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Lenore A. Martinez

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CIVIL RIGHTS

Overview

During this survey term the Tenth Circuit Court of Appeals again considered a large number of appeals arising from actions brought under federal civil rights statutes. One area of controversy treated by this survey was created when two Tenth Circuit panels, hearing cases brought under Title VII of the Civil Rights Act of 1964,[1] adopted inconsistent approaches towards evaluating the evidentiary effect of proof that a minority candidate has better objective qualifications than a selected applicant. Another employment discrimination opinion covered by this survey examined the use of statistical evidence to establish a pattern of discrimination.

The majority of civil rights appeals analyzed here, however, relate to actions brought under 42 U.S.C. § 1983.[2] Section 1983 provides a civil remedy for persons suffering deprivations of federally protected rights through actions taken under color of state law.[3] Several Tenth Circuit opinions analyzed in this section involve the question of when an ostensibly private party's joint participation with a state or municipal entity constitutes action taken under color of state law. Other section 1983 issues surveyed include immunity for municipal officials, prisoner's rights, the propriety of awarding a section 1983 plaintiff nominal damages, "special circumstances" which will preclude an award of attorney fees to a prevailing plaintiff in a section 1983 action, and due process claims.

I. Effect of Proving a Minority Candidate's Objectively Superior Qualifications in a Title VII Action

A. Mohammed v. Callaway: *Rebuttal of an Employer's Subjective Justifications through Proof of Objectively Superior Qualifications*

In *Mohammed v. Callaway*[4] the plaintiff, a Hispanic civilian employee of the Army, applied for a supervisor's position in response to a posted job vacancy.[5] The announcement listed specific job qualifications, which the plaintiff possessed.[6] The stipulated facts established that the job opening

1. 42 U.S.C. §§ 2000e-2000e(17)(1976 & Supp. V 1981).
2. 42 U.S.C. § 1983 (Supp. V 1981). This section provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

3. *See id.*
4. 698 F.2d 395 (10th Cir. 1983).
5. *Id.* at 396.
6. *Id.*

was withdrawn, and less than a year later the Army posted a similar opening[7] with relaxed job qualifications.[8] Dyer, the non-minority applicant hired for the job, did not possess the original job qualifications,[9] nor did he possess the technical qualifications required for the revised position.[10] Nevertheless, Dyer was hired over Mohammed and two other applicants because of Dyer's "experience, education, ability, dedication, and enthusiasm."[11] After Mohammed brought an administrative complaint alleging procedural irregularities in the selection process, the Army ordered a new selection based on an ostensibly objective "Ranking Guide."[12] When Dyer was selected again, Mohammed brought suit against the Army alleging discrimination under Title VII.[13] Following a bench trial, the district court held that Mohammed was not entitled to relief on two grounds. First, he had failed to establish a prima facie case of discrimination.[14] Second, even if a prima facie case had been established, the evidence showed that the Army had chosen between two "amply" qualified candidates on the basis of legitimate business reasons.[15]

1. Elements of a Prima Facie Claim of Promotion Discrimination

The trial court formulated the elements of a prima facie case of promotion discrimination as "1) qualified applicant; 2) racial minority; 3) unsuccessful application for existing vacancy; and 4) employer continuing to seek further applicants."[16] This formulation precisely paralleled that of the Supreme Court in *McDonnell Douglas Corp. v. Green*.[17] The Tenth Circuit rejected the trial court's formulation, pointing out that in promotion discrimination, as opposed to hiring discrimination, the sought after position will usually be filled following rejection of the minority's application.[18] Noting that the Court in *McDonnell Douglas* had explicitly recognized that the elements of a prima facie case of employment discrimination will vary with the

7. The evidence indicated that the two positions were identical, although this question was the subject of conflicting testimony. *See id.* at 396-97 & n.1.

8. Originally, the position in dispute was at a grade level GS-13; the position was downgraded to GS-12 the second time it was posted. Mohammed and two other finalists could have qualified at the GS-13 level, while the applicant selected for the position could not have qualified at that level. *Id.* at 397.

9. *Id.*

10. *Id.* at 400.

11. *Id.* at 397.

12. *Id.* at 398.

13. Title VII of the 1969 Civil Rights Act, 42 U.S.C. §§ 2000e-2000e(17)(1976 & Supp. V 1981). *See* 698 F.2d at 398.

14. 698 F.2d at 398.

15. *Id.* at 399.

16. *Id.* at 398.

17. 411 U.S. 792, 802 (1973). *McDonnell Douglas* held that a prima facie case of discrimination in hiring is established when a plaintiff's evidence shows that he or she belongs to a protected class; that he or she, while qualified for an open position, applied for that position; that he or she was rejected for the position in spite of being qualified; and that the employer continued to seek qualified applicants following rejection of the plaintiff. *Id.* "Protected classes" embrace classes based on race, color, religion, sex, or national origin. *See* 42 U.S.C. 2000e-2(a)(2) (1976).

18. *See* 698 F.2d at 398.

nature of the alleged discriminatory act,[19] the Tenth Circuit held that a plaintiff establishes a prima facie case of promotion discrimination by proving that the first three *McDonnell Douglas* criteria are present[20] and then showing that the position has been filled by another applicant.[21] Because Mohammed's evidence satisfied this test, the Tenth Circuit held that a prima facie case of employment discrimination was established as a matter of law.[22]

2. Subjective Hiring Criteria as Proof of Discriminatory Intent in Light of a Minority Candidate's Objectively Superior Qualifications

Once a prima facie case of discrimination is shown, the burden of production[23] shifts to the defendant employer to articulate a legitimate business reason for its prima facie discriminatory practice.[24] The employer meets this burden by articulating a nondiscriminatory justification for its hiring decision.[25] The plaintiff then has an opportunity to prove, by a preponderance of the evidence, that the employer's alleged reasons for rejecting the application were only a pretext for unlawful discrimination.[26] The employee can satisfy this burden by showing that a discriminatory intent in fact motivated the employer's decision, or by offering evidence showing that the proffered justification is unbelievable.[27]

The district court in *Mohammed* found that the evidence showed that Mohammed and Dyer were both "amply" qualified.[28] In that context, subjective considerations were accepted as a legitimate business reason supporting the Army's selection of Dyer.[29] The district court then concluded that Mohammed had not shown that the proffered reasons were mere pretext,[30] and accordingly held that the Army had not intentionally discriminated in violation of Title VII.[31]

After reviewing the entire record, the Tenth Circuit held that the district court's findings of fact were clearly erroneous,[32] and that the district court had applied an erroneous legal standard in evaluating the employer's explanations.[33] The record showed that the candidate selected was not "am-

19. *Id.* (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973)).
20. *See supra* note 17.
21. 698 F.2d at 398 (quoting Mortenson v. Callaway, 672 F.2d 822, 823 (10th Cir. 1982)).
22. 698 F.2d at 398.
23. The employee retains the burden of persuasion throughout a Title VII action. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).
24. *McDonnell Douglas*, 411 U.S. at 802. The prima facie case entitles an employee to judgment if the employer fails to come forward with a legitimate business reason. *Burdine*, 450 U.S. at 254.
25. *Burdine*, 450 U.S. at 255.
26. *Id.* at 256.
27. *Id.*
28. 698 F.2d at 399.
29. *See id.* at 400-01.
30. *Id.* at 399.
31. *See id.* at 396.
32. *See id.* at 401.
33. *See id.*

ply" qualified.[34] More importantly, the record showed that the candidates were not *equally* qualified:[35] specific qualifications placed in the job announcement were met by Mohammed, but not by Dyer.[36] The Tenth Circuit concluded that a candidate meeting the specific requirements in a job announcement is objectively more qualified than one who does not meet the stated requirements.[37] Although an employer retains discretion to choose between *equally* qualified candidates on the basis of nondiscriminatory, subjective criteria,[38] the use of those criteria when candidates are not equally qualified substantially diminishes the credibility of the employer's justification for using subjective criteria as the ultimate basis of its decision.[39] Given the inferences of discriminatory intent arising from the totality of the Army's conduct,[40] the Tenth Circuit found that the Army had engaged in intentional discrimination and accordingly reversed the lower court.

3. Summary

Three significant principles for proving employment discrimination result from *Mohammed*. First, the elements of a prima facie case of employment discrimination are flexible.[41] Second, a critical determination in assessing whether applicants are equally qualified is the match between an applicant's credentials and posted job requirements.[42] Third, a strong inference of intentional discrimination arises when an employer uses subjective factors to justify the rejection of a minority candidate who is objectively better qualified than the candidate chosen.[43]

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34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981) (quoted in *Mohammed*, 698 F.2d at 401).

39. *See* 698 F.2d at 401. Adams v. Gaudet, 515 F. Supp. 1086 (W.D.La. 1981) held that unless a selected applicant is objectively more qualified than a rejected minority applicant, the employer does not rebut the prima facie case by explaining that its hiring decision was based on an employer's prerogative to make a discretionary selection. *Id.* at 1097-98 (citing *Burdine*, 450 U.S. at 259). *Mohammed* cites *Gaudet* for the proposition that use of subjective criteria in rejecting a better qualified minority candidate is indicative of discriminatory intent. 698 F.2d at 399. *Mohammed*, however, did not adopt *Gaudet's* categorical rejection of the power of a discretion-based explanation to rebut a prima facie case when an objectively better qualified minority applicant has been rejected. *See id.* at 401.

40. The court observed that, in addition to reliance on subjective considerations, the Army had engaged in inexplicable procedural irregularities in filling the position in question, had adopted but not implemented an affirmative action program, and had never permitted a minority to hold a supervisory position in the division encompassing the disputed position. 698 F.2d at 401.

41. *See supra* notes 18-21 and accompanying text.

42. *See supra* text accompanying notes 35-38.

43. *See supra* note 40 and accompanying text. *See also* Bauer v. Bailar, 647 F.2d 1037, 1045 (10th Cir. 1981)(subjective decision-making creates inference of discriminatory intent where applicant's protected class is significantly under-represented). In another twist on the use of subjective qualifications, the Tenth Circuit recently held that failure to meet an employer's subjective criteria could not defeat a plaintiff's prima facie case. Burrus v. United Telephone Co., 683 F.2d 339, 342 (10th Cir.), *cert. denied*, 103 S.Ct. 491 (1982).

B. Verniero v. Air Force Academy School District #20: *The Insignificance of Superior Objective Qualifications*

Three months after *Mohammed*, a different Tenth Circuit panel addressed another case involving a similar set of facts, but reached its result by using an analysis inconsistent with that of *Mohammed*. In *Verniero v. Air Force Academy School District #20*,[44] the plaintiff, a female, applied for two job vacancies within School District #20: elementary school principal and director of special education.[45] The school district had posted a vacancy notice for the elementary school principal position listing three job requirements: 1) three years experience in public schools, 2) master's degree or equivalent, and 3) a Type D administrative certificate.[46] Although the plaintiff undisputably met all three requirements, a male applicant who possessed only two of the qualifications[47] was selected over Verniero, allegedly on the basis of certain subjective factors.[48] The job announcement for the position of Director of Special Education listed three years experience in special education and a Type D or special education endorsement as the required qualifications.[49] Although the plaintiff was admittedly qualified, a male applicant was hired.[50] Verniero then brought suit alleging sex discrimination under Title VII.

Following a bench trial, the district court found that the plaintiff had established a prima facie case of discrimination, that the defendant had articulated a legitimate non-discriminatory reason for plaintiff's non-selection; and that plaintiff had been unable to show the proffered reasons were pretext, or were overshadowed by unarticulated discriminatory purposes.[51] Thus, plaintiff failed to carry her ultimate burden of proving that she was the victim of intentional sex discrimination.[52]

Verniero appealed to the Tenth Circuit on three grounds. First, she argued that the district court failed to give due weight to the fact that she had established a prima facie case of discrimination.[53] Second, she argued that the court failed to evaluate the school board's use of subjective criteria in its selection process as a possible pretext for sex discrimination.[54] Finally, Verniero argued that the trial court failed to recognize that waiver of the Type D certificate after it had been listed as a job qualification indicated

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44. 705 F.2d 388 (10th Cir. 1983).

45. *Id.* at 390.

46. *Id.*

47. The male applicant, who came from outside the state, did not possess the required Type D Administrative Certificate. *Id.* at 390.

48. *Id.* at 392. The School District presented evidence that it preferred an out-of-state person, and that certification requirements had been waived for other out-of-state persons "in certain circumstances." *Id.*

49. *Id.* at 390.

50. *Id.*

51. *Id.; cf. Burdine*, 450 U.S. at 256 (plaintiff may demonstrate employer's justification was not basis for selection decision by showing that "a discriminatory reason more likely motivated the employer or . . . by showing that the employer's proffered explanation is unworthy of credence").

52. 705 F.2d at 392.

53. *Id.* at 391.

54. *Id.*

that the district's reasons for failing to hire her were pretextual.[55]

Judge Barrett, writing for the Tenth Circuit over Judge McKay's dissent, found the plaintiff's first argument to be without merit.[56] Judge Barrett stated that when the trial court properly found that the plaintiff had established a prima facie case, it correctly shifted the burden to the defendant to articulate a legitimate nondiscriminatory reason for denying the position to the plaintiff.[57] Because this was the proper treatment of a prima facie case, plaintiff's first ground for appeal did not justify reversal.

The plaintiff's next contention was essentially that the pervasive subjectivity of the articulated basis for the Board's decision precluded a finding that the Board had not consciously or unconsciously discriminated in the hiring process.[58] While acknowledging that a decision based on subjective opinions of a candidate's qualifications entitles a plaintiff "to the benefit of an inference of discrimination,"[59] the Tenth Circuit affirmed the district court's holding that the subjective factors used by the district, such as the quality of an employee's work experience or the employee's ability to get along with others, were legitimate reasons for selecting one applicant over another.[60] Because the defendant had articulated legitimate reasons for the plaintiff's non-selection, plaintiff was required to show that the ostensibly legitimate reasons merely shrouded the employer's true discriminatory motive.[61] Deferring to the trial court's findings, the Tenth Circuit held that the plaintiff had not shown that the school district's justifications were merely pretextual.[62]

Plaintiff's third argument, that the defendant's waiver of the Type D certificate after listing it as a job qualification demonstrated that the Board's justifications for its hiring decision were merely pretextual, was also rejected.[63] Testimony indicated that the certificate requirements had been waived for non-residents in certain circumstances in the past, and that the Board preferred a non-resident for the position.[64] Once again, the court refused to reverse the trial court's finding that the defendant had acted for its stated, legitimate reasons and without discriminatory intent.[65]

Finally, the court rejected plaintiff's contention that remarks of the trial judge demonstrating distaste for discrimination suits justified a new trial. Although the majority found the remarks "misplaced," it viewed them as

55. *Id.* at 391.

56. *Id.*

57. *Id.* The purpose of the prima facie case is to ensure that the employment decision did not result from a simple lack of qualifications or lack of a job opening. International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977). The prima facie case essentially serves to identify a case as one having an inherent likelihood of discrimination, thus requiring the presentation of substantive evidence of non-discrimination. *See Burdine*, 450 U.S. at 253-56.

58. *See* 705 F.2d at 391.

59. *Id.* (citing Burrus v. United Telephone Co., 638 F.2d 339, 342 (10th Cir. 1982)).

60. 705 F.2d at 392.

61. *Id. See also Burdine*, 450 U.S. at 256.

62. 705 F.2d at 391.

63. *Id.* at 392.

64. *Id.*

65. *Id.*

harmless.[66]

In a persuasive dissent, Judge McKay stressed that the majority erred by failing to engage in the method of analysis set forth in *Mohammed*.[67] In *Mohammed* the Tenth Circuit emphasized that when an employer rejects a minority candidate on the basis of employer discretion (i.e. on the basis of subjective factors), the crucial determination is whether the candidate selected is as objectively qualified as the minority candidate.[68] Incident to this inquiry, *Mohammed* held that candidates meeting the specific requirements in a job announcement are objectively better qualified than those who do not,[69] and that once the bypassed minority employee establishes superior objective qualifications the factfinder must consider the inference of discriminatory intent which results from the decision to use subjective, rather than objective, criteria.[70] Similarly, *Mohammed* confirmed that employer use of subjective factors to justify rejection of a minority candidate generally supports an inference of discriminatory intent or pretext.[71] Judge McKay would have remanded because the *Verniero* trial court failed to consider the relative objective qualifications of plaintiff and the successful candidate, and because the trial court's findings failed to give due weight to the strong inference of discriminatory intent arising from the employer's ultimate reliance on subjective hiring criteria.[72]

Judge McKay also dissented from the majority's treatment of the trial judge's disparaging remarks. Noting that judges must disqualify themselves if their impartiality towards a particular case could be reasonably questioned,[73] Judge McKay felt that the trial judge's remarks clearly demonstrated a prejudicial lack of impartiality which, in conjunction with the failure to follow *Mohammed*, mandated a new trial.[74]

C. *The Conflict Created by* Mohammed *and* Verniero

One possible explanation for the difference in the appellate treatment of *Mohammed* and *Verniero* is the different nature of the disputed positions. The supervisory position in *Mohammed* was technically oriented, rendering subjective factors of little relevance in the hiring decision. Given the technical orientation of the position, the applicant meeting the posted requirements is clearly the better qualified candidate. Conversely, in school staff administrative positions, like those in *Vernerio*, subjective factors, such as the ability to

66. *Id.* at 393. Prior to entering his findings of fact and conclusions of law, the trial judge questioned the reasons why anyone would serve as a school board member in light of the liability for civil rights violations, and stated that the only way a board member could be absolutely sure of avoiding discrimination cases is by hiring "only handicapped females having as grandparents a Black, a Chicano, an American Indian and an Oriental, who is over 50 years of age." *Id.* at 393 n.2.

67. *Id.* at 393 (McKay, J., dissenting).

68. *Id.* *See supra* notes 35-39 and accompanying text.

69. *See supra* notes 35-36 and accompanying text.

70. *See supra* notes 38-39 and accompanying text.

71. *See supra* note 40. *See also Mohammed*, 698 F.2d at 401.

72. 705 F.2d at 394 (McKay, J., dissenting).

73. *Id.* at 394 (quoting 28 U.S.C. § 455(a)(1982)).

74. 705 F.2d at 395 (McKay, J., dissenting).

work with others, would be of greater importance. The *Vernerio* court did not, however, attempt to articulate such a distinction. As a result, trial courts lack guidance on whether, and to what extent, *Mohammed*'s objective-criteria based analysis is controlling.[75]

II. The Use of Statistics in Employment Discrimination Cases

During the survey term, the Tenth Circuit examined the admissibility of statistical evidence to rebut an employer's reason for rejecting a minority applicant. In *Anderson v. City of Albuquerque*[76] the plaintiff, while employed by the City of Albuquerque, learned that the staff director for the Human Rights Board was planning to resign and applied for the position.[77] Anderson then voluntarily left her job with the city to accept a position elsewhere, but did not withdraw her application for the staff director position.[78] Upon learning that a male Hispanic was appointed to the position, Anderson instituted a class action under Title VII claiming illegal sex discrimination.[79] The trial court dismissed the class action, held the staff director's position was exempt from Title VII, and dismissed Anderson's claim on the merits.[80] Anderson then appealed, contending that the court erroneously denied her standing to maintain the class action,[81] erroneously ruled the position was exempt,[82] and erroneously failed to admit and consider statistical evidence she offered to rebut the employer's articulated legitimate business reason for its selection of another candidate.[83] The Tenth Circuit, over Chief Judge Seth's dissent, agreed with all of plaintiff's contentions.[84]

A. *Class Action Standing for Voluntarily Terminated Employee*

The trial court ruled that the Tenth Circuit's *Hernandez v. Gray*[85] decision precluded finding that plaintiff had standing to maintain a class action representing past, present, and future female city employees.[86] *Hernandez* held that former employees who had voluntarily terminated their employment could not maintain a class action based on allegations of discrimina-

75. Further confusion stems from *Mohammed* itself. The court noted that an Army witness had testified that specific qualifications were listed in job announcements for the express purpose of obtaining the best qualified personnel. 698 F.2d at 400. The court stated that "[t]he only reasonable inference to be drawn from *this evidence* is that a candidate who meets the specific requirements in the job announcement is better qualified than one who must resort to alternative criteria." *Id.* (emphasis supplied). Thus it is unclear whether a candidate meeting posted qualifications will automatically be deemed more objectively qualified, or whether employer testimony concerning the purpose of specific requirements will be necessary in order to establish the superior objective qualifications of one matching posted requirements.

76. 690 F.2d 796 (10th Cir. 1982).

77. *Id.* at 798.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 800.

83. *Id.* at 802.

84. *See id.* at 803.

85. 530 F.2d 858 (10th Cir. 1976).

86. 690 F.2d at 799.

tion towards existing employees.[87] The reason for this holding was that the voluntary ex-employees did not allege they were past victims of the alleged discriminatory practice, nor did they allege they were presently victims of the employer's discrimination.[88] Thus, they were not representatives of the putative class, and had no standing to maintain an action on behalf of the class.[89]

Unlike the trial court, the Tenth Circuit found *Hernandez* distinguishable from *Anderson*.[90] The court noted that Anderson had maintained an employment application despite her voluntary termination; thus, Anderson remained a member of the class subject to the employer's alleged hiring discrimination and had standing to maintain the class action.[91] The court also noted that the district court had erred to the extent it premised its denial of class certification on the merits of plaintiff's claim.[92]

B. *Title VII Exemption*

Title VII exempts certain governmental advisory/policy making positions from the its antidiscrimination strictures.[93] The Tenth Circuit stated that, in any event, this exemption must be narrowly construed.[94] Examining the evidence detailing the staff director's actual advisory functions, the court concluded that the staff director was not a policy making employee, was not on an elected official's staff, and was not a legal advisor to an elected official.[95] Hence, even though the staff director position was not subject to civil service laws, it did not fall within the claimed exemption.[96]

C. *Use of Statistical Evidence to Demonstrate Discriminatory Intent*

The Tenth Circuit also reversed and remanded the case to the district court with directions to admit excluded statistical evidence,[97] and then to reevaluate the evidence and make findings in terms of the three-step presentation of proof analysis set out in *McDonnell Douglas*.[98] The court noted that

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87. Hernandez v. Gray, 530 F.2d 858, 859 (10th Cir. 1976).

88. *Id.*

89. *Id.*

90. *Anderson*, 690 F.2d at 799.

91. *Id.*

92. *Id.*

93. *See* 42 U.S.C. § 2000e(f)(1976). This section provides:

> The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

Id.

94. 690 F.2d at 800.

95. *Id.* at 800-01.

96. *Id.* at 801.

97. *Id.* at 803.

98. *Id.* The method of proof required by *McDonnell Douglas* is: 1) plaintiff establishes prima facie case; 2) employer articulates legitimate, non-discriminatory reason for its hiring decision; and 3) plaintiff presents evidence showing employer's actual motivation was discriminatory ani-

because upper level jobs are often filled on the basis of subjective factors, statistical evidence of the employer's overall hiring practices becomes especially significant.[99] Although the trial court had admitted statistical evidence relating to the city's general female hiring practices, those statistics did not examine hiring of females as professionals or as department heads.[100] When plaintiff attempted to inquire about those statistics, defense objections were made and sustained.[101] Given the significance of statistics concerning professionals and department heads to plaintiff's claim, and the Supreme Court's explicit approval of the use of statistics to rebut an employer's proffered legitimate reasons for its hiring decision,[102] the Tenth Circuit held that Anderson had been denied a fair trial[103] and ordered a new trial including the excluded statistical evidence.[104] As noted, the majority also instructed the trial court to make its findings of fact in a manner reflecting its consideration of the *McDonnell Douglas* three-step analysis.[105]

D. *The Dissent*

Chief Judge Seth dissented from the majority's ruling on plaintiff's class action claim,[106] its ruling on the exclusion of statistical evidence,[107] and its ruling requiring the trial court to make findings of fact explicitly tracing the *McDonnell Douglas* three-step analysis.[108] The dissent reasoned that the plaintiff had been discriminated against (if at all) only for a nonclassified supervisory position, precluding her from being considered a representative of a class including *all* female city employees.[109] Further, because a class including all future female city employees was "really not a description of a class at all,"[110] the class action claim should have been rejected for failure to identify a true class.[111] Similarly, Chief Judge Seth would have upheld the trial court's rejection of plaintiff's "statistical evidence" concerning professional employment because the lack of any supporting data made the evidence meaningless.[112] Finally, the dissent found no support in Supreme Court rulings or the Federal Rules of Civil Procedure for requiring the trial court to present its findings in a manner exactly paralleling that of the *Mc-*

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mus rather than the proffered legitimate justification. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973).

99. 690 F.2d at 802 (citing Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947 (1982)).

100. 690 F.2d at 802.

101. *Id.*

102. *See McDonnell Douglas*, 411 U.S. at 805.

103. 690 F.2d at 803 (citing Donaldson v. Pillsbury Co., 554 F.2d 825, 833 (8th Cir.), *cert. denied*, 434 U.S. 856 (1977)).

104. 690 F.2d at 803.

105. *Id.*

106. *Id.* at 804 (Seth, C.J., dissenting).

107. *Id.*

108. *Id.* at 805.

109. *Id.* at 804.

110. *Id.*

111. *Id.* at 805.

112. Chief Judge Seth noted that the plaintiff offered no evidence relating the numbers of female professionals or department heads to the labor market, the number of applicants, or "anything else which would make the numbers relevant." *Id.* at 804.

Donnell Douglas evidentiary scheme.[113]

III. Section 1983: Due Process and the Deprivation of Property

The fourteenth amendment[114] entitles a person to protection of property rights against state interference without due process of law.[115] Persons acting under color of state law who interfere with this fundamental protection without due process of law are subject to a federal civil rights action under section 1983.[116] This section surveys several Tenth Circuit decisions involving property rights and section 1983 claims.

A. *Requirement of Notice Prior to Sale of Property*

McKee v. Heggy[117] began with McKee's arrest for kidnapping.[118] While searching McKee's car the police found what they thought was marijuana and, consequently, seized the car as potential evidence.[119] Two weeks later, after deciding against using the car as evidence, the police treated the car as abandoned and sold it at a public auction without directly notifying the plaintiff.[120] Alleging that the police knew he was an interested party and had failed to notify him of the sale, McKee brought a section 1983 action claiming that he was deprived of a property interest without due process of law when the police sold his car.[121] Deciding the merits of the section 1983 claim, the district court granted summary judgment in favor of the city and the police chief on the basis that the notice provided through police compliance with Oklahoma's abandonment statute[122] satisfied due process.[123]

In light of the fact that the plaintiff's car was seized and not abandoned, the Tenth Circuit held that compliance with the Oklahoma abandonment statute's notice procedures was irrelevant.[124] The court then assessed the adequacy of the notice provided against the standard announced in *Mullane v. Central Hanover Bank and Trust Co.*:[125] notice reasonably calculated to reach

113. *Id.* at 805.

114. U.S. CONST. amend. XIV. The fourteenth amendment prohibits governmental actions which deprive "any person of life, liberty or property without due process of law." *Id.*

115. *Id.* The traditional forms of possessory interests in real and personal property clearly fall within the fourteenth amendment's definition of property. *E.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972). Since the 1972 decision in Board of Regents v. Roth, 408 U.S. 564 (1972), the fourteenth amendment's definition of property has been extended by the concept of "entitlement." This concept includes interests, such as governmental benefits, which are unlike traditional property but which are entitled to fourteenth amendment protection because persons justifiably rely on the continued existence of those benefits. *Id.* at 577. *See generally* Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L.J. 405 (1977).

116. Lugar v. Edmondson Oil Co., 457 U.S. 927 & n.18 (1982); Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982); Parratt v. Taylor, 451 U.S. 527 (1981).

117. 703 F.2d 479 (10th Cir. 1983).

118. *Id.* at 480.

119. *Id.*

120. *Id.* at 481.

121. *Id. See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 434(1982).

122. OKLA. STAT. tit. 47, § 908 (1981). This statute provides for notice to an abandoned car's registered owner, *id.* § 908(f), and also requires public notice of a proposed sale. *Id.*

123. 703 F.2d at 481.

124. *Id.* at 482.

125. 339 U.S. 306 (1950).

all interested parties in time to afford them a reasonable opportunity to be heard.[126] The court of appeals found that the posted notice given by the police was not "reasonably calculated" to inform the plaintiff of the sale[127] and thus did not afford him an adequate opportunity to present his objections.[128] Therefore, McKee was deprived of a property interest without being afforded due process of law.[129] The court also noted that because the sale was not explicitly authorized by statute or rule, McKee would have to prove that the sale was pursuant to the department's customary informal procedure in order to establish action under color of state law.[130]

B. *Satisfying Due Process Through Providing A Post-deprivation Tort Remedy*

The Supreme Court, in *Parratt v. Taylor*,[131] held that a prisoner is deprived of property under color of state law when prison personnel negligently lose or destroy a prisoner's property.[132] *Parratt* further held that due process is not violated by deprivation of property simpliciter; rather, there needed to be a shortcoming in the state procedures which resulted in inadequate procedural protection of the prisoner's property interest.[133] Hence, due process is satisfied if circumstances preclude providing a prisoner with meaningful predeprivation process and the state provides a meaningful post-deprivation remedy.[134]

In *Williams v. Morris*[135] the plaintiff brought a section 1983 action alleging that because prison employees had negligently lost his property, which had been stored in the prison during his incarceration, he had been deprived of property without due process.[136] The district court dismissed Williams' suit as frivolous because, although the state could not have predicted the negligent loss of plaintiff's property and therefore could not have provided a meaningful predeprivation hearing, the state had provided a meaningful post-deprivation remedy through a state prison grievance procedure.[137]

The Tenth Circuit affirmed the district court's decision, but differed with the district court's analysis of the source of Williams' meaningful post-deprivation remedy. The court noted that the prison grievance procedure could only afford partial relief, perhaps unconstitutionally, because it did

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126. *Id.* at 314. The Supreme Court stated that provision for a hearing satisfies due process only when notice is given which is "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id. See* 703 F.2d at 482.

127. 703 F.2d at 482. The Oklahoma City Police Department knew McKee was an interested party because he had informed an interrogating police officer that the car was his, and because his parents and lawyer had repeatedly inquired about the car at the police station. *Id.*

128. *Id.* at 482.

129. *Id.*

130. *Id.* at 482-83.

131. 451 U.S. 527 (1981).

132. *Id.* at 536-37.

133. *See id.* at 537-41.

134. *Id.*

135. 697 F.2d 1349 (10th Cir. 1983).

136. *Id.* at 1350.

137. 697 F.2d at 1351.

not provide a prisoner a chance to prove his entire loss.[138] Turning to state tort law as a source of post-deprivation relief, the court of appeals acknowledged that although the Utah Governmental Immunity Act[139] precluded an action against the state, the warden, or other supervisors, Williams could proceed against those prison employees whose alleged negligence caused his claimed loss.[140] Because the state, via its tort law, provided Williams with a post-deprivation remedy providing the possibility of full compensation for his alleged loss, the Tenth Circuit affirmed the trial court's dismissal of Williams' section 1983 claim.[141]

C. *Due Process Considerations in Terminating a Public Employee*

In *Miller v. City of Mission*,[142] a newly elected mayor fired the plaintiff, an assistant police chief and member of the police force for over fifteen years, on the grounds that the plaintiff was responsible for the low morale and high turnover in the police department.[143] At the time of his termination plaintiff was informed that he was entitled to a hearing, but was not in fact provided a pretermination hearing.[144] Nine days later, the plaintiff received a letter from the mayor informing plaintiff of his right to a public hearing and listing seven reasons for his termination.[145] Miller was eventually granted a post-termination hearing, at which a list of additional, previously undisclosed reasons for termination were presented.[146] Following the hearing the mayor refused to reinstate Miller who then sought, unsuccessfully, law enforcement employment in several nearby cities as well as local employment unrelated to police work.[147] Miller subsequently brought suit against the city, the mayor, and several city council members under section 1983 claiming that the termination of his employment as assistant police chief had deprived him of liberty and property interests without due process of law.[148]

In a pretrial hearing the district court ruled that the discharge procedure had unconstitutionally deprived Miller of a property interest unless the city could show that the failure to provide a pretermination hearing was based on extraordinary circumstances, existing at the time of termination, which justified denial of a hearing.[149] After trial, the court found that no such circumstances existed.[150]

The district court also determined, on a motion for summary judgment, that the hearing officer presiding over the termination hearing was biased,

138. *Id.* The grievance procedure did not allow a prisoner to recover for items not listed in the prisoner's "property book"; it was the use of this conclusive presumption that was potentially unconstitutional. *Id.* (citing Vlandis v. Kline, 412 U.S. 441 (1973)).

139. *See* UTAH CODE ANN. § 63-30-10 (Supp. 1983).

140. 697 F.2d at 1351.

141. *Id.*

142. 705 F.2d 368 (10th Cir. 1983).

143. *Id.* at 371.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 370.

149. *Id.* at 371.

150. *Id.* at 372.

thereby denying the plaintiff due process.[151] In addition to the violations of due process found by the court, the jury found that the plaintiff had been deprived of a liberty interest without due process of law.[152]

On appeal, the defendants contended that the district court erred in holding that the hearing was defective,[153] that the evidence did not support the conclusion that the plaintiff's liberty interests were denied,[154] and that the city council members were not liable for plaintiff's injuries.[155] The Tenth Circuit rejected these contentions.

1. Pretermination Hearing Requirements

The Tenth Circuit held that the hearing actually accorded petitioner violated due process in three ways. First, due process requires an impartial tribunal and pre-hearing notice of the charges which will be asserted at the hearing.[156] Because the plaintiff first learned of many of the reasons for his dismissal at the hearing itself, due process was violated.[157] Second, absent the presence of an emergency, only a *pre*termination hearing satisfies due process.[158] Because no emergency existed justifying the failure to provide plaintiff a pretermination hearing, due process was violated.[159] Finally, the court rejected the defendants' argument that the Rule of Necessity rendered the hearing adequate, even though the hearing officer may have been prejudiced.[160] Under the Rule of Necessity, due process is not violated when a tribunal has an interest in the matter to be decided if the matter cannot otherwise be heard.[161] The court of appeals found that the defendants' evidence did not demonstrate the unavailability of an unprejudiced hearing officer.[162] Thus, the Rule of Necessity was irrelevant, and due process was violated by use of a biased hearing officer.[163]

2. Deprivation of Public Employee's Liberty Interest

A public employee's liberty interest is deprived without due process of law when the manner of termination either stigmatizes the employee or forecloses comparable employment opportunities.[164] In *Miller*, the irregularity of the termination proceedings[165] failed to provide plaintiff the fair hearing necessary to protect his liberty interests.[166] Further, the mayor responsible

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151. *Id.*
152. *Id.* at 372-73.
153. *Id.* at 372.
154. *Id.* at 373.
155. *Id.* at 374.
156. *Id.* at 372 (citing Staton v. Mayes, 552 F.2d 908 (10th Cir.), *cert. denied*, 434 U.S. 907 (1977)).
157. 705 F.2d at 372.
158. *Id.* (citing Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972)).
159. 705 F.2d at 372.
160. *Id.*
161. *Id.* (citing United States v. Will, 449 U.S. 200, 214 (1980)).
162. 705 F.2d at 372.
163. *Id.*
164. *Id.* at 373.
165. *See supra* notes 157-64 and accompanying text.
166. *See* Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

for the termination extensively publicized both the fact of termination and the reasons therefore.[167] Plaintiff's inability to obtain similar employment could reasonably be traced to the defendants' due process violations.[168] The court therefore upheld the jury's conclusion that plaintiff's liberty interests had been violated.[169]

3. Immunity for City Council Members

Several defendants also appealed on the grounds that their actions as city council members had not deprived Miller of property without due process, and that they could not be individually liable because of their qualified immunity.[170] The court held that even if these defendant's had not initiated the unconstitutional termination proceedings, they had both ratified the decision to proceed and failed to take steps to prevent unconstitutional action.[171] Accordingly, they were responsible for the injuries caused by the municipality's actions.[172] Further, the city council officials had not acted pursuant to a good faith, reasonable belief that the termination proceedings were constitutional.[173] Hence, they were not entitled to immunity from personal liability.[174]

IV. STATE ACTION THROUGH NOMINALLY PRIVATE PERSONS

This section examines the extent to which a private entity must interface with the government in order for seemingly private actions to constitute state action for the purpose of section 1983 liability.

A. *Private School Discipline as State Action*

In *Milonas v. Williams*[175] former students of the Provo Canyon School for Boys brought a class action alleging that their constitutional rights had been violated by the school's use of a behavior-modification program which administered polygraph tests, monitored and censored students' mail, used isolation rooms, and used excessive physical force.[176] The district court found that the school's behavior modification program was carried out "under the cloak of state action."[177] This conclusion was based on the fact that various state agencies charged with supervision over juveniles sent stu-

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167. 705 F.2d at 373.

168. *Id.* at 374.

169. *Id.*

170. *Id.*

171. *Id.* at 374-75.

172. *Id.* at 375 (citing McClelland v. Facteau, 610 F.2d 693, 697 (10th Cir. 1979)).

173. *Id.* at 375-76. The court noted that the defendants' conduct violated well established principles of constitutional law, and that therefore they could not have had a reasonable belief in the propriety of their actions. *Id.* at 375 n.6. (citing Harlow v. Fitzgerald, 457 U.S. 800 (1982)).

174. 705 F.2d at 376. *See generally* Harlow v. Fitzgerald, 457 U.S. 800 (1982); Wood v. Strickland, 420 U.S. 308 (1975)(discussing personal liability of municipal officers).

175. 691 F.2d 931 (10th Cir. 1982), *cert. denied*, 103 S.Ct. 1524 (1983).

176. *Id.* at 934. The school's behavior modification program allegedly involved cruel and unusual punishment and denied plaintiffs' right to due process of law. *Id.*

177. *Id.* at 939.

dents to the school, the fact that the school received significant state funding, and the extensive state regulation of the school.[178] The Tenth Circuit affirmed the district court's conclusion that the owners and operators of the Provo Canyon School were acting under color of state law.[179]

The Tenth Circuit stated that the essential inquiry in determining when private action is action under color of state law is "whether the alleged infringement of Federal rights is fairly attributable to the state."[180] The court held that the extensive state involvement in funding the school, the knowing acquiesence of state agencies in Provo Canyon's use of the behavior modification program, and the state practice of mandating attendance at the school rendered the behavior modification program action under color of state law.[181] In reaching its decision the court distinguished *Rendell-Baker v. Kohn*,[182] a Supreme Court decision holding that state funding and regulation of a private school were insufficient, in and of themselves, to support a finding of action under color of state law when the school discharged employees.[183] In *Rendell-Baker*, the parties bringing the section 1983 action were discharged employees, not students.[184] The Supreme Court observed that because the state regulations did not compel or influence the decision to discharge the employees,[185] the school's action could not fairly be characterized as state action.[186] Thus, although state funding and regulation were not enough to create state action, the Tenth Circuit held that because the state agencies had approved of the practices challenged in *Milonas*, and had sent students to the school knowing they would be subjected to the challenged practices, use of the practices constituted state action.[187]

B. *Determining When a State Actor's Actions are "State Action"*

Gilmore v. Salt Lake Community Action Program[188] arose when Gilmore was terminated from his position as Fiscal Director of the Salt Lake Community Action Program (SLCAP).[189] The plaintiff filed suit alleging that his termination involved state and federal action depriving him of a property interest without due process of law.[190] Gilmore asserted that because SLCAP was a state organized "community action agency" funded and regulated by Con-

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178. *Id.* at 940.
179. *Id.* at 941.
180. *Id.* (citing Rendell-Baker v. Kohn, 457 U.S. 830 (1982)).
181. 691 F.2d at 940.
182. 457 U.S. 830 (1982).
183. *Id.* at 840-41.
184. *Id.* at 830.
185. *Id.* at 841.
186. *Id.* at 842. *See also id.* at 838 n.6.
187. 691 F.2d at 940. The First Circuit, in *Rendell-Baker*, had observed that students placed in the private school by state agencies "would have a stronger argument than do plaintiffs that the school's action *towards them* is taken 'under color of' state law, since the school derives its authority over them from the state." Rendell-Baker v. Kohn, 641 F.2d 14, 26 (1st Cir. 1981), *aff'd*, 457 U.S. 830 (1982)(emphasis in original).
188. 710 F.2d 632 (10th Cir. 1983).
189. *See id.* at 632-33.
190. *Id.* at 633.

gress[191] its actions necessarily involved state and federal action.[192]

The Tenth Circuit affirmed the district court's finding that no federal action was present by likening federal involvement in Gilmore's firing to the state involvement in *Rendell-Baker*.[193] Thus, although there was extensive federal funding and regulation of SLCAP, the lack of federal involvement in SLCAP's personnel policies and decisions precluded a finding of federal action.[194]

The court also held that Gilmore's termination did not involve state action.[195] This decision was reached after applying the two-part test for state action articulated in *Lugar v. Edmondson Oil Co.*,[196] a recent Supreme Court opinion. Under *Lugar*, state action is present when the alleged unconstitutional conduct results from a rule, policy, or decision attributable to the state, and when the defendant is a person who may be fairly characterized as a state actor.[197] The court found that although SLCAP was a state actor,[198] there were no allegations that its personnel policies or decisions reflected or embodied state policies or objectives.[199] Thus, although SCLAP was a state actor, the decision to terminate Gilmore did not involve state action[200] and accordingly could not be the subject of a section 1983 action.

V. Limiting Prosecutorial Immunity During Performance of Administrative Tasks

In *Coleman v. Turpen*,[201] the Tenth Circuit heard a case which determined whether a plaintiff, who was deprived of property by a private party, could maintain an action under section 1983. In connection with Coleman's arrest, the Oklahoma City Sheriff's Department had seized Coleman's truck and camper worth $8,000, some tools worth $500, and $210 cash.[202] After seizing Coleman, the Sheriff's Department hired a private wrecker to tow and store the camper.[203] The company subsequently presented the Sheriff's Department with a substantial bill for storing the vehicle.[204]

191. SLCAP was organized under the aegis of Title II of the Economic Opportunity Act of 1964, 42 U.S.C. §§ 2781-2837 (1976) (repealed 1981). 710 F.2d at 634.

192. *See* 710 F.2d at 635.

193. *Id.* at 636.

194. *Id.*

195. *Id.* at 639.

196. 457 U.S. 922 (1982).

197. *Id.* at 937.

198. *See* 710 F.2d at 637. The court found that SLCAP was a state actor because the state was responsible for SLCAP's existence, and because many of SLCAP directors were public officials. *Id. Gilmore* indicates that the mere presence of public officials in a policymaking position may be sufficient to render an agency a state actor. *See id.* at 637 n.12.

199. *Id.* at 638-39.

200. *Id.* at 638. The Tenth Circuit explicitly recognized the apparent paradox of finding that the actions of a state actor were not "state action," but reasoned that a state should not be charged with responsibility for all actions taken by independent (i.e. nominally private) state actors. *See id.* at 638 n.13. The court recognized, however, that actions taken by state officials under state authority are undeniably "state action." *Id.*

201. 697 F.2d 1341 (10th Cir. 1983).

202. *Id.* at 1343. The ultimate disposition of the tools was unclear, *see id.*; for the purpose of this discussion it is assumed that the tools remained with the truck and camper.

203. *Id.*

204. *Id.*

Coleman was convicted of murder and received a death sentence.[205] None of the seized property, with the possible execption of the cash,[206] was used at Coleman's trial.[207] After his conviction, Coleman tried to recover his property and learned that his camper had been sold, with police permission, to cover the storage bill.[208] The authorities also refused to return the cash, alleging that they had a statutory duty to retain all evidence used at Coleman's trial until the death penalty was exacted.[209] Coleman then brought a section 1983 action against the sheriff, the public prosecutor, and the wrecker service.[210] The district court dismissed the suit as frivolous and also found that the prosecutor was absolutely immune from Coleman's suit, and that the sheriff was immune because of his statutory duty to retain the evidence.[211] Additionally, the district court held that the private wrecker was not acting under "color of state law" when it sold the camper, and that therefore that action could not subject any of the defendants to liability under section 1983.[212]

On appeal, the Tenth Circuit examined the alleged deprivation of cash separately from the deprivation of the camper and tools, in order to delineate the contours of the asserted due process violations and the asserted immunity defenses.[213]

A. *Immunity for Retention of Possible Evidence*

As noted, the prosecutor and sheriff claimed to be keeping the cash in accordance with an Oklahoma statute.[214] Coleman alleged, however, that the money was not used as evidence in his trial.[215] The court of appeals held that because Coleman was not given an opportunity to show that the money was not used as evidence at trial, and therefore was not subject to retention under Oklahoma law, he had stated a claim of deprivation of his property without due process.[216] Thus, the trial court had erred in ruling that Coleman's section 1983 claim was frivolous with respect to the retained cash.[217]

The Tenth Circuit upheld the district court's ruling that the public prosecutor was absolutely immune for his role in keeping the cash.[218] The

205. *Id.*
206. *See id.* at 1344.
207. *Id.* at 1343.
208. *Id.*
209. *Id.* The prosecutor and sheriff claimed to be acting pursuant to OKLA. STAT. tit. 22, § 1327(1981 & Supp. 1983), which requires retention of all exhibits in capital cases until the death penalty has been carried out. *See id.* § 1327(A).
210. 697 F.2d at 1343.
211. *Id.*
212. *Id.*
213. *See id. See also infra* notes 214-33 and accompanying text.
214. OKLA. STAT. tit. 22, § 1327 (1981 & Supp. 1983). *See supra* note 210.
215. 697 F.2d at 1344.
216. *Id.*
217. *Id.*
218. *Id.* The Tenth Circuit found that absolute immunity was required by Imbler v. Pachtman, 424 U.S. 409 (1976), which confers absolute immunity on a public prosecutor for his conduct in "initiating a prosecution and in presenting the state's case." *Id.* at 431. The court found that retention of possible evidence was part of the prosecutor's presentation of his case. 697 F.2d at 1344.

court, however, rejected the categorical grant of immunity for the sheriff. The sheriff was only entitled to immunity if he did not know or could not reasonably have known that he was depriving Coleman of his constitutional rights.[219] Because Coleman claimed that his money was not introduced as evidence, the Oklahoma statute might not have been applicable. If the trial court found that Coleman's claim was true, it would be required to consider the sheriff's conduct to determine whether qualified immunity was available.[220] Hence, the trial court had improperly granted immunity to the sheriff.[221]

B. *Immunity for Administrative Disposition of Prisoner's Property*

Before reaching this immunity issue, the Tenth Circuit reversed the district court's finding that the private wrecker service's sale of the camper and tools was not action under color of state law.[222] The court once again relied heavily on *Lugar's* two-part test[223] for ascertaining the presence of state action.[224] The court of appeals held that by enacting a statute[225] which allowed a good faith purchaser of the truck and camper to take them free of Coleman's claims, Oklahoma had created the right to sell the truck exercised by the wrecker service.[226] This satisfied the first prong of the *Lugar* test.[227] With respect to the second prong, because the state expressly permitted the wrecker service to hold and sell the camper, the state had jointly participated with the private wrecker service in depriving Coleman of his property, rendering the sale action by a state actor.[228] Further, because Coleman had not received notice of the sale, and because there was no exigency precluding a predeprivation hearing, Coleman had stated a claim of unconstitutional state action.[229]

With respect to the immunity issue, the court of appeals found that the prosecutor, in participating in the disposition of property which was not used as evidence, had been acting in an administrative capacity and not as an advocate.[230] Therefore, the prosecutor had only a qualified immunity, which would shield him from liability only if he neither knew or should have known that the sale violated Coleman's constitutional rights.[231] As with the money, the sheriff enjoyed only a qualified immunity.[232]

219. 697 F.2d at 1344 (citing Harlow v. Fitzgerald, 457 U.S. 800, 815-20 (1982)).
220. 697 F.2d at 1344.
221. *See id.* at 1347.
222. *Id.* at 1345.
223. *See supra* note 197 and accompanying text.
224. *See* 697 F.2d at 1345.
225. OKLA. STAT. tit. 12A, § 7-210 (1981).
226. 697 F.2d at 1345.
227. *Id. See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).
228. 697 F.2d at 1345. *See Lugar*, 457 U.S. at 937.
229. 697 F.2d at 1345 (citing Parratt v. Taylor, 451 U.S. 527, 539 (1981)).
230. 697 F.2d at 1346.
231. *Id.* The Tenth Circuit's decision resolved a question left open by Imbler v. Pachtman, 424 U.S. 409 (1976), where the Supreme Court distinguished between a prosecutor's roles as advocate and as administrator or investigator, but did not decide whether that difference justified different levels of immunity. *Id.* at 430-31.
232. 697 F.2d at 1347.

VI. PRISONER'S RIGHTS UNDER SECTION 1983

A. *Standards for Section 1983 Actions Involving Violence to Pretrial Detainees*

Smith v. Iron County[233] established the proposition that a prison guard's use of force against a prisoner is not always a constitutional violation. The plaintiff was a detainee-prisoner who was awaiting disposition of a burglary charge.[234] During the detention the jailer, who was on duty alone, heard a loud noise coming from the vicinity of plaintiff's cell.[235] The jailer saw the plaintiff on the floor under a bunk and, after inquiring what plaintiff was doing and providing plaintiff several opportunities to cooperate, sprayed the plaintiff with mace.[236] The jailer later recovered a six-pound iron drain cover with a jagged edge, which the plaintiff was allegedly using to dig through the cell wall.[237] After the incident, the plaintiff brought suit under section 1983 alleging that the macing incident constituted cruel and unusual punishment in violation of the eighth amendment,[238] and constituted a deprivation of liberty in violation of the fourteenth amendment.[239] The district court granted summary judgment to the defendants, finding that the undisputed facts did not support the conclusion that the defendant's conduct constituted a violation of plaintiff's constitutional rights.[240]

The Tenth Circuit affirmed the district court's decision.[241] Prior to considering the merits, however, the court reaffirmed its statement in *Littlefield v. Deland*[242] that a pretrial detainee's claim of unconstitutional punishment is to be evaulated through a due process analysis, rather than an analysis focusing on the "cruel and unusual" nature of the punishment.[243] Under the due process analysis, unconstitutional action is present when a jailer uses unreasonable force, or when a jailer uses force maliciously.[244]

Turning to the merits, the court noted that in most circumstances the use of mace would constitute excessive force giving rise to a valid section 1983 claim.[245] The court held, however, that the particular circumstances surrounding this macing incident—the jailer was on duty alone, there had been previous trouble with the plaintiff, there were two prisoners in the cell with the plaintiff, and the plaintiff had a dangerous object—were sufficient to prevent the guard's use of mace from violating the plaintiff's constitutional rights.[246]

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233. 692 F.2d 685 (10th Cir. 1982).
234. *Id.* at 685.
235. *Id.*
236. *Id.* at 686.
237. *Id.*
238. U.S. CONST. amend VIII. This amendment provides that "cruel and unusual punishments" shall not be inflicted. *Id.*
239. 692 F.2d at 686.
240. *See id.* at 685.
241. *Id.* at 688.
242. 641 F.2d 729 (10th Cir. 1981).
243. 692 F.2d at 687.
244. *Id.* (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied sub nom.* Employee-Officer John v. Johnson, 414 U.S. 1033 (1973)).
245. 692 F.2d at 686.
246. *Id.* at 687.

B. *Standards for Prisoner Section 1983 Actions Claiming Cruel and Unusual Punishment*

In *Sampley v. Ruettgers*[247] two inmates at the Wyoming State Penitentiary alleged they were beaten by a guard who was giving them haircuts.[248] Plaintiff Sampley alleged that a guard, without provocation, grabbed him by the throat, strangled him, slammed his head against a steel window, and then struck him several times with barber clippers, leaving an inch deep cut.[249] The guard was then alleged to have cut Sampley's hair, spit on the hair clippers, pushed plaintiff Martinez, and cut Martinez' hair without washing the saliva from the clippers.[250] The plaintiffs claimed in their section 1983 actions that the prison guard's conduct subjected them to cruel and unusual punishment and deprived them of liberty without due process.[251] An internal prison investigation concluded that no unnecessary force was used against the plaintiffs.[252] The district court dismissed the complaint on the basis of the prison report, despite the submission of conflicting pleadings and affidavits by plaintiffs.[253]

The circuit court treated the trial court's dismissal as a summary judgment for the defendants, thus requiring construction of the pleadings and affidavits in the plaintiffs' favor.[254] With this review posture, the court reversed the district court as to Sampley, but affirmed as to Martinez.[255] In reversing the district court's ruling on Sampley's complaint, the Tenth Circuit relied on *Estelle v. Gamble*[256] and held that a "prison guard's unauthorized beating of an inmate can violate the eighth amendment."[257] The court stated, however, that a prison guard's use of force against an inmate is cruel and unusual only if it involved "the unnecessary and wanton infliction of pain."[258] This standard required that a section 1983 claim alleging an eighth amendment violation include three elements.[259] First, the complaint must allege wanton conduct, which is shown by an intention to harm the inmate.[260] Second, the complaint must allege unnecessary conduct, which is the use of force exceeding that which appeared reasonably necessary, in the circumstances, to maintain or restore discipline.[261] Third, the inmate must have suffered pain exceeding momentary discomfort; the guard's attack must result in either severe pain or a lasting injury.[262]

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247. 704 F.2d 491 (10th Cir. 1983).
248. *Id.* at 493.
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.* The Tenth Circuit noted that reliance on the prison report was improper because administrative findings could not be permitted to usurp the court's factfinding obligation. *Id.* at 493 n.3.
254. *Id.* at 493 n.2.
255. *Id.* at 496.
256. 429 U.S. 97 (1976).
257. 704 F.2d at 495.
258. *Id.* (citing Gregg v. Georgia, 428 U.S. 153, 173 (1976)).
259. 704 F.2d at 495.
260. *Id.*
261. *Id.*
262. *Id.*

The circuit court found that Sampley's complaint satisfied these three requirements and, because disputed issues of fact remained, reversed the district court's dismissal of the complaint.[263] The court held that Martinez, although he may have had state tort actions against the guard, had not stated a claim of cruel or unusual punishment under the *Sampley* test, and also held that the guard's conduct had not deprived Martinez of liberty.[264] Accordingly, the district court's dismissal of Martinez' complaint was affirmed.[265]

VII. Propriety of Awarding Nominal Damages

In *Lancaster v. Rodriguez*[266] the Tenth Circuit addressed the issue of whether a nominal damage award is appropriate under section 1983 when a plaintiff proves a violation of his rights but is unable to prove actual injury.[267] Lancaster sought actual damages for violation of his eighth amendment right to be free from cruel and unusual punishment.[268] The trial court found that there was an eighth amendment violation without actual injury and, relying on the Supreme Court's *Carey v. Piphus*[269] decision, awarded only nominal damages.[270]

On appeal, the Tenth Circuit affirmed the district court, holding that damage awards in section 1983 actions are governed by the principle of compensation.[271] The circuit court refused to distinguish *Piphus*, which involved a procedural deficiency,[272] from Lancaster's substantive constitutional claim, stating that when no damages were shown to have resulted from the constitutional claim, the nature of the violation was insignificant.[273]

VIII. Maximum Award of Attorney's Fees in Section 1983 Action

The civil rights attorney's fees statute[274] provides that in the enforcement of a section 1983 action, the court, in its discretion, may award reasonable attorney's fees to the prevailing party.[275] In *Cooper v. Singer*,[276] the district court denied the plaintiffs an award of attorney's fees, despite their

263. *Id.* at 496.
264. *Id.*
265. *Id.*
266. 701 F.2d 864 (10th Cir.), *cert. denied*, 103 S.Ct. 3121 (1983).
267. *Id.* at 864.
268. *Id.*
269. 435 U.S. 247 (1978).
270. 701 F.2d at 864.
271. *Id.* In Carey v. Piphus, 435 U.S. 247 (1978), the Court recognized that compensation principles, which generally control the award of damages in the American legal system, were applicable to section 1983 actions. *See id.* at 254-57. *See generally* Note, *Damage Awards for Constitutional Torts: A Reconsideration After* Carey v. Piphus, 93 HARV. L. REV. 966 (1980).
272. *See* 435 U.S. at 248.
273. 701 F.2d at 866.
274. 42 U.S.C. § 1988 (Supp. V. 1981). This statute provides, in relevant part, that "[i]n any action . . . to enforce a provision of [section 1983] . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." *Id.*
275. *See id.*
276. 689 F.2d 929 (10th Cir. 1983).

successful section 1983 action, because plaintiffs had a contingent fee agreement with their counsel.[277] The district court stated that the contingent fee arrangement made any award of attorney's fees unnecessary, because the arrangement fulfilled the purpose of the civil rights attorney's fees statute, which was to encourage plaintiffs to vindicate their civil rights by ensuring compensation for attorneys.[278] Any award in excess of the contingent fee would be an unnecessary "windfall" for the attorney.[279]

The Tenth Circuit reversed the district court.[280] Stating that the discretion allowed in awarding fees under the attorney's fees statute is extremely narrow, the court held that fees could be denied only when "special circumstances" were present.[281] Under this rule, a prevailing party will recover attorney's fees "unless special circumstances would render such an award unjust."[282] The court then held that the existence of a contingent fee arrangement does not itself constitute a "special circumstance" precluding an award of attorney's fees.[283] Rather, the contingency arrangement or any other contractually stipulated amount would be treated as the maximum fee permitted in the case, with attorney's fees awards used to harmonize the agreed on figure with the amount actually obtained through judgment.[284]

In a well-reasoned partial dissent, Judge Holloway disagreed with the majority's ruling that a fee arrangement establishes the maximum allowable fee.[285] Judge Holloway argued that neither the statute nor its history called for such a limitation.[286] The judge urged that the statute required the court to grant a fee sufficient to attract competent counsel, with that determination to be made on an objective basis, rather than by reference to the plaintiff's agreement with the lawyer.[287]

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277. *Id.* at 932.
278. *Id.* at 931.
279. *Id.*
280. *Id.* at 932.
281. *Id.* at 931 (citing Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968)).
282. *See* 689 F.2d at 931.
283. *Id.*
284. *Id.* at 932. The court noted that the district court could benefit a plaintiff by setting off the contingent fees amount through an award of statutory attorney's fees. *Id.*
285. *Id.* (Holloway, J., concurring in part and dissenting in part).
286. *Id.*
287. *Id.* at 934. Judge Holloway noted that lawyers may frequently accept low contingency fees for worthy reasons. *Id.*