential Fed. Sav. & Loan Ass'n, 763 F.2d 1166, 1170 (10th Cir.), *cert. denied*, 106 S. Ct. 312 (1985); Perrell v. Finance America Corp., 726 F.2d 654, 656 (10th Cir. 1984).

18. Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299 (E.D. Mich. 1976); *cf. Burdine*, 450 U.S. at 254 (if employer is silent after establishment of prima facie case, court must enter judgment for plaintiff); *Loeb*, 600 F.2d at 1015 (prima facie case may entitle plaintiff to directed verdict if defendant fails to carry burden of production).

19. *See infra* text accompanying notes 20-28.

20. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973); *see also Burdine*, 450 U.S. at 252-53.

21. *McDonnell Douglas*, 411 U.S. at 802.

22. *Burdine*, 450 U.S. at 253.

Burdine.[23] Whereas the plaintiff always bears the ultimate burden of persuasion,[24] the employer's burden merely is to rebut the presumption of discriminatory motive which the prima facie case establishes.[25] It is sufficient for the employer to raise a genuine issue of fact as to the alleged discrimination.[26] However, the explanation of the factual issue must be specific enough to allow the plaintiff a fair opportunity to demonstrate pretext.[27]

Stage three of the trial should result in a "new level of specificity" into the factual inquiry.[28] This higher scrutiny results from focusing the evidence on any underlying reasons for the employer's actions. Stage three therefore, completes an order of proof which is essential for narrowing the issues and enabling the trier of fact fairly to decide if age was a determinative factor in an employer's decision to reject an employee or applicant.

3. *EEOC v. University of Oklahoma*

Marion Clark, a 59 year old employee of University of Oklahoma (OU), applied for the available position of section chief, cartography section of the Oklahoma Geological Survey (OGS), a department of OU.[29] Dr. Charles Mankin, head of OGS, chaired a nineteen person search and selection committee which, after a nation-wide advertising campaign, narrowed the field of applicants to three.[30] Ms. Clark was the only internal applicant among the three and was rejected in favor of a Mr. Furr, then age thirty-six.[31] The EEOC filed this action on behalf of Ms. Clark.[32]

At trial the parties stipulated that the plaintiff had made out a prima facie case.[33] However, there was conflicting testimony as to any actual discriminatory conduct on the part of OU. The search committee members who testified stated that age discrimination did not enter into their voting process.[34] The defendant's proffered rationale for not promoting Ms. Clark was her lack of management experience and problems with productivity. Testimony detracting from this reasoning showed

23. 450 U.S. 248 (1981).
24. *Id.* at 253.
25. *Id.* at 254.
26. *Id.* at 254-55.
27. *Id.*; *see also* Board of Trustees v. Sweeney, 439 U.S. 24, 25 n.2 (1978) (per curiam) (this burden of showing a legitimate, nondiscriminatory rationale is met by an explanation by the employer of what he has done). For a discussion of different ways of demonstrating pretext, see Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129, 1154 n.128 (1980).
28. *Burdine*, 450 U.S. at 255.
29. EEOC v. University of Okla., 774 F.2d 999, 1000-01 (10th Cir. 1985), *rev'g* 554 F. Supp. 735 (W.D. Okla. 1982), *cert. denied*, 106 S. Ct. 1637 (1986).
30. EEOC v. University of Okla., 554 F. Supp. 735, 737 (W.D. Okla. 1982), *rev'd*, 774 F.2d 999 (10th Cir. 1985).
31. *University of Okla.*, 774 F.2d at 1001.
32. The ADEA provides for administration and enforcement by the EEOC. 29 U.S.C. § 633a (1982).
33. *University of Okla.*, 774 F.2d at 1001.
34. *University of Okla.*, 554 F. Supp. at 738.

that Dr. Mankin had no way of knowing or measuring productivity levels. Moreover, though Ms. Clark had no extensive managerial experience, the applicant chosen may have had less.[35]

On appeal from judgment n.o.v. rendered in favor of OU, the Tenth Circuit Court of Appeals reversed.[36] It found that the district court had granted the judgment n.o.v. in error by reweighing the evidence and injecting its own view of the witnesses' credibility.[37] The district court had found that in stage three of the trial,[38] the plaintiff's evidence supported only "murky theories" that OU's articulated reasons for Ms. Clark's rejection were pretextual.[39] The Tenth Circuit set out much of the testimony in its opinion and concluded that it was reasonable for the jury to infer that age discrimination was a factor in OU's hiring decision.[40]

In his concurring opinion, however, Judge Seth wrote that it was unnecessary for the court to set out the "ritual" of the *McDonnell Douglas* model. After the trial had taken place, he reasoned, the model had served its purpose and had become irrelevant.[41] At the appellate level, Judge Seth favored applying only standards for judgments n.o.v. rather than conducting an in-depth review of the evidence.[42]

4. Analysis

EEOC v. University of Oklahoma demonstrates the value of the *McDonnell Douglas* prima facie model and order of proof structure in disparate treatment litigation. Where all the evidence is circumstantial and the testimony disputed, the Supreme Court's Title VII guidelines provide the trier of fact with a workable model in which it can separate and analyze the probative force and credibility of such evidence.

The Tenth Circuit's decision in this case clearly supports the use of the *McDonnell Douglas* model. The model provides a means for guiding the trier of fact through a narrowing of issues so that a rational determination can be made as to whether the plaintiff's ultimate burden has been met. In *EEOC v. University of Oklahoma*, the district court abrogated the benefits and policies behind the model by taking the case away from the jury.[43] Civil rights actions alleging age discrimination deserve to be

35. *University of Okla.*, 774 F.2d at 1002.
36. *Id.* at 1000.
37. *Id.* at 1002.
38. *See supra* text accompanying notes 22-28.
39. *University of Okla.*, 554 F. Supp. at 740. The district court found that even though problems existed in the cartography section, this fact could not be used to support an inference of a "scheme" or "plot" against Ms. Clark. *Id.*
40. *University of Okla.*, 774 F.2d at 1003. Much of the evidence advanced for Ms. Clark showed that Mr. Furr's conduct in his new job was similar to that which OU proffered to denigrate her suitability for the position. *See id.*
41. *Id.* at 1004-05 (Seth, J., concurring); *see also* EEOC v. Samsonite Corp., 723 F.2d 748, 749 (10th Cir. 1983) (finding that when the *McDonnell Douglas* model has been used at trial and the inquiry has reached the ultimate question of discrimination, it has served its purpose and drops out of the case).
42. *Id.* at 1004-05 (Seth, J., concurring).
43. *See supra* text accompanying notes 11-13.

given close scrutiny because discrimination is usually secretive and always subjective. Therefore, the Tenth Circuit was correct in critically analyzing the lower court's decision.

University of Oklahoma recently has served as precedent allowing the Tenth Circuit to reverse a directed verdict against another ADEA plaintiff in *Cockrell v. Boise Cascade Corp.*[44] In *Cockrell*, the Tenth Circuit found that sufficient circumstantial evidence existed from which a jury could have determined a discriminatory purpose in the defendant's offer of demotion.[45]

B. *Monetary Remedies Under the ADEA*

Section 2(b) of the Age Discrimination in Employment Act[46] provides that the purpose of the legislation is "to promote employment of older persons based on their ability rather than age; [and] to prohibit arbitrary age discrimination in employment."[47] The remedial provisions of the ADEA[48] incorporate portions of the Fair Labor Standards Act (FLSA),[49] and together the two statutes provide for a wide range of remedies.[50] Furthermore, the Act's broad allowance of trial court discretion[51] to fashion remedies creates a mandate to "make whole" successful ADEA plaintiffs.[52] This broad interpretation of ADEA guidelines has been embraced by the Tenth Circuit.[53]

1. Liquidated Damages

The availability of liquidated damages is a frequently litigated remedial issue under the ADEA. When liquidated damages are awarded under the ADEA, the plaintiff is awarded not only unpaid wages, but also an additional equal amount constituting liquidated damages.[54] The

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44. 781 F.2d 173 (10th Cir. 1986).

45. *Id.* at 179. The Tenth Circuit found that in granting the directed verdict for the defendant, the trial court erroneously acted as factfinder. The Tenth Circuit cited *EEOC v. University of Okla.*, 774 F.2d 999, 1002 (10th Cir. 1985), *rev'g* 554 F. Supp. 735 (W.D. Okla. 1982), *cert. denied*, 106 S. Ct. 1637 (1986), to support its finding.

46. 29 U.S.C. §§ 621-34 (1982).

47. 29 U.S.C. § 621(b) (1982).

48. *See* 29 U.S.C. §§ 626(b)-(c) (1982).

49. 29 U.S.C. §§ 201-219 (1982). The incorporated provisions of the FLSA are §§ 211(b), 216 (except for subsection (a) thereof), and 217.

50. The available remedies include "such legal or equitable relief as may be appropriate to effectuate the purposes of [the Act], including *without limitation*, judgments compelling employment, reinstatement or promotion," or damages in amounts "deemed to be unpaid minimum wages or unpaid overtime compensation." 29 U.S.C. § 626(b) (1982) (emphasis added).

51. *See id.*

52. *E.g.*, Davis v. Combustion Eng'g, Inc., 742 F.2d 916, 922 (6th Cir. 1984); Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1097 (8th Cir. 1982).

53. Dartt v. Shell Oil Co., 539 F.2d 1256, 1260 (10th Cir. 1976), *aff'd per curiam by an equally divided court*, 434 U.S. 99 (1977) (ADEA is "humanitarian legislation" which should be liberally construed in order to end age discrimination).

54. 29 U.S.C. § 216(b) (1982). For a brief discussion of liquidated damages, see Nosler & Wing, *Remedies Under the Federal Age Discrimination in Employment Act*, 62 DEN. U.L. REV. 469, 481-83 (1985) and Richards, *Monetary Awards for Age Discrimination in Employment*, 30 ARK. L. REV. 305, 327-36 (1976).

ADEA specifically states that liquidated damages are only to be awarded when an employer's acts are found to have been willful.[55]

Some courts have found that liquidated damages are compensatory and therefore such "double recovery" as liquidated damages plus prejudgment interest can be denied.[56] Others have held that liquidated damages are punitive, thereby allowing awards of both types of relief.[57] The Supreme Court recently addressed this issue in *Trans World Airlines v. Thurston*.[58] The *Thurston* Court found that Congress intended liquidated damages to be "punitive in nature"[59] and adopted a "reckless disregard" standard for determining willfulness.[60]

Although the ADEA and FLSA contain similar remedial requirements, the Acts differ in their provisions for the award of liquidated damages. The ADEA requires a finding of willful violation for an award of liquidated damages[61] while the FLSA does not.[62] Thus, the Court's interpretation that Congress intended liquidated damages to be punitive in nature when awarded under the ADEA is supported by the differences in the remedial provisions of the two statutes.

2. Front Pay

Front pay is another highly contested issue in ADEA litigation. It is generally awarded as compensatory damages for amounts not yet incurred by a plaintiff at the time of trial.[63] Courts are in general agreement that front pay exists as a part of the broad remedial powers of the Act even though it is not explicitly provided for in the ADEA.[64] This construction is consistent with the liberal "equitable relief . . . without

55. 29 U.S.C. § 626(b) (1982).

56. Blim v. Western Elec. Co., 731 F.2d 1473, 1479 (10th Cir.), *cert. denied*, 469 U.S. 874 (1984); *see also* Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1102 (8th Cir. 1982) (no award of both liquidated damages and prejudgment interest absent exceptional circumstances); *cf.* Heiar v. Crawford County, Wis., 746 F.2d 1190, 1202 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985) (ADEA liquidated damages are compensatory, delay being one item compensated); Brooklyn Bank v. O'Neil, 324 U.S. 697, 715 (1945) (liquidated damages under the FLSA compensate for delay and therefore prejudgment interest is not available).

57. *E.g.*, Criswell v. Western Airlines, Inc., 709 F.2d 544, 556 (9th Cir. 1983); Hannon v. Continental Nat'l Bank, 427 F. Supp. 215, 218 (D. Colo. 1977).

58. 469 U.S. 111 (1985).

59. *Id.* at 624.

60. *Id.*

61. 29 U.S.C. § 626(b) (1982).

62. The Portal-to-Portal Act, 29 U.S.C. § 260 (1982), provides a FLSA defendant with a defense against liquidated damages when he can show good faith and reasonable grounds for believing the challenged conduct was not in violation of the FLSA.

63. *See generally* EEOC v. Prudential Fed. Sav. & Loan Ass'n, 763 F.2d 1166, 1172-73 (10th Cir.), *cert. denied*, 106 S. Ct. 312 (1985) (future damages in lieu of reinstatement); Davis v. Combustion Eng'g, Inc., 742 F.2d 916, 923 (6th Cir. 1984) (prospective damages); Whittlesey v. Union Carbide Corp., 742 F.2d 724, 727 (2d Cir. 1984) (front pay is damages for loss of future earnings).

64. *See Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d at 1172 (legal and equitable remedies in ADEA are not limited to those enumerated in Act); *Davis*, 742 F.2d at 922 (consistent theme among the circuits is that front pay award is in the discretion of trial court); *cf.* Kolb v. Goldring, Inc., 694 F.2d 869, 874 n.4 (1st Cir. 1982) (no future damages for time after which plaintiff has secured a higher paying job).

limitation" language of the Act[65] and the "make whole" purpose attributed to it.[66]

The major concern courts have expressed in allowing front pay is its inherently speculative nature.[67] Circuits that recognize front pay as a remedy have not been deterred by its speculative nature, but rather have used it reasonably by formulating limitations on its applicability.[68] Most courts have awarded front pay only in lieu of the preferred remedy of reinstatement when reinstatement is not feasible.[69] Where hostility exists between the parties[70] or where the defendant cannot offer a position comparable to plaintiff's previously held one,[71] front pay has been awarded as a viable alternative. At least one court has disallowed front pay where substantial liquidated damages were sufficient to make the plaintiff whole.[72] Since there is no *per se* rule for awarding front pay, the use of this remedy is usually left to the sound discretion of the trial court in the calculation of damages.[73]

3. *Smith v. Consolidated Mutual Water Company*

Eugene Smith was fired from his job with Consolidated Mutual Water Company (Consolidated), allegedly for falsifying water meter tests.[74] Smith was not confronted with the falsification charge before the decision was made to discharge him. His supervisor, who was twenty years his junior, replaced him with a younger worker. Smith sued Consolidated, claiming that it had violated his rights under the ADEA by firing him because of his age. At trial, Smith presented evidence that he had been discriminated against both verbally and through job performance evaluations.

The district court entered judgment on a jury verdict which in-

65. 29 U.S.C. § 626(b) (1982); *see supra* note 50.

66. *See supra* note 52 and accompanying text.

67. *E.g.*, *Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d at 1173; Cancellier v. Federated Dep't Stores, 672 F.2d 1312, 1319 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982). For a discussion of the problem of speculation in front pay awards, see Note, *Front Pay: A Necessary Alternative to Reinstatement Under the Age Discrimination in Employment Act*, 53 FORDHAM L. REV. 579, 603-06 (1984).

68. *See supra* note 67.

69. *Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d at 1172-73; Davis v. Combustion Eng'g, Inc., 742 F.2d 916, 923 (6th Cir. 1984); Whittlesey v. Union Carbide Corp., 742 F.2d 724, 728 (2d Cir. 1984); *Cancellier*, 672 F.2d at 1319-20; Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1100-01 (8th Cir. 1982); *cf.* O'Donnell v. Georgia Osteopathic Hosp., Inc., 748 F.2d 1543, 1550 (11th Cir. 1984) (plaintiff's unreasonable refusal of reinstatement precludes recovery of both back pay and front pay).

70. *Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d at 1172; Dickerson v. Deluxe Check Printers, Inc., 703 F.2d 276, 281 (8th Cir. 1983); *Cancellier*, 672 F.2d at 1319-20.

71. *See* EEOC v. Safeway Stores, Inc., 634 F.2d 1273, 1281-82 (10th Cir. 1980), *cert. denied*, 451 U.S. 986 (1981) (front pay awarded until plaintiff is reinstated in "rightful place"); *cf. Dickerson*, 703 F.2d at 280-81 (defendant's policy is against reinstatement to a "high level" position).

72. *Cancellier*, 672 F.2d at 1319. The court found that the trial court did not abuse its discretion in finding that a substantial verdict of over two million dollars had made the plaintiffs whole. *Id.* at 1320.

73. *See, e.g.*, *Davis*, 742 F.2d at 922-23 (award of front pay to 41 year old until age of retirement is probably unwarranted).

74. Smith v. Consolidated Mut. Water Co., 787 F.2d 1441, 1441-42 (10th Cir. 1986).

cluded an award of front pay in lieu of reinstatement.[75] Consolidated appealed, maintaining that the evidence was insufficient for a prima facie ADEA claim and that the award of front pay was in error.[76] Smith cross-appealed, claiming that Consolidated's actions constituted a willful violation of the ADEA and therefore liquidated damages should also have been awarded.[77]

The Tenth Circuit affirmed the trial court's award of front pay in lieu of reinstatement.[78] It concluded that the evidence was sufficient to support the jury's verdict. However, Smith's cross-appeal for liquidated damages was denied based on the "thin and circumstantial" nature of the evidence.[79]

Judge Barrett filed a dissent in which he argued that liquidated damages are designed to compensate for nonpecuniary or highly speculative losses and that front pay, having a similar purpose, is simply a form of liquidated damages.[80] Characterizing front pay as a legal remedy rather than an equitable one, he argued that the legal remedies under the ADEA are those specifically enumerated — unpaid wages, unpaid overtime, and liquidated damages. Judge Barrett concluded that if front pay is allowable at all, it is necessarily as a liquidated damage.[81] Therefore, he reasoned, since Smith was ineligible for liquidated damages because no willful violation had been established, he was equally ineligible for front pay.[82]

4. Analysis: The Status of ADEA Remedies in the Tenth Circuit

Judge Barrett's argument that front pay is simply a form of liquidated damages fails to take into consideration the Supreme Court's recent portrayal of liquidated damages under the ADEA as punitive.[83] This "punitive nature" colors liquidated damages with a purpose somewhat different than that of front pay.[84] Thus, Judge Barrett's fear of a "double-barrel" approach, though not unfounded,[85] goes too far.

Judge Barrett is not alone in the Tenth Circuit in his analysis of the front pay issue. In *Blim v. Western Electric Co.*,[86] Chief Judge Seth wrote a separate opinion opposing the use of this remedy. He argued that even though the ADEA grants broad equitable powers, these cannot be used to expand the legal remedies specifically enumerated in the Act.[87]

75. *Id.* at 1443.
76. *Id.* at 1442.
77. *Id.* at 1443.
78. *Id.*
79. *Id.* Consolidated's conduct was not found to be "willful" under the *Thurston* standard; *see supra* notes 58-60 and accompanying text.
80. *Id.* at 1444 (Barrett, J., dissenting).
81. *Id.* at 1444-45 (Barrett, J., dissenting).
82. *Id.* at 1446 (Barrett, J., dissenting).
83. Trans World Airlines v. Thurston, 469 U.S. 111, 125 (1985).
84. *See supra* note 63 and accompanying text.
85. *Smith*, 787 F.2d at 1443 (Barrett, J., dissenting).
86. 731 F.2d 1473 (10th Cir.), *cert. denied*, 469 U.S. 111 (1984).
87. *Id.* at 1481 (Seth, C.J., concurring and dissenting).

The language of the ADEA belies such an argument. When read as a whole it gives the courts wide discretion in fashioning legal and equitable relief to effectuate its purposes.[88] Judge Barrett's depiction of front pay as a legal rather than an equitable remedy is of no assistance in determining how these purposes can best be served. Since the Tenth Circuit has recognized front pay only in lieu of the equitable remedy of reinstatement, its application is more equitable in nature than it is legal. Therefore, an award of front pay should not be dependent upon meeting the standard for an award of liquidated damages. Through *Smith*, the Tenth Circuit has reaffirmed its alignment with other circuits that have held that front pay and liquidated damages are not interdependent remedies under the ADEA.[89]

II. SECTION 1983

A. *Sufficiency of Civil Rights Complaints Against Municipalities*

1. General Sufficiency

Liberal federal pleading requirements[90] and the broad scope of civil rights statutes allow for a low threshold of sufficiency for civil rights complaints. The Civil Rights Act of 1871 (Section 1983)[91] is the broadest piece of legislation in federal civil rights law.[92] Instead of providing substantive rights, section 1983 ensures a private right of action for constitutional violations.[93] To state a section 1983 claim, a plaintiff must allege that some person, acting under color of state law, has deprived him of a federal right.[94] Of course, factual allegations in support

88. *See supra* text accompanying notes 46-53. For a discussion of the differences between the legal and equitable remedies available under the ADEA, see Lorillard v. Pons, 434 U.S. 575 (1977).

89. *See, e.g.*, Whittlesey v. Union Carbide Corp., 742 F.2d 724, 726-28 (2d Cir. 1984); Criswell v. Western Airlines, Inc., 709 F.2d 544 (9th Cir. 1983); O'Donnell v. Georgia Osteopathic Hosp., Inc., 574 F. Supp. 214, 223 (N.D. Ga. 1983), *rev'd in part on other grounds*, 748 F.2d 1543 (11th Cir. 1984); *see also* Note, *Front Pay: A Necessary Alternative to Reinstatement Under the Age Discrimination in Employment Act*, 53 FORDHAM L. REV. 579, 607-08 (1984) (arguing that front pay and liquidated damages should be regarded independently).

90. One only needs to include a jurisdictional statement, unless the court already has jurisdiction, a short and plain statement to show entitlement, and a demand for judgment. *See* FED. R. CIV. P. 8(a).

91. The pertinent portion of section 1983 is:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, . . . 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.

42 U.S.C. § 1983 (1982).

92. *See, e.g.*, Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966) (section 1983 should be interpreted with sufficient liberality to fulfill its purpose of providing a federal remedy in federal court for protection of a federal right).

93. *See, e.g.*, Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617-18 (1979) (a litigant cannot claim a violation of section 1983; section 1983 merely provides a remedy).

94. Gomez v. Toledo, 446 U.S. 635, 640 (1980); *see* Green v. Maraio, 722 F.2d 1013, 1016 (2d Cir. 1983); Brantley v. Surles, 718 F.2d 1354, 1357-58 (5th Cir. 1983); Wirth v. Surles, 562 F.2d 319, 321 (4th Cir. 1977), *cert. denied*, 435 U.S. 933 (1978); Flemming v.

of the claim must also be advanced.[95] Generally, a civil rights complaint will not be dismissed summarily unless it appears beyond doubt that a plaintiff cannot prove any facts which would support the claim.[96]

2. Municipal Liability

A 1978 Supreme Court decision has had significant impact on civil rights litigation. In *Monell v. Department of Social Services*,[97] the Court expressly overruled *Monroe v. Pape*[98] by holding that local governing bodies can be sued under section 1983.[99] This decision has raised a question as to what sort of act or conduct of a municipal employee will create liability on the part of a municipality.

The *Monell* Court went far towards defining the outer reaches of municipal liability. Even though a municipality may be subject to section 1983 claims, the court held that a municipality will not be liable solely because an employee has committed a tort.[100] Relying on the language of section 1983 itself, the Court found that if the challenged conduct does not occur under the color of an ordinance or regulation, a plaintiff must show that it rises to a level of policy, custom, or usage.[101] A custom or usage is inferred from any edict or act which "may be said to represent official policy."[102]

Adams, 377 F.2d 975, 977 (10th Cir.), *cert. denied*, 389 U.S. 898 (1967). *Compare* State *ex rel.* Gore v. Wochner, 620 F.2d 183, 185 (8th Cir.), *cert. denied*, 449 U.S. 875 (1980) (transgression of specific and articulable constitutional right and cognizable claim for relief must appear on face of pleadings) *with* Bounds v. Smith, 430 U.S. 817 (1977) (civil rights complaint need only set forth facts giving rise to cause of action). *But cf.* Keniston v. Roberts, 717 F.2d 1295, 1299 (9th Cir. 1983) (section 1983 complaint need not set out particular constitutional or statutory basis for claim so long as court can ascertain that claimed rights exist); Bonner v. Circuit Ct., 526 F.2d 1331, 1334 (8th Cir. 1975), *cert. denied*, 424 U.S. 946 (1976) (court has duty to determine if allegations could support relief on any possible theory).

95. *See* FED. R. CIV. P. 8(a).

96. *E.g.*, Batista v. Rodriguez, 702 F.2d 393 (2d Cir. 1983); District 28 United Mine Workers v. Wellmore Coal Corp., 609 F.2d 1083 (4th Cir. 1979); Johnson v. Wells, 566 F.2d 1016 (5th Cir. 1978); Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970).

97. 436 U.S. 658 (1978).

98. 365 U.S. 167 (1961). The Court overruled this case to the extent that it held municipalities were not "persons" for section 1983 purposes and, therefore, were not subject to suit. However, it left the *Monroe* "intent" requirements of a section 1983 claim intact.

99. *Monell*, 436 U.S. at 700-01.

100. *Id.* at 691.

101. *See id.* at 690-91, 694. Quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68 (1970), the Court recognized that certain practices of local officials could easily be so prevalent as to carry the force of written law. *Monell*, 436 U.S. at 691.

For language emphasizing the importance of *alleging* a policy or custom, see Powe v. City of Chicago, 664 F.2d 639, 652 (7th Cir. 1981) (civil rights action against city cannot be maintained without adequate allegation of policy by either direct or implied charge of a practice); Glaros v. Perse, 628 F.2d 679, 683 (1st Cir. 1980) (section 1983 claim not stated against a municipality in absence of allegation of official policy); Walters v. City of Ocean Springs, 626 F.2d 1317, 1323 (5th Cir. 1980) (per curiam) (city cannot be held liable where it is not alleged that injury resulted from the carrying out of municipal policy or custom); *see generally* Note, *Municipal Liability Under Section 1983: The Meaning of "Policy or Custom,"* 79 COLUM. L. REV. 304 (1979).

102. *Monell*, 436 U.S. at 694. For a discussion on what persons acting in which capacity

After a custom or usage has been established, the plaintiff must clear another hurdle by showing a nexus between the municipal policy and the act or conduct which caused an injury.[103] If a causal connection is not sufficiently shown, the court will not hold the municipality liable for the employee's acts.[104] In *City of Oklahoma City v. Tuttle*,[105] the Supreme Court reversed a Tenth Circuit decision that a single unconstitutional act by a police officer was sufficient to establish municipal liability.[106] The Tenth Circuit had upheld a jury instruction which allowed a finding of liability where an officer's acts were so egregiously out of accord with accepted practices that a policy of inadequate training or supervision could be inferred.[107] The Supreme Court made clear that no liability should attach absent a finding that some fault can be attributed to municipal policymakers.[108] Thus, it is insufficient to infer a policy from a single incident which itself gave rise to the cause of action.

However, upon proving an unconstitutional policy, a single act based on this policy may breed section 1983 liability.[109] In *Garcia v. Salt Lake County*,[110] the court found that the combined actions of the jail em-

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can be deemed acting for government, see Schnapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213 (1979).

103. *See* Batista v. Rodriguez, 702 F.2d 393, 397 (2d Cir. 1983). The *Batista* court found that a plaintiff in a *Monell*-type case must "plead and prove three elements: (1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right." *Id.* The mere allegation of a pattern without a causal link will not suffice. *Id.*

See also Wilson v. Attaway, 757 F.2d 1227, 1241 (11th Cir. 1985) (causal connection between official's acts and deprivation of rights may be shown where widespread abuse puts official on notice; personal involvement is not required); Espino v. City of Kingsville, 676 F.2d 1075, 1078 (5th Cir. 1982) (per curiam) (city not liable for death of Mexican-American inmate in absence of showing of policy of discrimination). *Compare* Rankin v. City of Wichita Falls, 762 F.2d 444, 449 (5th Cir. 1985) (decedent's attempt to rescue co-worker not attributable to any misuse of power by city) *with* Cameo Convalescent Center, Inc. v. Senn, 738 F.2d 836, 846 (7th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985) (nexus between harmful act and infringement of rights too attenuated for liability to attach).

104. *See supra* text accompanying notes 100-01; *see also* Ross v. Reed, 719 F.2d 689, 698 (4th Cir. 1983) (doctrine of respondeat superior has no place in section 1983 litigation); Wise v. Bravo, 666 F.2d 1328, 1335 (10th Cir. 1981) (city not liable under theory of respondeat superior for police officer's civil rights violations).

105. 105 S. Ct. 2427 (1985) (plurality opinion). Tuttle sued Oklahoma City under section 1983 after a city police officer shot and killed her husband.

106. *See* Tuttle v. City of Oklahoma City, 728 F.2d 456 (10th Cir. 1984), *rev'd*, 105 S. Ct. 2427 (1985).

107. *Tuttle*, 105 S. Ct. at 2435.

108. *Id.*

109. *Id.* at 2436. Though not deciding the issue, the Court indicated that it may be possible to base municipal liability on a constitutionally sound policy. This would require much more proof than a single incident in order to show municipal fault and a causal connection between the policy and the constitutional deprivation. *Id. See also id.* at 2441 n.8 (Brennan, J., concurring in part) (finding no need for the "metaphysical distinction" between unconstitutional policies and policies which cause constitutional violations).

110. 768 F.2d 303 (10th Cir. 1985). The widow and parents of Ronald Garcia brought a section 1983 action against Salt Lake County and the jail employees following Garcia's death in the county jail. The decedent had ingested an overdose of a prescription barbiturate which was legally in his possession. Pursuant to a practice of the jail, the officers, believing him to be only under the influence of alcohol, admitted him to jail in an unconscious state. The jail and the sheriff had *written* policies prohibiting this practice. *Id.*

ployees formed an unconstitutional policy which created municipal liability even though no one individual employee's acts or omissions violated a right.[111] The "cumulative effect" of the individual acts or omissions was attributable to the defendant county's unconstitutional practices.[112] Shortly thereafter, the Tenth Circuit addressed the sufficiency of a municipal liability complaint which alleged a causal connection between a policy and a *failure* to act.[113]

3. *State* ex rel. *Candelaria v. City of Albuquerque*

Billy Candelaria, a Mexican youth, drowned in an inadequately maintained syphon culvert in the South Valley region of Albuquerque.[114] Plaintiff sued the City of Albuquerque, Bernalillo County, and the Middle Rio Grande Conservancy District, alleging that the drowning was a violation of Billy Candelaria's civil rights.[115] The plaintiff based his civil rights claim on an alleged custom of discriminatory failure to provide services in the area because the area was populated mostly by persons of Mexican-American descent.[116] The plaintiff alleged that the defendants neglected and refused to maintain the syphon culvert in which Candelaria drowned and that it was the defendants' policy not to provide adequate services to the South Valley area.[117]

The district court dismissed the action for failure to state a claim upon which relief could be granted.[118] It found that there was no causal connection between the allegation of defendants' failure to maintain the culvert and the claim of a custom of discrimination.[119] On appeal, the Tenth Circuit found that the complaint could be read as alleging intentional discrimination based on race, and therefore, the plaintiff's claim under section 1983 was sufficient.[120]

In finding the plaintiff's complaint sufficient to state a cause of action under section 1983, the Tenth Circuit relied on the rule that "the complaint should be construed liberally in favor of an interpretation which states a cause of action."[121] The court did not specifically reach the issue upon which the district court dismissed the action.[122] Instead, it merely concluded that the complaint could be reasonably interpreted to allege "that the defendants discriminated against an area of the city predominately occupied by Mexican-Americans *because* it is occupied by Mexican-Americans."[123]

111. *Id.* at 310.
112. *Id.*
113. State *ex rel.* Candelaria v. City of Albuquerque, 768 F.2d 1207 (10th Cir. 1985).
114. *Id.* at 1208.
115. *Id.*
116. *Id.*
117. *Id.* at 1209.
118. *See id.* at 1208.
119. *Id.* at 1209.
120. *Id.*
121. *Id.* at 1210.
122. *See supra* text accompanying note 119.
123. *Candelaria*, 768 F.2d at 1209 (emphasis added). The majority opinion quoted a lengthy portion of the complaint, which alleged *inter alia*, that the defendants' failure to

4. *State* ex rel. *Candelaria v. City of Albuquerque*: An Analysis

By reversing the district court's decision, the Tenth Circuit has afforded this plaintiff an opportunity to prove that an unconstitutional custom or policy exists. If the plaintiff is able to meet the burden of proof, the nexus between the unconstitutional custom or policy and the violation of Billy Candelaria's rights is much stronger than the connection found in *Garcia*.[124] Here, since the policy would be one of failure to act, the only actors involved are those who set the policy or allow it to exist. The policy and the harmful omission merge and the policy *itself* could trigger liability. As the *Garcia* court found, "gross deficiencies and deliberate indifference" in procedures can serve to form a custom or policy.[125]

The Tenth Circuit has remained open-minded on the question of municipal liability despite *Tuttle*. *Garcia* demonstrates this by its finding of municipal liability based on a single incident which resulted from an underlying unconstitutional policy. *Candelaria* confirms the trend by recognizing a cause of action based on an alleged unconstitutional policy of omission. Regardless of whether a unity of discriminatory policy and failure to maintain the culvert is found to have existed in *Candelaria*, the "single incident" of such failure can still cause liability to attach based on *Garcia*.

B. *Enforcement of Due Process Interests in Employment*

Enforcement of constitutional rights is one of the many purposes of section 1983.[126] Its broad language allows for a private right of action against any person who under color of law deprives an injured party of any federally protected right.[127] Section 1983 has played its most significant civil rights role as enforcer of the fourteenth amendment's liberty and property interest guarantees.[128]

1. Property Interests

The seminal property interest cases are *Board of Regents v. Roth*[129]

maintain the culvert was a "direct result of a custom and usage" of defendants' failure to provide services to the general area. *Id.* This language asserts a causal connection between the policy and the harmful omission. The court found that the complaint was sufficient.

124. In *Garcia*, there were identifiable actors involved who were initially named as defendants. See *Garcia v. Salt Lake County*, 768 F.2d 303, 309 n.6 (10th Cir. 1985).

125. *See Garcia*, 768 F.2d at 308.

126. *See supra* note 91.

127. *See id.* For an in-depth analysis of the elements of a prima facie section 1983 claim, see J. MAHONEY, SECTION 1983: SWORD AND SHIELD 119-36 (R. Freilich & R. Carlisle ed. 1983).

The "color of law" requirement of section 1983 is met by any conduct constituting state action. Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 n.18 (1982), *rev'g* 639 F.2d 1058 (4th Cir. 1981).

128. Section 1983 began as section 1 of the Ku Klux Klan Act of 1871. That section's purpose was to enforce the fourteenth amendment. For a description of the purposes of section 1983, see Mitchum v. Foster, 407 U.S. 225, 238-39 (1972).

129. 408 U.S. 564 (1972).

and *Perry v. Sindermann*.[130] These provided the Supreme Court with the opportunity to delineate the types of interests that are of sufficient importance to be deemed constitutionally protected.

In *Roth*, the respondent sued a state university at which he had been an untenured professor. Without notice or hearing, the university decided not to renew Roth's employment contract. Roth claimed a protected interest had been violated but the Court found that since his one-year contract had terminated he had no protected interest.[131] To acquire a property interest in a benefit, a person must have a "legitimate claim of entitlement" to it.[132] An abstract desire or unilateral expectation is not sufficient.[133] The Court left open, however, a broad spectrum of conditions which could qualify an interest as protected by due process. These protected interests can be created and defined by rules or understandings based on state law that support "legitimate claims of entitlement."[134]

In *Perry*, the Court clarified the extent to which it will recognize property interests. Like Roth, Sindermann was an untenured teacher at a state institution. Unlike Roth, however, Sindermann was found to have a case for a property interest in his employment. The Court found that a college manual and state tenure guidelines may have created a legitimate expectation of continued employment; if so, Sindermann was entitled to a due process hearing on allegations against him.[135] Expanding on *Roth*, the Court indicated that implied contracts, circumstances, and unwritten understandings and practices could create property interests.[136] Upon deprivation of such interests, a due process hearing is required.[137]

2. Liberty Interests

The fourteenth amendment requires due process for governmental deprivation of liberty interests.[138] In employment actions there is a fine line between the twin concepts of liberty and property. Many times, a due process analysis will properly include an examination of both liberty and property interests.[139] However, property cases generally are more dependent on the legitimate expectancy, while liberty cases focus more on a measure of damage to individual reputation sufficient to foreclose

130. 408 U.S. 593 (1972).
131. *Roth*, 408 U.S. at 578. The Court also found that Roth had no liberty interest. *Id.* at 575.
132. *Id.* at 577.
133. *Id.*
134. *Id.*
135. *Perry*, 408 U.S. at 600-03.
136. *Id.* at 601-02.
137. *Id.* at 603.
138. "No State shall . . . deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV, § 1.
139. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972); Weathers v. West Yuma County School Dist., 530 F.2d 1335 (10th Cir. 1976).

some future opportunity.[140] Liberty interest cases, therefore, usually arise from a claim of deprivation of rights due to a state-created stigma.[141]

In *Wisconsin v. Constantineau*,[142] the appellee challenged the constitutionality of a state statute which allowed authorities to post her name as an "excessive drinker" who could not be sold liquor.[143] In finding her claim valid, the Supreme Court stated broadly that where a person's good name or reputation is impugned by government conduct, due process is required.[144]

In *Paul v. Davis*,[145] however, the Court did not find that a liberty interest had been violated when the police department distributed a brochure to local businesses containing respondent's picture and the designation "active shoplifter."[146] Justice Rehnquist, writing for the majority, distinguished and limited the broad language of *Constantineau*. He wrote that in *Constantineau* the appellee's future right to purchase liquor was deprived by the stigma and, therefore, a violation of her liberty interests rose to constitutional status. The stigma alone would have been insufficient to require the procedural protection of due process.[147]

Since most discharges or non-retentions will reflect negatively on an employee's character, courts must take care to find a protected liberty interest only when a state-created stigma seriously damages an individual's ability to be reemployed.[148] The Tenth Circuit has recognized that liberty interests of public employees involve two particular aspects: (1) the protection of reputation, and (2) the freedom to pursue employment opportunity.[149] Further, the Tenth Circuit has found valid liberty interests to exist even though an employer alleges willful neglect and incompetence,[150] but nonexistent under charges of improper job performance.[151] Similarly, employer accusations involving correctable failures are not so stigmatizing so as to foreclose job opportunities.[152]

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140. *See Roth*, 408 U.S. at 571-75.

141. *See, e.g.*, Doe v. United States, 753 F.2d 1092, 1106 (D.C. Cir. 1985) (describing the "reputation plus" standard used in liberty interest cases); Martin v. Unified School Dist., 728 F.2d 453, 455 (10th Cir. 1984) (noting that "[t]he liberty interest protected by the Constitution is the individual's good name and his freedom to work") (citations omitted); Bartel v. F.A.A., 725 F.2d 1403, 1415 (D.C. Cir. 1984) (where government, by injuring a person's reputation effects a removal or significant change of an interest protected by law, due process is required).

142. 400 U.S. 433 (1971).

143. *Id.*

144. *Id.* at 437.

145. 424 U.S. 693 (1976).

146. *Id.* at 711-12.

147. *Id.* at 708-09.

148. *See* Weathers v. West Yuma County School Dist., 530 F.2d 1335, 1339 (10th Cir. 1976).

149. *Weathers*, 530 F.2d at 1338 (citing Lipp v. Board of Educ., 470 F.2d 802 (7th Cir. 1972)). *Weathers* treated the two aspects as severable; the case was decided before the Supreme Court decided against such a view in *Paul*; *see supra* text accompanying notes 145-47.

150. *See* Staton v. Mayes, 552 F.2d 908, 911 (10th Cir.), *cert. denied*, 434 U.S. 907 (1977).

151. *See* Abeyta v. Town of Taos, 499 F.2d 323, 327 (10th Cir. 1974).

152. *See* Garcia v. Board of Educ., 777 F.2d 1403, 1419 (10th Cir. 1985).

Recently, the Tenth Circuit had the opportunity to decide whether a liberty interest claim should be upheld when there was a decline in business rather than a discharge or non-retention.

3. *Corbitt v. Andersen*

Corbitt was employed by a Wyoming school district as a school psychologist. Additionally, he had a private practice for which he gained clientele by referrals from two state agencies. He brought a section 1983 suit against Andersen, the director of Southwest Counseling Service, a political subdivision of the county. He claimed that Andersen, acting under color of state law, campaigned to discredit his professional standing, defamed him, and caused him to lose his referral clients.[153] The jury found in Corbitt's favor and Andersen appealed, claiming insufficient evidence to establish a section 1983 claim. The Tenth Circuit affirmed the jury's verdict.

The Tenth Circuit decided that *Paul v. Davis*[154] did not require a reversal of the district court's judgment. The majority held that the jury could reasonably find that Andersen had not only defamed Corbitt, but also that he had created a stigma which foreclosed Corbitt's freedom to find other employment.[155]

Judge Bohanon disagreed in an extensive dissent. He argued that Corbitt had no contracts, and thus no legally protected right to his referral work.[156] Judge Bohanon claimed that the majority had stated in conclusory language that contracts existed between the state agencies and Corbitt and that the jury had found intentional, improper interference with such contracts.[157]

Judge Bohanon also took exception to the court's reliance on *Schware v. Board of Bar Examiners*.[158] In *Schware*, the Supreme Court found that a liberty interest had been violated when the petitioner was denied the opportunity to take the New Mexico bar examination.[159] Judge Bohanon noted that Schware's claim was based upon his being completely precluded from practicing his profession.[160] In the instant case, Corbitt was merely subjected to an adverse influence which reduced the number of his referrals.[161]

4. *Corbitt v. Andersen*: An Analysis

In *Corbitt* there was no question of whether a defamation occurred. Rather, the central issue was whether the defamation infringed upon a

153. Corbitt v. Andersen, 778 F.2d 1471, 1473 (10th Cir. 1985).
154. 424 U.S. 693 (1976).
155. *Corbitt*, 778 F.2d at 1475 (citing Board of Regents v. Roth, 408 U.S. 564, 573 (1972)).
156. *Id.* at 1476-77 (Bohanon, J., dissenting).
157. *Id.* at 1481 (Bohanon, J., dissenting).
158. 353 U.S. 232 (1957).
159. *Id.* at 246-47.
160. *See Schware*, 353 U.S. at 234.
161. *Corbitt*, 778 F.2d at 1480 (Bohanon, J., dissenting).

liberty interest held by Corbitt. The majority held that it did, by foreclosing his freedom to engage in work opportunities,[162] but did not explain the nature of such interest. The majority sidestepped the threshold issue of whether Corbitt's referral business rose to the level of a protected liberty interest. Apparently, the court was content to leave undisturbed the jury's finding that Corbitt's "contractual relations" had been violated.[163]

The dissent pointed out that Corbitt's own testimony tended to refute the existence of a contract.[164] It may be that the majority saw no need to base its decision on the existence *vel non* of a contract.[165] It merely concluded that there was sufficient evidence of a decline in the value of Corbitt's private practice to support a finding of a violated interest.[166]

The outcome of the case is not clearly incorrect. Corbitt had more than a "mere subjective expectancy"[167] in his referral work.[168] Even so, the majority's deference to the trial court and jury has added confusion to the state of liberty interest law in the Tenth Circuit. While the court has in the past tried to provide some guidance as to a minimum type of foreclosure of employment opportunity required to sustain such a case, here it has failed to provide any clarification. The incisive dissent correctly takes the court to task for its deferential and conclusory analysis.

III. Attorney's Fees in Civil Rights Cases

A. *The Civil Rights Attorney's Fees Award Act*

The Civil Rights Attorney's Fees Award Act of 1976 (the Act or section 1988)[169] provides that in federal civil rights actions "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."[170] The Act was drafted in direct response to a 1975 Supreme Court case which denied an attorney's fee award to civil rights plaintiffs.[171]

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162. *Id.* at 1475.

163. *See id.* at 1474.

164. Corbitt testified that he had understandings with the state agencies, but that they were under no obligations. *Id.* at 1476 (Bohanon, J., dissenting).

165. The Supreme Court has recognized that an interest of constitutional magnitude can arise from mutually explicit understandings. *See supra* text accompanying notes 134-37.

166. *Corbitt*, 778 F.2d at 1475.

167. Perry v. Sindermann, 408 U.S. 593, 603 (1972); *cf.* Board of Regents v. Roth, 408 U.S. 564, 571 (1972) (to determine whether due process requirements apply, courts must look to the nature and not the weight of the interest at stake).

168. Corbitt had an ongoing relationship with the state agencies through which he obtained referrals. *Corbitt*, 778 F.2d at 1473.

169. 42 U.S.C. § 1988 (1982).

170. *Id.*

171. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) (plaintiffs winning an injunction against issuance of permits authorizing construction of trans-Alaska oil pipeline). *Alyeska* was simply a re-affirmance of the "American Rule" which generally prohibits an award of attorney's fees to a prevailing civil litigant absent express statutory authority to do so. *See id.* at 247, 269.

The policy behind section 1988 is based on a recognition that the protection of civil rights is strongly dependent upon private enforcement, which is too often deterred by the high cost of litigation.[172] Section 1988 is intended to insure effective access to the courts for civil rights claimants.[173] Awards of attorneys' fees are an essential part of vindicating civil rights grievances.[174] In effect, a plaintiff is compensated for his efforts as a "private attorney general."[175]

Two major issues pervade section 1988 litigation. The first concerns what constitutes a "prevailing plaintiff." After a court has determined that a plaintiff has prevailed, the second issue involves what standard should be used to determine a fees award amount.

1. Defining Success

In order to meet the threshold requirement for a fees award, a plaintiff must prevail.[176] He must "succeed on any significant issue . . . which achieves some of the benefit . . . sought in bringing suit."[177] A plaintiff has been found to prevail when a consent decree has been entered into prior to final judgment.[178] A plaintiff has also prevailed when his case, although mooted before judgment, was catalytic in prompting civil rights reform.[179] The Tenth Circuit, following the lead of the Supreme Court, has recognized that where civil rights are vindicated, a plaintiff need not obtain formal relief to be considered prevailing for section 1988 purposes.[180]

2. Degrees of Success

After a plaintiff has prevailed, the amount of reasonable fees owing must be determined on the facts of the case.[181] General guidelines for the computation of fees are provided in the legislative history of section 1988.[182] These include the much-contested factor of the relationship

172. S. REP. No. 1011, 94th Cong., 2d Sess. 1, 2 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908, 5910 [hereinafter SENATE REPORT].

173. H.R. REP. No. 1558, 94th Cong., 2d Sess. 1 (1976).

174. SENATE REPORT, *supra* note 172 at 2.

175. *See, e.g.*, Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968) (per curiam); Zarcone v. Perry, 581 F.2d 1039, 1041 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

176. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).

177. Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978), *quoted in* Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).

178. Maher v. Gagne, 448 U.S. 122, 129 (1980); Gurule v. Wilson, 635 F.2d 782, 791-92 (10th Cir. 1980).

179. Williams v. Miller, 620 F.2d 199 (8th Cir. 1980) (per curiam); Fischer v. Adams, 572 F.2d 406 (1st Cir. 1978); *see also* Martin v. Heckler, 773 F.2d 1145, 1148-49 (11th Cir. 1985) (vindication of rights does not depend on the necessity of litigation); Morrison v. Ayoob, 627 F.2d 669, 671 (3d Cir. 1980) (per curiam), *cert denied*, 449 U.S. 1102 (1981) (when defendants cease their challenged conduct, the fact that the plaintiffs dismiss the action makes no difference in the award of attorneys' fees).

180. Gurule v. Wilson, 635 F.2d 782, 792 (10th Cir. 1980) (citing Maher v. Gagne, 448 U.S. 122, 129 (1980)).

181. Hensley v. Eckerhart, 461 U.S. 424, 429 (1983).

182. Both the House and Senate approved of the twelve factors listed in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). The factors are: (1) time and labor required; (2) novelty and difficulty of issues; (3) skill required; (4) pre-

between the potential award and the actual results obtained. Generally, it has been held that a plaintiff advancing multiple claims and prevailing on less than all of them is entitled to attorneys' fees, so long as the award is adjusted to reflect the degree of success realized.[183] The Supreme Court recently has affirmed this view in *Hensley v. Eckerhart*.[184]

In *Hensley*, the Supreme Court attempted to provide reasonable guidelines to alleviate the disparity in standards and computation methods used by the various circuits. It stated that after a plaintiff is deemed to have prevailed, a product of reasonable hours multiplied by reasonable rates must be found.[185] The trial court must then engage in an adjusting computation by addressing two questions: (1) did the plaintiff fail to prevail on all claims that were unrelated to his successful claims, and (2) was the plaintiff's degree of success such that hours reasonably expended are a satisfactory basis for making a fees award.[186] The first question is useful for mechanically cutting out a proportion of an award which is allocable to distinct unsuccessful claims. The second reaches the situation in which a plaintiff's several claims "involve a common core of facts or [are] based on related legal theories."[187] In "*such a lawsuit*" the Court asserted, the trial court must consider the significance of the relief obtained in relation to hours expended.[188]

A more difficult issue arises when a plaintiff has technically prevailed in a single-claim case but is not awarded the relief requested. It has been held that an award of nominal damages does not constitute special circumstances and in such cases attorneys' fees are available.[189]

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clusion of other employment due to the case; (5) customary fees for similar work; (6) whether fees are fixed or contingent; (7) time constraints imposed by client or circumstances; (8) amount involved and results obtained; (9) experience, reputation, and ability of the attorneys; (10) undesirability of the case; (11) nature and length of professional relationship with the client; and, (12) amounts awarded in similar cases. *See* Thome, *The Court's Discretion in Assessing Fees Under the Civil Rights Attorney's Fees Award Act of 1976*, 2 W. NEW ENG. L. REV. 283 (1979). The Tenth Circuit has stated that the trial court need not consider all of these factors in determining an award. Littlefield v. Deland, 641 F.2d 729, 732 (10th Cir. 1981).

183. *See* Jones v. Diamond, 594 F.2d 997, 1026 (5th Cir. 1979) (plaintiffs gaining injunctive relief but not monetary damages are entitled to attorneys' fees), *cert dismissed sub nom.*, Ledbetter v. Jones, 453 U.S. 950 (1981); *see also* Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978) (fees award is based on work performed on successful claims). *But see* Franklin v. Shields, 569 F.2d 784 (4th Cir. 1977) (winning on only one of six claims is not sufficient to obtain attorneys' fees), *reh'g en banc, cert. denied*, 435 U.S. 1003 (1978).

184. 461 U.S. 424, 435 (1983) (unrelated claims must be treated separately so that no fee is awarded for work on failed claims).

185. *Id.* at 434.

186. *Id.*

187. *Id.* at 435.

188. *Id.* at 434-35 (emphasis added).

189. *See* Milwe v. Cavuota, 653 F.2d 80, 84 (2d Cir. 1981) (trial court abused discretion in denying fees award to plaintiff winning one dollar in damages); Skoda v. Fontani, 646 F.2d 1193, 1194 (7th Cir. 1981) (per curiam) (jury verdict of one dollar entitles plaintiffs to attorneys' fees); Perez v. University of P.R., 600 F.2d 1, 2 (1st Cir. 1979) (fees award is not inconsistent with award of nominal damages); Burt v. Abel, 585 F.2d 613, 616-18 (4th Cir. 1978) (recovery of nominal damages does not diminish eligibility for fees award, though it is a factor in determining amount); *cf.* Ramos v. Lamm, 713 F.2d 546, 557 (10th Cir. 1983) (rejecting practice of reducing fees awards because of limited recovery). *But cf.* Miami Herald Publishing Co. v. City of Hallandale, 742 F.2d 590, 591 (11th Cir. 1984) (it

In *Ramos v. Lamm*,[190] the Tenth Circuit made its position clear that an award of attorney's fees in civil rights litigation should not be reduced solely because the damages awarded were nominal.[191] The *Ramos* court declared that a fees award should not be required to have a particular relationship to a recovery amount.[192]

During this survey period, the Tenth Circuit dealt with the issue of whether fees awards should be reduced in a case in which plaintiffs prevailed on their single claim but were awarded only nominal damages.

B. Nephew v. City of Aurora

Plaintiffs sued Aurora police officers under the Civil Rights Act,[193] alleging that they were assaulted, battered, and falsely arrested, and that it was the custom of the city to discriminate against blacks.[194] They sought relief in the form of compensatory and punitive damages in the amount of two million dollars.

Two of four plaintiffs prevailed and were awarded damages of one dollar each. The plaintiffs moved for an attorneys' fees award pursuant to section 1988. In calculating the amount of the award, the court reduced the amount sought by subtracting for time spent on a state claim[195] and also to account for the fact that only two of the original four plaintiffs prevailed.[196] The defendants requested that the court reduce the fees award further based on the nominality of the damages awarded. The court denied this request and the defendants appealed.

The Tenth Circuit subsequently agreed with the defendants and reversed and remanded the case to reduce the attorney's fees award.[197] Although *Ramos v. Lamm*[198] is applicable, the *Nephew* court wrote that "it ha[d] yet to address the precise issue."[199] The Tenth Circuit reasoned that because Nephew sought damages and Ramos sought declaratory and injunctive relief, the *Ramos* language was dicta and should not control.[200] Judge Barrett, writing for the majority, quoted *Cooper v. Singer*[201] to emphasize that the Act's purpose is not merely to encourage private enforcement of civil rights, but to encourage *meritorious* civil

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is insufficient that claims were not rejected on their merits, the primary relief sought must be obtained).

190. 713 F.2d 546 (10th Cir. 1983).

191. *Id.* at 557.

192. *Id.*; *see also* City of Riverside v. Rivera, 106 S. Ct. 2686 (1986) (plurality opinion) (attorneys' fees award not required to be proportionate to amount of damages civil rights plaintiffs recovered).

193. 42 U.S.C. § 1983 (1982).

194. Nephew v. City of Aurora, 766 F.2d 1464 (10th Cir. 1985).

195. The police officers had filed suit against the plaintiffs in state court alleging assault and battery. This suit was later dismissed by stipulation and is irrelevant for purposes of this article. *Id.* at 1465 n.1.

196. *Id.*

197. *Id.* at 1467.

198. 713 F.2d 546 (10th Cir. 1983).

199. *Nephew*, 766 F.2d at 1465.

200. *Id.* at 1465-66.

201. 719 F.2d 1496 (10th Cir. 1983) (en banc).

rights claims.[202] The court concluded that "results obtained" is an important factor that must be considered in determining the reasonableness of a fees award.[203]

In a forceful dissent, Judge McKay argued that civil rights suits seek to vindicate constitutional rights and their success should not be a function of the amount of damages awarded.[204] He viewed the court's reliance on *Hensley* and *Cooper* as misplaced. According to Judge McKay, *Hensley* and *Cooper* both dealt with multiple claims and stand for the principle that a reduction in fees awards is required when plaintiffs prevail on less than all of the claims they have asserted.[205] In *Nephew,* the plaintiffs prevailed on their only claim.

C. Nephew v. City of Aurora: *An Analysis*

The *Nephew* court erroneously relied on *Hensley v. Eckerhart.*[206] *Hensley* did not address the problem of single-claim cases. Therefore, the *Nephew* court should have relied on *Ramos* and its correct statement of *Hensley* that the results-obtained factor should be used to reduce fees awards only in cases where multiple claims are brought and some of the claims have failed.[207]

The *Hensley* rationale withstands closer scrutiny. If a plaintiff advances five claims and is successful on only two, the question of whether he has prevailed in the case as a whole is inextricably intertwined with how close the results obtained are to the results sought. Success in such a case is necessarily a matter of degree and the only equitable measure of that degree lies in a qualitative examination of the results obtained.

Fairness to a defendant requires that an award be adjusted so that the degree of success can be measured and limited proportionately. Fairness to a plaintiff requires that the time and effort expended to the extent of success realized be rewarded. To mechanistically disallow an award because of partial success would create unnecessary apprehensions in bringing multiple, possibly meritorious claims.

In a single-claim action, however, success and vindication of civil rights grievances are immediately discernible by a jury verdict or court judgment. The fact that actual damages are nominal in no way detracts from the social benefit achieved from a plaintiff's efforts in bringing a suit, or from the fact that a constitutional wrong was committed. It follows that nominal awards in multiple-claim suits should not be considered in reducing a fees award. The victory in *Nephew* demonstrates as much. Aurora police officers should be deterred from engaging in the

202. *Id.* at 1502 (emphasis added). The *Cooper* court viewed section 1988 as "strik[ing] a delicate balance, encouraging civil rights litigation where success can be achieved through a reasonable expenditure of legal services." *Id.*

203. *Id.* at 1466 (citing Hensley v. Eckerhart, 461 U.S. 424, 434 (1983)).

204. *Id.* at 1467-68 (McKay, J., dissenting).

205. *Id.* at 1467 (McKay, J., dissenting).

206. 461 U.S. 424 (1983).

207. *See Ramos,* 713 F.2d at 556.

type of behavior that gave rise to discriminatory practices following this case despite the fact that only nominal damages were awarded.

Judge McKay correctly noted in his dissent that a civil rights "interest is vindicated whenever a plaintiff proves, in open court, that he or she has suffered discrimination."[208] Section 1988 was enacted to encourage just such vindication.[209]

Hugh S. Pixler

208. *Nephew*, 766 F.2d at 1467 (McKay, J., dissenting).
209. *See supra* text accompanying notes 169-75.