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Constitutional Law and Civil Rights

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CONSTITUTIONAL LAW AND CIVIL RIGHTS

OVERVIEW

During the period covered by this survey, most of the constitutional law and civil rights cases considered by the Tenth Circuit Court of Appeals were discrimination actions brought under either section 1983 of the Civil Rights Act of 1871 or Title VII of the Civil Rights Act of 1964. Some of the other topics dealt with by the court were age discrimination, Indian rights, prisoners' rights, drug paraphernalia, ballot access, religious freedom, and the supremacy clause.

I. THE POST-CIVIL WAR CIVIL RIGHTS ACTS

A. *42 U.S.C. Sections 1981 and 1982*

1. The Prima Facie Case

Houston v. Benttree, Ltd.[1] involved claims under sections 1981[2] and 1982[3] of the Civil Rights Acts of 1866 and 1870 arising out of alleged racial discrimination in the sale of a house. The Tenth Circuit reviewed the five elements of a prima facie case under the two sections: 1) the owner placed the property on the open market; 2) the plaintiff was willing and able to buy on the owner's terms; 3) the plaintiff so advised the owner; 4) the owner refused to sell; and 5) there was no apparent reason for the refusal other than the plaintiff's race.[4] Because the court found nothing in the record to show that the plaintiff was treated any differently from other prospective buyers, the court found there was no violation.

2. Discriminatory Intent

The court in *Denny v. Hutchinson Sales Corp.*[5] was faced with the question of whether discriminatory intent is necessary in an action based upon section 1982. In *Chicano Police Officer's Association v. Stover*[6] the court had held that, under sections 1981, 1983, and 1985, actions are not unlawful solely because they produce a disproportionate impact; discriminatory intent is required. In *Denny*, the court held that, because section 1982 is phrased in a manner similar to section 1981 and because both statutes have a common genesis, Congress must have intended each to incorporate the same intent requirement.[7]

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1. 637 F.2d 739 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 2018 (1981).
2. 42 U.S.C. § 1981 (1976).
3. *Id.* § 1982.
4. 637 F.2d at 741. *See* Duckett v. Silberman, 568 F.2d 1020 (2d Cir. 1978); Bush v. Kaim, 297 F. Supp. 151 (N.D. Ohio 1969).
5. 649 F.2d 816 (10th Cir. 1981).
6. 552 F.2d 918 (10th Cir. 1977).
7. 649 F.2d at 822.

3. Statute of Limitations

In *Denny v. Hutchinson Sales Corp.*, the court was also faced with the question of the applicable statute of limitations under section 1982.[8] The court looked to the state statutes, but did not decide which statute was applicable because none of the potentially applicable statutes would have precluded the plaintiff's action.[9]

In *Shah v. Halliburton Co.*,[10] the court had to determine the applicable statute of limitations for a section 1981 action in Oklahoma. Under *Johnson v. Railway Express, Inc.*,[11] since there is no stated statute of limitations, the controlling period would ordinarily be the most appropriate one provided by state law. The trial court had applied the two-year statute of limitations for tort actions, rather than the three-year statutes for actions based upon contracts or actions based upon liability created by statute. The court of appeals recognized that various courts have applied the three different statutes in section 1981 actions, but held that where there is a substantial question over which of conflicting statutes of limitations should apply, the court should as a matter of policy apply the longer, particularly in civil rights actions.[12]

B. *42 U.S.C. Section 1983*

1. Basis for Liability—Protected Rights

In *McGhee v. Draper*,[13] the defendants were past and present members of an Oklahoma school board who had declined to renew the contract of the plaintiff, a non-tenured teacher. The plaintiff brought suit under section 1983 of the Civil Rights Act of 1871[14] asserting that she had not been granted a hearing and thus had been denied procedural due process. She sought reinstatement with back pay, damages, and attorneys fees. The Tenth Circuit had previously held that the plaintiff had shown no entitlement to the position and hence had no protected property interest.[15] The court in the previous appeal had also instructed the district court to hold new proceedings to determine whether the discharge infringed the plaintiff's liberty interest and, if so, to consider proper equitable relief for the denial of procedural due process. The district court, on remand, did not conduct a new trial, but decided that the only available remedy was a hearing before the school board. Because the plaintiff had not requested such a hearing, the trial court dismissed the action.

In the instant appeal, the court of appeals held that, if the plaintiff could show that the non-renewal of her contract caused or enhanced her alleged reputational damage, she would have shown that she was entitled to

8. *Id.* at 816.
9. *Id.* at 820.
10. 627 F.2d 1055 (10th Cir. 1980).
11. 421 U.S. 454 (1975).
12. 627 F.2d at 1059.
13. 639 F.2d 639 (10th Cir. 1981).
14. 42 U.S.C. § 1983 (1976).
15. McGhee v. Draper, 564 F.2d 902 (10th Cir. 1977).

a hearing or other reasonable opportunity to clear her name. The court held that it is the character of the charges, not their truthfulness, that determines whether the plaintiff was deprived of a liberty interest.[16]

In *Major v. Benton*,[17] the court was faced with the question of whether negligent conduct could support a section 1983 action. This action was brought by the survivors of an Oklahoma state prisoner who died in a cave-in of a sewer ditch. The plaintiffs alleged that the deceased was deprived of life without due process of law because the state had not formulated proper safety standards. At the time of this appeal, the United States Supreme Court had twice been presented with this question, but on both occasions had found its resolution unnecessary.[18] The court of appeals held that the allegation was of a simple tort, rather than a constitutional violation, and therefore, it could not support a section 1983 action.[19]

Since *Major* was decided, the United States Supreme Court, in *Parratt v. Taylor*,[20] held that the negligent loss by prison officials of hobby materials a prisoner had ordered by mail did not deprive the inmate of property without due process of law for the purposes of section 1983. The Court stated that other remedies, in this case state tort claims procedures, were sufficient to satisfy the requirements of due process.[21] Although Justice Blackmun, in a concurring opinion,[22] stated that he did not understand the Court's opinion to apply to deprivations of life or liberty, there is no logical reason why a different analysis should be used in such cases. Consequently, cases such as *Major* should fall under the holding in *Parratt v. Taylor* (in accord with the Tenth Circuit view).

In *Brown v. Bigger*,[23] the court in a per curiam opinion held that trivial or frivolous invasions of personal rights are not cognizable under section 1983. The plaintiff was an inmate at the Kansas State Penitentiary who brought suit against prison guards and officials for forcibly putting him into bed while he was at a hospital for treatment of stab wounds. This treatment, he argued, constituted cruel and unusual punishment. The court disagreed.[24]

Zamora v. Pomeroy[25] involved a warrantless search of a school locker during a general investigation that yielded marijuana. The student plaintiff brought a 1983 action alleging that the search and the use of "sniffer" dogs

16. 639 F.2d at 643.

17. 647 F.2d 110 (10th Cir. 1981).

18. Baker v. McCollan, 443 U.S. 137 (1979); Procunier v. Navarette, 434 U.S. 555 (1978).

19. 647 F.2d at 113. *See also* Tucker v. Harper, No. 80-1350 (10th Cir. April 10, 1981) (not for routine publication), in which the defendants were court reporters who allegedly prepared incomplete transcripts resulting, according to the plaintiff, in a denial of due process. Because the allegations were no more than claims of professional malpractice, the trial court's dismissal was affirmed.

20. 101 S. Ct. 1908 (1981).

21. *Id.* at 1917.

22. *Id.* at 1918 (Blackmun, J., concurring).

23. 622 F.2d 1025 (10th Cir. 1980) (per curiam).

24. *Id.* at 1027. *See also* Bradenburg v. Maschner, No. 79-2294 (10th Cir. Oct 10, 1980) (not for routine publication), in which the court rejected a § 1983 action claiming cruel and unusual punishment of an inmate who had been forced to get a haircut.

25. 639 F.2d 662 (10th Cir. 1981).

were unlawful, and that a warrant was required in order to open the locker after discovery of the marijuana by the dogs. The plaintiff was never prosecuted, but he was transferred to an allegedly inferior school.[26]

The court of appeals held that the case was not of constitutional magnitude because: 1) it did not involve a defendant versus the state, but rather school discipline; 2) the plaintiff was not expelled; and 3) the plaintiff never offered any kind of explanation.[27] Consequently, the court held, the case differed from *Goss v. Lopez*.[28] Moreover, there was no lack of due process because on at least five occasions the plaintiff had appeared before persons in authority and had never offered an explanation. Also, since the school had assumed joint control of the locker and since the student had signed a form at the beginning of the school year consenting to the opening of his locker, the school had a right to search it once a probability existed that there was contraband inside.[29]

In *Younger v. Colorado State Board of Law Examiners*,[30] the court upheld the constitutionality of rule 214 of the Colorado Rules of Civil Procedure[31] under which the plaintiff had been denied the opportunity to sit again for the Colorado bar examination after having failed it three times. The rule provides that permission must be granted before an applicant can sit for the exam more than twice. Permission to take the exam a third time was routinely granted, and was granted plaintiff, but permission to sit a fourth time was not routinely granted, and was denied plaintiff. As a matter of practice, the admissions committee generally looked at what the applicant had been doing in the time since his third attempt and generally imposed a waiting requirement of two to three years. The district court held that the final preclusion of any opportunity for re-examination violated the fourteenth amendment because such a policy constituted an irrebuttable presumption of incompetence.[32]

The court of appeals stated that no irrebuttable presumption was involved, rather a general policy undergirded by many factors.[33] The court considered an affidavit of Justice Erickson of the Colorado Supreme Court, which stated that the requirement of obtaining permission before a fourth attempt was based upon the Colorado Supreme Court's conclusion that repeated failure proves that an individual is not competent to practice law and that few pass on the fourth attempt, even with additional training. The appeals court stated that "justifiable doubts could be felt about those taking

26. *Id.* at 664.

27. *Id.* at 667-68.

28. 419 U.S. 565 (1975) (*Goss* held that students who face temporary suspension from public schools have interests which qualify for protection under the due process clause of the fourteenth amendment).

29. 639 F.2d at 671.

30. 625 F.2d 372 (10th Cir. 1980).

31. The rule states: "Any applicant in Class C who fails on examination to obtain a passing grade may take the next succeeding examination. If he then fails he will be reexamined only by special permission of the Court en banc and for good cause shown." COLO. R. CIV. P. 214.

32. Younger v. Colorado State Bd. of Bar Examiners, 482 F. Supp. 1244, 1247 (D. Colo. 1980).

33. 625 F.2d at 378.

four or more examinations, despite ultimate success."[34]

Key v. Rutherford[35] was a section 1983 action brought by a discharged police chief against the city of Stroud, Oklahoma, and city officials. Shortly after assuming his position as police chief, Key became aware that members of the police force were dissatisfied with their salaries and were considering the formation of a Fraternal Order of Police lodge. At first he discouraged them and tried to present their budget grievances to the city council. When his efforts failed, Key publicly supported formation of the chapter and became a member. He was fired a few days later for violating section 4.11 of the city's employee's handbook, which provided that employees were not to discuss complaints with the city council. The trial court ruled that the provision violated the first amendment.[36]

The court of appeals reversed in part, citing *Pickering v. Board of Education*,[37] which held that the state has an interest as an employer in regulating the speech of employees different from the interest it possesses in regulating speech of the citizenry in general. The *Pickering* Court set forth a balancing test that requires courts to balance the employee's interest in commenting on issues of public concern against the employer's interest in promoting efficiency of public services. The trial court had not balanced the two interests, but instead had held the provision facially unconstitutional.[38]

The court of appeals identified two situations in which the state can regulate an employee's right to speak. The first situation is where the speech is so disruptive as to impair efficiency; the second is where the speech does not involve matters of public interest.[39] The court remanded for a determination of whether the content of Key's communication or the method of expression significantly interfered with Key's effectiveness as police chief or with the efficiency of the police department.

Key also alleged that his termination was due to formation of the Fraternal Order of Police lodge and his public support for it. The court of appeals stated that, although public employees have a constitutional right to join a union, the right is not absolute.[40] The city may prevent union membership of managers if it can show a substantial state interest. The court instructed the district court that if the issue were to arise again on retrial it must determine whether the chief's membership sufficiently conflicted with the city's interest.[41]

In *Littlefield v. Deland*,[42] the court affirmed a lower court holding that the plaintiff had been unconstitutionally punished. The action arose out of the arrest and confinement of the mentally ill plaintiff who was charged with

34. *Id.* at 377.
35. 645 F.2d 880 (10th Cir. 1981).
36. *Id.* at 882.
37. 391 U.S. 563 (1968).
38. 645 F.2d at 884.
39. *Id.*
40. *Id.* at 885.
41. *Id.*
42. 641 F.2d 729 (10th Cir. 1981).

disorderly conduct based on "certain bizarre but nonviolent activities"[43] in a service station. He was held in a strip cell for fifty-six days without notice or opportunity to be heard with respect to the nature or duration of his confinement. He was forced to sleep naked on a concrete floor, and to amuse himself he was relegated to banter with inmates in nearby cells. Occasionally these interactions escalated to the throwing of urine and feces at each other. Plaintiff had no means of washing his hand afterwards and had to eat with his fingers.

The court of appeals affirmed the lower court holding that the plaintiff's confinement amounted to punishment and that failure to provide a hearing violated the due process clause of the fourteenth amendment. The court held that to determine whether the disabilities imposed on the plaintiff during detention constituted punitive measures requiring due process or whether they were permissible regulatory restraints, the trier of fact must first consider whether detention facility officials expressed an intent to punish detainees.[44] If they did not, under *Bell v. Wolfish*[45] the determination turns on whether there is a rational alternative purpose for the detention and whether the detention appears excessive in relation to that alternative purpose. The court must apply the *Wolfish* standard to determine whether the policy in fact constitutes punishment.[46] The district court found no clear evidence of expressed intent to punish. The lower court did, however, find that the circumstances of confinement were unreasonably degrading and inhumane and could hardly have been worse if the detainee were being punished for adjudicated infractions of a serious nature.

The court of appeals found the trial court's judgment abundantly supported by the record, but did not hold that the use of a strip cell is *per se* unconstitutional. The court held only "that to hold a pretrial detainee under conditions of detention this extreme for such an excessive period as fifty-six days is *punishment* and, absent a determination of guilt, cannot be imposed in accordance with the due process clause of the fourteenth amendment."[47] The court noted that a determination of guilt would not have altered the decision, because, even though the eighth amendment applies only after guilt is determined,[48] it was clear that the plaintiff suffered unconstitutional punishment, for whatever reason it was imposed.

2. Liability of Government

An earlier appeal[49] in *McGhee v. Draper*[50] had determined that, because good faith had been shown on the part of government officials alleged to have violated the plaintiff's rights, damages were not recoverable. The court in the present appeal held that the prior ruling must be altered in light of the

43. *Id.* at 730.
44. *Id.* at 731.
45. 441 U.S. 520 (1979).
46. 641 F.2d at 731.
47. *Id.* at 732 (emphasis in original) (footnote omitted).
48. *Id.*
49. McGhee v. Draper, 564 F.2d 902 (10th Cir. 1977).
50. 639 F.2d 639 (10th Cir. 1981).

United States Supreme Court ruling in *Owen v. City of Independence*,[51] which held that government officials are liable in their official capacities for constitutional violations regardless of the presence of good faith.

In *Littlefield v. Deland*,[52] the court had to determine who was liable for the unlawful detention of the plaintiff in a strip cell. Under *Monell v. Department of Social Services*,[53] when the execution of a local government's "policy or custom"[54] inflicts the complained-of injury, the government as an entity is responsible under section 1983. An examination of three factors led the court of appeals to find the local government liable in *Littlefield*. First, the jail facilities were under the control of the county commissioners. Second, there was a long-standing policy and custom of using strip cells for administrative segregation. Third, the commissioners had repeatedly had their attention called to the inadequacy of the facilities, but had done nothing. The court made clear that the three findings were ones of direct culpability, not vicarious liability.[55]

3. Remedies

In *McGhee v. Draper*,[56] the court held that if the plaintiff, a nontenured teacher whose contract had not been renewed, could show that she was deprived of a liberty interest without due process, she would have a number of possible remedies.[57] Nominal damages would be available even if the charges against her were true. A post-termination hearing, if requested, might also be available. The court stated that compensatory damages and equitable relief might also be appropriate if the damaging, publicly disseminated charges were determined to be false or improper.[58] With respect to equitable relief, the court stated that absent a property interest in continued employment, reinstatement is not ordinarily an appropriate remedy for deprivation of a liberty interest.[59] If the plaintiff can prove that she would have been retained had full procedural due process been provided, however, she may be reinstated.[60] Similarly, the court held, back pay would be an appropriate remedy if plaintiff is able to prove a direct causal link between the denial of due process and her termination.[61]

4. Attorneys Fees

In *Gurule v. Wilson*,[62] the court provided guidance to the trial court on remand on the issue of the proper measure of attorneys fees under section

51. 445 U.S. 622 (1980).
52. 641 F.2d 729 (10th Cir. 1981).
53. 436 U.S. 658 (1978).
54. *Id.* at 694.
55. 641 F.2d at 732.
56. 639 F.2d 639 (10th Cir. 1981).
57. *Id.* at 644.
58. *Id.*
59. *Id.* at 645.
60. *Id.* at 646.
61. *Id.*
62. 635 F.2d 782 (10th Cir. 1980).

1988.[63] In its original order setting attorneys fees, the district court considered the compensation provided to attorneys of indigent criminal defendants under the Criminal Justice Act[64] and awarded $33 per hour for lead counsel, and $21 and $20 per hour for associate counsel. Because the policies behind the Criminal Justice Act and section 1988 are different, the court of appeals held that guidelines under the former statute should not apply. The court held that an award that does not fully compensate an attorney for his time does not meet the section 1988 standard of reasonableness.[65]

The trial court had also considered that the plaintiffs had prevailed in only about sixty percent of the matters they had presented. The court then reduced the award by an amount proportionate to the extent the plaintiffs did not prevail. The court of appeals cited with approval *Stanford Daily v. Zurcher*,[66] in which the court noted several decisions where fees were granted for work "reasonably calculated" to promote the client's interest even if unsuccessful. The *Zurcher* court stated that "courts should not require attorneys (often working in new or changing areas of the law) to divine the exact parameters of the courts' willingness to grant relief."[67] The Tenth Circuit held that fees under section 1988 should be in line with fees traditionally received from fee-paying clients and noted that courts rejecting the proportionate recovery rule have pointed out that fee paying clients do not ordinarily receive a discount for issues upon which their attorney did not prevail.[68]

In *Prochaska v. Marcoux*,[69] the court of appeals reversed a district court denial of attorneys fees. The plaintiff had brought suit against a wildlife

63. 42 U.S.C. § 1988 (1976). Section 1988 provides, *inter alia*:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 U.S.C. §§ 1681-1686], . . . 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.

64. 18 U.S.C. § 3006A(d) (1976).

65. 635 F.2d at 793.

66. 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977).

67. 64 F.R.D. at 684.

68. 635 F.2d at 793. It could be argued, however, that the issue is not so much whether the prevailing plaintiff's attorney should be paid for all his time, but rather who should pay. It is not clear why a defendant who prevailed on a particular issue should have to pay the fees of the attorney who lost on the issue. Furthermore, there are considerations present in actions where attorneys fees may be provided for by statute that are not present in traditional litigation. In litigation in which the client will be paying the attorneys fees, the attorney has a responsibility to his client not to spend a great deal of time on issues on which there is little chance of success. Where attorneys fees are provided by statute for civil rights actions, there is an incentive for an attorney who knows he can prevail on at least some issues to pursue other issues as well in order to try to change the law to conform to his own political and social philosophy. In traditional litigation, an attorney's obligation to his client not to spend money unnecessarily will prevent this kind of philosophical crusade; in civil rights actions, attorneys are now given virtually carte blanche to tilt at windmills at the expense of defendants. It is true that the court of appeals did state that "[o]f course, attorneys fees should not be awarded for issues that are frivolous or asserted in bad faith." *Id.* at 794. It is doubtful, however, that this limitation is very meaningful. In the first place, there are many issues that have little chance of success, yet would not be characterized as frivolous. In the second place, the "frivolous or asserted in bad faith" standard is essentially the standard used now for a prevailing defendant to be entitled to attorneys fees. Very few prevailing defendants collect attorneys fees, and it is unlikely that unsuccessful defendants will be able to exclude many issues from their fee liability.

69. 632 F.2d 848 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 2316 (1981).

conservation officer who had cited the plaintiff for operating a boat on a lake without proper safety equipment. The plaintiff alleged that the defendant's actions were malicious, that the plaintiff had been deprived of life, liberty, or property without due process, and that his right to be free from unreasonable interference by police officers had been violated.[70]

According to the test set out in *Morgan v. Brittany Apartments*,[71] a defendant is entitled to attorneys fees when "the action is clearly frivolous, vexatious, or brought for harassment purposes."[72] The court of appeals concluded in *Prochaska* that the district court erred in finding that the plaintiff's action was not "frivolous, unreasonable, or without foundation" because plaintiff was convicted of violating Colorado's boating safety laws and the conviction was affirmed before commencement of the civil action.[73] Judge Doyle dissented from the fee award, stating that in the absence of plain error the trial court's judgment on attorneys fees should be affirmed.[74]

C. *42 U.S.C. Section 1985*

The Tenth Circuit in *Fisher v. Shamburg*[75] decided a section 1985[76] action arising out of an assault against a black man by three white men. As the plaintiff was entering a cafe in Kansas, one of the defendants who was leaving uttered a racial slur. When the plaintiff left the cafe, the defendants were in the parking lot and made more insulting racial remarks. A fight ensued, in which the plaintiff received minor injuries. One of the defendants was later convicted of criminal assault.[77]

The issue in *Fisher* was whether an allegation of a racially motivated conspiracy, under the circumstances of the case, stated a deprivation of "the equal protection of the laws, or of equal privileges and immunities under the laws"[78] within the meaning of section 1985(3). In *Griffin v. Breckenridge*,[79] the United States Supreme Court set out the following four requirements for a valid cause of action under section 1985: 1) the defendants conspired or went in disguise on the highway or premises of another; 2) for the purpose of depriving a person or class of persons of the equal protection of the laws or equal privileges and immunities; 3) one or more of the conspirators performed an act in furtherance of the conspiracy; 4) whereby another was injured in his person or property or deprived of having or exercising any right or privilege of a citizen of the United States.[80]

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70. *Id.* at 850.
71. No. 79-1230 (10th Cir. Feb. 22, 1980) (not for routine publication).
72. *Id.*, slip op. at 5. The Supreme Court set a similar standard for an attorneys fee award to defendants in Title VII actions in Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978). There, the Court stated that attorneys fees are appropriate if the plaintiff's action was "frivolous, unreasonable, or without foundation." *Id.* at 421.
73. 632 F.2d at 854.
74. *Id.* at 855 (Doyle, J., dissenting in part).
75. 624 F.2d 156 (10th Cir. 1980).
76. 42 U.S.C. § 1985 (1976).
77. 624 F.2d at 157.
78. 42 U.S.C. § 1985(3) (1976) (renumbered in Supp. III 1979).
79. 403 U.S. 88 (1971).
80. *Id.* at 102-03.

The court of appeals in *Fisher* focused on the second *Griffin* element. In *Griffin*, the Court had stated that the necessary purpose was present if there was a racial, or perhaps otherwise class-based, invidiously discriminatory animus which aimed at a deprivation of the equal enjoyment of rights secured by the law to all.[81] Because Fisher alleged a conspiracy to deprive him of the right to enjoy the public accommodations of the cafe, the court of appeals held that he had stated a valid claim.[82]

Holmes v. Finney[83] involved a suit alleging that the defendants, who were connected with the Topeka Housing Authority, had arranged a clandestine tape recording of the plaintiffs in the office of one of the defendants. The question in the case was whether section 1985 provides a remedy on the mere showing of a discriminatorily motivated conspiracy, or whether the plaintiff must also show a violation of some right protected independently of section 1985. The court concluded that section 1985 is a purely remedial statute creating no rights itself and that a violation of an independently created right is required.[84] In the instant case, no constitutional or statutory rights were violated. Therefore, there was no cause of action under section 1985.[85]

In *Shaffer v. Cook*,[86] the plaintiff alleged that an Oklahoma trial judge conspired with several attorneys to deprive the plaintiff of a fair trial in a prior case brought by the plaintiff and dismissed by the judge. The trial judge in the instant case had held that because the Oklahoma judge was immune from suit a private person alleged to have conspired with him could not be liable.[87] Based on *Norton v. Liddel*,[88] the Tenth Circuit disagreed, holding that one who conspires with an immune person may be liable under section 1985.[89]

II. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. *The Prima Facie Case*

In *Coe v. Yellow Freight System, Inc.*,[90] the Tenth Circuit Court of Appeals held that the plaintiff had not established a prima facie case of racial discrimination under Title VII[91] under either the disparate treatment test[92] or the disparate impact test.[93] The plaintiff alleged that he was discriminatorily denied promotion to the position of safety manger of Yellow Freight System. He further maintained that although he received his college degree in 1975 he was not offered the safety manager's position or admitted into the company's management training program. Moreover, in June of 1975, the

81. *Id.* at 102.
82. 624 F.2d at 162.
83. 631 F.2d 150 (10th Cir. 1980).
84. *Id.* at 154. *See* Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366 (1979).
85. 631 F.2d at 154.
86. 634 F.2d 1259 (10th Cir. 1980) (per curiam), *cert. denied*, 451 U.S. 984 (1981).
87. *See* Stump v. Sparkman, 435 U.S. 349 (1978).
88. 620 F.2d 1375 (10th Cir. 1980).
89. 634 F.2d at 1260.
90. 646 F.2d 444 (10th Cir. 1981).
91. 42 U.S.C. § 2000e (1976).
92. 646 F.2d at 450.
93. *Id.* at 453.

company refused to transfer him to the night shift to allow him to attend law school during the day.[94]

The Tenth Circuit applied both the disparate treatment test and the disparate impact test. Illegal discrimination is established under the disparate treatment test when "[t]he employer simply treats some people less favorably than others because of their race, color, religion or national origin."[95] It is, thus, a motive-oriented test. Illegal discrimination is established under the disparate impact test when employment practices that are basically neutral in their treatment of different groups in fact fall more harshly on one group than another and cannot be justified by business necessity.[96]

With respect to the disparate impact test, the court found no allegation that the company systematically followed hiring practices that were discriminatory in effect.[97] With respect to the disparate treatment test, the court found plaintiff's evidence on the failure to promote to be weak on two grounds.[98] First, there was no position open, because there had been a decision not to hire anyone to fill the position of safety manager. In fact, at the time of the appeal, seven years had passed without the position having been filled. Second, the plaintiff was not as qualified as the safety directors who had been assuming some of the duties of the safety manager's position. The court also found that the company's failure to transfer plaintiff to the night shift was justified because there were no night positions open for which he was qualified. Moreover, with respect to the denial of admission to management training, the court found that no trainees were admitted for several months prior to plaintiff's application and no trainees were enrolled during the time that Coe was seeking admission.[99]

The court also rejected Coe's attempt to use spurious statistics. He had tried to buttress his case by using a statistical comparison of the number of minority employees in the company's managerial work force in 1975 and the total number of minority workers in the national population. He had also compared the number of minorities in the company's managerial work force in 1975 with the total number of minorities in the Kansas City metropolitan area in 1970. The court held that these statistics were irrelevant.[100]

Williams v. Colorado Springs, Colorado School District No. 11[101] was an appeal from a judgment in a Title VII action brought by a black teacher alleging as an individual that she was denied employment because of her race and alleging in a class action that the school district's hiring and assignment practices resulted in the concentration of black teachers in a few schools. The plaintiff was originally hired to teach fourth grade at one school, but

94. *Id.* at 448.

95. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

96. Griggs v. Duke Power Co., 401 U.S. 424 (1971); United States v. Lee Way Motor Freight, Inc., 625 F.2d 918 (10th Cir. 1979).

97. 646 F.2d at 451.

98. *Id.* at 449.

99. *Id.* at 450.

100. *Id.* at 453.

101. 641 F.2d 835 (10th Cir. 1981).

was subsequently reassigned to a different school because of increased school enrollment there. The principal at her new school told her that she was not welcome and that he would not have hired her. Four months later, the principal told her that her contract would probably not be renewed because she was not meeting minimum teaching standards. Her official first year evaluations were also poor. After leaving the school, she got a master's degree and sought reemployment, interviewing with a number of principals, but receiving no offers.[102]

With respect to the individual claim, the trial court held that she had made a prima facie case, but that the school district successfully rebutted it by articulating a legitimate reason for non-employment, *viz.*, that the principals had selected other applicants for non-discriminatory reasons. The court of appeals upheld the trial court on this point, finding rebuttal of the prima facie case in the poor evaluations of the plaintiff and in the district's legitimate reasons for hiring others.[103]

With respect to the class action, however, the court of appeals held that the trial court had applied the disparate treatment standards set forth in *McDonnell Douglas Corp. v. Green*[104] and *Furnco Construction Corp. v. Waters*,[105] when it should have applied the disparate impact standards set forth in *United States v. Lee Way Motor Freight, Inc.*[106] The trial court had held that after the class had made out its prima facie case, the school district had only to articulate a legitimate non-discriminatory reason for the practice in order to rebut the claim. This was error, said the court of appeals, because the proper test was the disparate impact test, under which the employer must prove business necessity in order to rebut the prima facie case. The court stated that "unlike a disparate treatment case, a rational or legitimate, non-discriminatory reason is insufficient. The practice must be essential, the purpose compelling."[107] The court remanded for consideration under the disparate impact standards and, while expressing no opinion on the merits, stated that "the question whether hiring and promotion procedures that rely heavily on subjective determinations are justified by business necessity has been of great concern to courts and commentators."[108]

In *Bauer v. Bailar*,[109] the court held that the defendant had successfully rebutted the plaintiff's prima facie case. In examining allegations of disparate impact in hiring procedures that involved a great deal of subjective judgment, the court found that even though only 14 of 150 employees at the Englewood Post Office were women, there was no suggestion that there was discrimination in hiring. The court held, however, that the plaintiff had proved a prima facie case of disparate treatment under *Texas Department of*

102. *Id.* at 838.
103. *Id.* at 843.
104. 411 U.S. 792 (1973).
105. 438 U.S. 567 (1978).
106. 625 F.2d 918 (10th Cir. 1979).
107. 641 F.2d at 842.
108. *Id.*
109. 647 F.2d 1037 (10th Cir. 1981).

Community Affairs v. Burdine.[110] *Burdine* requires a plaintiff to show that he applied for an available position for which he was qualified, but was rejected under circumstances which give rise to an inference of discrimination.[111] If the plaintiff can show that the defendant's actions were more likely than not based on a discriminatory intent, the burden of going forward then shifts to the defendant. The burden of persuasion, however, remains with the plaintiff at all times. If the defendant articulates legitimate non-discriminatory reasons for its action, the plaintiff may introduce evidence to show that the reasons are mere pretext.[112]

The *Bauer* court found that despite the plaintiff's showing of a prima facie case, the post office came back with considerable proof of legitimate reasons for its policies and that there was no basis for the argument that the reasons given were mere pretext.[113]

B. *Policies That Perpetuate Pre-Act Discrimination*

In *Sears v. Atchison, Topeka & Santa Fe Railway*,[114] the Atchison, Topeka & Santa Fe Railway (Santa Fe) and the United Transportation Union (UTU) appealed from a judgment that they violated Title VII by perpetuating the effects of prior discrimination in a non-bona fide seniority system.[115] The primary question in the case was whether the seniority system was bona fide under section 703(h).[116]

Train runs on the Santa Fe traditionally included passenger trains, through freights, local freights, and mixed passenger and freight runs. Train crews on freights included conductors, head-end brakemen, rear-end brakemen, engineers, and firemen. In 1899, the railroad created the post of train porter to perform the duties of head-end brakemen on passenger trains and also to attend to passengers and care for the interior condition of passenger cars. Most passenger trains also carried chair car attendants who performed no braking duties. Porters and chair car attendants were always black. From 1918 to 1959, the entry level job with Santa Fe for blacks was chair car attendant. The entry level job for non-blacks was brakeman. Seniority dates were figured from the earliest date of continuous service in a particular craft within a particular district.[117]

A UTU predecessor, the Brotherhood of Railroad Trainmen (BRT), made several attempts to transfer braking duties from black train porters to white brakemen. The BRT protested that the use of porters to perform the duties of head-end brakemen violated the contracts between BRT and Santa Fe providing for the seniority rights and duties of brakemen. In 1959, the National Railroad Adjustment Board held that only train porters holding a seniority date prior to April 20, 1942 could perform head-end braking du-

110. 101 S. Ct. 1089 (1981); 647 F.2d at 1048.
111. 101 S. Ct. at 1094.
112. 647 F.2d at 1048.
113. *Id.* at 1044-45.
114. 645 F.2d 1365 (10th Cir. 1981).
115. *Id.* at 1368.
116. 42 U.S.C. § 2000e-2(h) (1976).
117. 645 F.2d at 1369.

ties.[118] Others were demoted to chair car attendants.

The district court held that Santa Fe and the union had engaged in a systematic "policy and pattern of discrimination against black employees, that this discrimination was perpetuated by the seniority system agreed to by both defendants, and that the disparate impact created by the seniority system was not immunized by the section 703(h) exemption for bona fide seniority systems."[119] Santa Fe and the union argued that the seniority system was valid under *International Brotherhood of Teamsters v. United States*.[120]

The district court relied on a distillation of four factors from *Teamsters* articulated by the Fifth Circuit Court of Appeals.[121] These factors are: 1) whether the seniority system operates to discourage all employees equally from transferring between seniority units; 2) whether seniority units are in the same or separate bargaining units (if the latter, whether the structure is rational and in conformance with industry practice); 3) whether the seniority system had its genesis in racial discrimination; and 4) whether the system was negotiated and has been maintained free from any illegal purpose.[122] The district court held that Santa Fe's system met the first two factors, but failed to meet the second two.

The court of appeals disagreed with the lower court's approval based upon the first two criteria. The appellate court distinguished *Teamsters*, where the majority of city drivers and servicemen were white, from the instant case, where all employees in the group discouraged from transferring were black. Consequently, the court held that Santa Fe also failed the first criterion.[123] Because the court of appeals found that the division into seniority units was drawn along racial lines, it also disagreed with the district court's finding that the division was rational.[124]

C. *The Effect of Settlements and Conciliation Agreements*

In *Chicano Police Officer's Association v. Stover*,[125] the Tenth Circuit held that a stipulated judgment that did not provide for attorneys fees did not necessarily bar an award of attorneys fees to a prevailing plaintiff. The case arose out of an employment discrimination suit by the Chicano Police Officer's Association against the Albuquerque Police Department. The parties stipulated to a judgment that included a monetary award and an agreement

118. *Id.*

119. *Id.* at 1370.

120. 431 U.S. 324 (1977). In *Teamsters*, a carrier had engaged in a pre-Act pattern of discrimination by hiring minorities only in serviceman or local city driver positions instead of higher paying line driver positions. Such discriminatory effects were perpetuated by the seniority system which required employees who transferred to line driver positions to forfeit seniority accumulated in a serviceman or local driver position. The Supreme Court held the system valid under § 703(h), but at the same time recognized that any difference in treatment created by the system must not be the result of intent to discriminate. *Id.*

121. James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978).

122. 645 F.2d at 1372-74.

123. *Id.* at 1373.

124. *Id.*

125. 624 F.2d 127 (10th Cir. 1980).

by the department to change certain hiring and training procedures.[126]

The court of appeals held that the *Newman v. Piggie Park Enterprises, Inc.*[127] standard should apply to sections 1988 and 2000e-5(k).[128] The *Newman* standard is that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."[129] With respect to the effect of the stipulated judgment on the availability of attorneys fees, the court held that the trial court, on remand, should determine whether the cash payment specified in the stipulated judgment should be construed as a settlement of all that was to be paid to the plaintiffs and their attorneys. The trial court should conduct a hearing on whether attorneys fees were intended to be covered, and if there was no agreement or misleading conduct by the plaintiffs, the court should award attorneys fees if it finds that the plaintiffs prevailed.[130]

Chief Judge Seth dissented,[131] stating that if the judgment were to be altered to the degree requested,[132] the agreement should be reopened to give an equal opportunity to both parties to consider the new factor.[133]

The approach Chief Judge Seth favored in *Chicano Police Officer's Association* was followed in *Trujillo v. Colorado*,[134] an action brought under the thirteenth and fourteenth amendments and sections 1981 and 1983. The plaintiff had accepted employment as assistant coordinator of veterans affairs at the Community College of Denver, pursuant to a United States Government civil rights conciliation agreement with the college. He subsequently brought the suit which is the basis for this appeal. The court of appeals stated that the public policy favoring voluntary settlements would be thwarted if Trujillo could accept the benefits of the agreement while at the same time retaining the right to sue, because no employer would agree to conciliation in such a situation.[135] The court remanded the case, however, for a hearing to determine whether Trujillo understood that the conciliation agreement was in full settlement of all claims. If he did not so understand, he would have the option of either accepting the agreement as full settlement or forfeiting the benefits of the agreement and maintaining the suit.[136]

126. *Id.* at 129.
127. 390 U.S. 400 (1968).
128. 42 U.S.C. §§ 1988, 2000e-5(k) (1976).
129. 390 U.S. at 402.
130. 624 F.2d at 132.
131. *Id.* (Seth, C. J., dissenting).
132. Attorneys fees claimed by the appellant were approximately $45,000, while the stipulated judgment was for only $16,000. *Id.*
133. *Id.*
134. 649 F.2d 823 (10th Cir. 1981).
135. *Id.* at 826-27.
136. If the goal of the courts is to be fair to defendants as well as plaintiffs in discrimination suits, the same approach should have been taken in *Chicano Police Officer's Ass'n* as in *Trujillo*, allowing the plaintiff to accept the stipulated judgment as it stood or reopen the entire judgment. Instead, the *Chicano Police Officer's Ass'n* court gave the plaintiff the opportunity to increase almost fourfold the sum of money that the defendant must pay, without giving the defendant the opportunity to repudiate the judgment.

D. *Remedies*

In *Stone v. D. A. & S. Oil Well Servicing, Inc.*,[137] the court of appeals upheld a back pay award, stating its unwillingness to hold that a jobseeker who leaves a non-comparable part-time job and moves to a new location to seek comparable work, thereby displays a lack of diligence.[138] The court stated that Title VII "should not be used to lock partially employed persons, fearful of losing backpay awards, into long-term unproductive geographic commitments."[139]

In *EEOC v. Safeway Stores, Inc.*,[140] the Tenth Circuit Court of Appeals held that in "failure to hire" cases, the proper remedy is instatement in the next available position. The court also adopted the standards for entitlement to front pay set forth by the Fourth Circuit.[141] These standards are that the claimant must prove: 1) he sought a position or would have sought it in accordance with *Teamsters*; 2) he was qualified for the position; 3) he would have accepted the position had it been offered; and 4) there was an available position that was filled by someone else in conformity with the discriminatory policy.[142]

E. *Attorneys Fees*

In *Chicano Police Officer's Association v. Stover*,[143] the court of appeals held that a court determination on the merits is not required for a plaintiff to be found the prevailing party and therefore entitled to attorneys fees. The appeal arose out of an employment discrimination suit by the Chicano Police Officer's Association (Association) against the Albuquerque Police Department. The parties agreed to a stipulated judgment award of $8,000 to an individual, $8,000 to the Association, and an agreement by the department to change a number of its hiring and training practices. The city made no admission of liability and the plaintiffs were not designated as the prevailing party.[144]

The defendants argued that the plaintiffs should not be considered a prevailing party because there was no decision on the merits or admission of fault and because the $16,000 settlement was *de minimis* in view of what a back pay award might have been. The court of appeals, however, stated that the defendants' view of what constitutes a prevailing party was too narrow, and held that a court determination on the merits is not required.[145] The court stated that although nuisance settlements should not give rise to a "prevailing" plaintiff, the congressional intent to encourage private enforcement of civil rights will be furthered by fee awards if the settlement "pro-

137. 624 F.2d 142 (10th Cir. 1980).
138. *Id.* at 144.
139. *Id.*
140. 634 F.2d 1273 (10th Cir. 1980).
141. Hill v. Western Elec. Co., 596 F.2d 99 (4th Cir. 1979).
142. 634 F.2d at 1282.
143. 624 F.2d 127 (10th Cir. 1980).
144. *Id.* at 129.
145. *Id.* at 130-31.

vides some benefit to plaintiffs or some vindication of their rights."[146] Consequently, the trial court was instructed on remand to determine whether plaintiffs' basic objectives were achieved or furthered in a significant way as a result of bringing the action.

In *Nulf v. International Paper Co.*,[147] the Tenth Circuit reversed a district court award of attorneys fees to a prevailing defendant. The plaintiff had been hired in 1966 as a receptionist. In 1976, a new telephone system was installed, which required a change in her duties. She refused to perform these new duties and was fired. She then brought a sex-discrimination action. The trial court granted a dismissal in favor of the defendant and awarded the defendant attorneys fees, finding that the plaintiff's action was "unreasonable and groundless and was wholly without factual or legal basis."[148] The court of appeals reversed the award, holding that the action was not frivolous, unreasonable, or groundless.[149]

In *Salone v. United States*,[150] the court of appeals held that the trial court erred in holding that the attorneys fee recovery would be limited to one-third of the back pay recovery. The judgment was for $15,544 in back pay and $5,181 in counsel fees. The plaintiff argued that the attorneys fees should be higher because there had been two appeal proceedings to obtain relief.[151] The court of appeals stated that the Tenth Circuit has not followed any fixed standard in setting attorneys fees in Title VII cases,[152] and concluded that the standards set forth in *Johnson v. Georgia Highway Express*[153] should be considered. Thus, the trial court should consider such factors as the nature and extent of the services, the time required, the results accomplished, the value of the matter, and the professional skill and experience of the attorney.[154]

F. *Statute of Limitations*

In *Shah v. Halliburton Co.*,[155] the court held that the statute of limitations begins to run from the date that an employee is discharged, rather than from the last date for which he receives compensation. Shah was fired and was given at least two weeks' severance pay. He maintained that the statute should not begin to run until two weeks after his discharge. The court of appeals held that the statutory period for employment discrimination begins to run from the date of the last alleged discriminatory practice, and in the instant case the discharge must be treated as the last such practice.[156] The court stated that "a discharge occurs at the latest as of the date after which

146. *Id.* at 131.
147. 656 F.2d 553 (10th Cir. 1981).
148. *Id.* at 557.
149. *Id.* at 564.
150. 645 F.2d 875 (10th Cir. 1981).
151. *Id.* at 876.
152. *Id.* at 879.
153. 488 F.2d 714 (5th Cir. 1974).
154. 645 F.2d at 879.
155. 627 F.2d 1055 (10th Cir. 1980).
156. *Id.* at 1056.

services are no longer accepted."[157] The fact that Shah received pay for at least two weeks after his discharge was of no consequence.[158]

III. THE AGE DISCRIMINATION IN EMPLOYMENT ACT

In *EEOC v. Sandia Corp.*,[159] the court of appeals held that because unemployment compensation is "purely a collateral source"[160] and "peculiarly the property of the claimant,"[161] it would be unfair to allow the defendant to offset amounts received against back pay awards in an action under the Age Discrimination in Employment Act (ADEA).[162] The court stated that the deduction of unemployment benefits would result in unjust enrichment to the employer "except to the extent that employers make contributions to the funds."[163] The court did allow the deduction of severance pay because it was a payment made wholly by the employer and thus not a collateral benefit.

Thomas v. United States Postal Inspection Service[164] involved a claim of age discrimination brought under the ADEA and the due process clause of the fifth amendment. Thomas was an employee of the United States Postal Service who was rejected for a position as a postal inspector because of a thirty-four-year maximum age limit. The limit was set forth in Postal Service regulations promulgated pursuant to a statute allowing heads of agencies to fix minimum and maximum ages for law enforcement personnel.[165] The district court held against Thomas on the ADEA claim because the Act expressly applies only to applicants who are at least forty.[166] Thomas did not appeal this holding, but he did appeal a holding that there was no constitutional violation.

The court of appeals stated that the only constitutional issue was whether there was a rational basis for the age limit.[167] Relying on *Vance v. Bradley*[168] and *Massachusetts Board of Retirement v. Murgia*,[169] the court upheld the limit. It found the limit to be not only rational, but sensible, stating that by passage of the federal law enforcement statute Congress recognized the need for comparatively young, strong, and vigorous personnel in law enforcement agencies.[170]

157. *Id.* (citing Payne v. Crane Co., 560 F.2d 198, 199 (5th Cir. 1977)).

158. *See also* Delaware State College v. Ricks, 449 U.S. 250 (1980), which involved a college professor who alleged that he had been denied tenure illegally. The United States Supreme Court held that the statute of limitations began to run when he was notified of the denial of tenure, not when his one-year terminable employment contract expired. *Id.* at 259.

159. 639 F.2d 600 (10th Cir. 1980).

160. *Id.* at 625.

161. *Id.*

162. 29 U.S.C. §§ 621-634 (1976).

163. 639 F.2d at 626. The court did not concern itself with the overcompensation to the employee that results, or the payment by the corporation which is excessive to the extent that the corporation also contributes to the unemployment compensation fund.

164. 647 F.2d 1035 (10th Cir. 1981).

165. 5 U.S.C. § 3307(d) (1976).

166. 29 U.S.C. § 631 (1976).

167. 647 F.2d at 1036.

168. 440 U.S. 93 (1979).

169. 427 U.S. 307 (1976).

170. 647 F.2d at 1037.

IV. INDIAN RIGHTS

A. *Preferential Treatment*

In *Wardle v. Ute Indian Tribe*,[171] the court upheld the tribe's discharge of a non-Indian tribal policeman who was discharged because the tribe had decided to fill the position with a tribal member. The plaintiff alleged that he was discharged in violation of the Indian Civil Rights Act,[172] the fifth amendment, and various civil rights provisions.[173] The court of appeals upheld the district court's grant of defendant's motion for summary judgment, holding that defendants had not violated any federally protected right.[174] The appellate court held that the allegations of the case fell squarely within the provisions of Title VII of the Civil Rights Act of 1964.[175] Plaintiff had not brought his action under Title VII because that Act specifically provides that "[t]he term 'employer' . . . does not include . . . an Indian tribe."[176] Moreover, Title VII also states that "[n]othing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice . . . under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation."[177] The court noted the Supreme Court's findings in *Morton v. Mancari*[178] that Congress recognized a unique legal status for Indians and that such a preference for Indians in reservation-related employment is not prohibited.[179]

With respect to the fifth amendment claim, the court held that under *Mancari* no federally protected right had been infringed and that the fifth amendment serves as a limit on federal action only, not on Indian tribes.[180] With respect to civil rights claims under sections 1981 and 1983, the court held that because there is no specific provision in these sections barring preferential hiring of tribal members, the specific provisions of Title VII control over the more general provisions of the other statutes.[181]

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171. 623 F.2d 670 (10th Cir. 1980).
172. 25 U.S.C. §§ 1301-1341 (1976).
173. 42 U.S.C. §§ 1981, 1983, 1988, 2000d (1976).
174. 623 F.2d at 672.
175. 42 U.S.C. § 2000e (1976).
176. *Id.* § 2000e(b).
177. *Id.* § 2000e-2(i).
178. 417 U.S. 535 (1974).
179. 623 F.2d at 673.
180. *Id. See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).
181. 623 F.2d at 673. It is not clear how this holding can be reconciled with the generally accepted rule that the existence of Title VII does not preclude actions under other civil rights statutes. For example, in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the United States Supreme Court stated that "the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." *Id.* at 48. Moreover, the Court quoted an interpretive memorandum introduced by Senator Joseph Clark, which stated that "Title VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes." *Id.* at 48 n.9. *See also* Goss v. Revlon, Inc., 548 F.2d 405 (2d Cir. 1976), in which a claimant who had not exhausted his administrative remedies before the EEOC was permitted to bring an action based on section 1981.

The court of appeals' reliance on Morton v. Mancari, 417 U.S. 535 (1974), is misplaced. The question in *Mancari* was whether a provision in the Indian Reorganization Act, 25 U.S.C. § 472 (1976), granting a preference to qualified Indians in the Bureau of Indian Affairs was

B. *Tribal Sovereignty*

In *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*,[182] the court held that the concept of tribal sovereignty should not be applied if to do so would deny non-Indian plaintiffs a forum in which their disputes with the tribe could be settled. The plaintiffs' land was within the exterior boundaries of the Wind River Reservation of the Shoshone and Arapahoe Indians in Wyoming. The land was patented in 1924. There was a small road, which had been used for some eighty years, providing access from the lodge to the principal highway. The plaintiffs decided to build a guest lodge for hunting. The superintendent of the reservation advised them that such projects were encouraged in order to provide employment and that there would be no access problem. The day after the lodge opened, the tribes closed the road at the request of the Indian family who owned the allotment over which the access road travelled. The tribal council directed that federal officers prevent access and that the family erect a barricade. The plaintiffs sought a remedy in tribal court, but the judge said that he would not incur the displeasure of the council, whose consent was necessary. Consent was not given.[183]

Defendants asserted that there was no remedy under *Santa Clara Pueblo v. Martinez*.[184] The court of appeals disagreed, distinguishing *Santa Clara* on the basis that it involved an entirely internal affair concerning property ownership and tribal membership.[185] The appellate court quoted the United States Supreme Court's opinion in *Oliphant v. Suquamish Indian Tribe*:[186] "Indian Tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers *'inconsistent with their status*.' "[187] Because the instant case related to a matter outside of internal tribal affairs and involving non-Indians, the court held that *Santa Clara* could not be applied to deny plaintiffs a forum in which their dispute could be settled.[188]

Judge Holloway dissented, stating that the Supreme Court in *Santa Clara* laid down a broad holding couched in terms of the tribes' traditional immunity from suit and the absence in the Indian Civil Rights Act of provisions subjecting the tribes to federal court jurisdiction in civil actions for injunctive or declaratory relief. Consequently, he reluctantly concluded that

implicitly repealed by section 11 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16(a) (1976), which extended Title VII to federal employment. The court of appeals is thus relying on a case that held that Title VII did not repeal another statute by implication for the proposition that Title VII limits remedies under other civil rights statutes.

182. 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 931 (1981). *See also* Dry Creek Lodge, Inc. v. United States, 515 F.2d 926 (10th Cir. 1975).

183. 623 F.2d at 684.

184. 436 U.S. 49 (1978). *Santa Clara* upheld a tribal ordinance denying membership in the tribe to children of female members who marry outside the tribe, while extending membership to children of male members who do so. The Court noted that a tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. *Id.* at 72 n.32.

185. 623 F.2d at 685.

186. 435 U.S. 191 (1978).

187. *Id.* at 208 (emphasis in original).

188. 623 F.2d at 685.

dismissal was compelled.[189]

C. *Religion*

In *Badoni v. Higginson*,[190] the court of appeals upheld a lower court order denying relief to Indian plaintiffs who argued that the religion clauses of the first amendment apply to government management of Rainbow Bridge National Monument and the Glen Canyon Dam and Reservoir (Lake Powell).

Rainbow Bridge National Monument is a 160-acre tract in southern Utah surrounded by a Navajo reservation. It was set aside by executive order for scientific and historic purposes.[191] Lake Powell has backed up so that Rainbow Bridge now arches over water. Boats licensed by the Bureau of Reclamation and the National Park Service bring tourists to the monument.

The Indians claimed that the government had violated the free exercise clause by impounding the water to form Lake Powell because the impoundment drowned some of their gods and denied the Indians' access to a sacred prayer site.[192] Also, the plaintiffs alleged that the government permitted desecration of the site by allowing tourists to visit and that the government denied the plaintiffs the right to conduct religious ceremonies.[193]

The trial court, finding for the government, held that plaintiffs had no cognizable free exercise claim because they had no property interest in the monument. The trial court also found that the federal government's interest in the dam and the reservoir outweighed plaintiffs' religious interests.[194]

The court of appeals affirmed the judgment of the trial court, but used different reasoning, rejecting the conclusion that plaintiffs' lack of property rights in the monument was determinative.[195] Instead, the court stated that the analysis of plaintiffs' free exercise claims involves a two-step process.[196] There must first be a determination of whether the government action creates a burden on the exercise of plaintiffs' religion.[197] If so, the government must establish an interest of sufficient magnitude to override the interest for which plaintiffs claim protection under the free exercise clause.[198] The court found that Rainbow Bridge has held a position of central importance in the Navajo religion for at least a hundred years and that plaintiffs believe that if humans alter the earth in the area of the bridge the gods will not hear their prayers. The court expressly stated, however, that it did not reach the question of whether the government action infringes the free exercise of religion,[199] because it held that the government's interest outweighs any

189. *Id.* at 686.
190. 638 F.2d 172 (10th Cir. 1980).
191. *Id.* at 175.
192. *Id.* at 176.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *See* Abington School District v. Schempp, 374 U.S. 203, 223 (1963).
198. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).
199. 638 F.2d at 177 n.4.

religious interest the plaintiffs might have.[200] The court noted that in order to drop the water level sufficiently to meet the plaintiffs' demands the storage capacity of the lake would have to be cut in half. Such action would reduce significantly the water available to the Upper Basin states of Colorado, New Mexico, Utah, and Wyoming.[201]

With respect to the claim that the presence of tourists burdens the practice of the plaintiffs' religion, the court pointed out that the Navajos may enter the monument on the same basis as anyone else. Moreover, the court held that the plaintiffs' goal would violate the establishment clause because the plaintiffs demanded government action to exclude and control the behavior of others.[202] The court also stated that "we do not believe plaintiffs have a constitutional right to have tourists visiting the Bridge act 'in a respectful and appreciative manner.' "[203]

V. PRISONERS' RIGHTS

The major prisoners' rights case before the Tenth Circuit during the year was *Ramos v. Lamm*.[204] The State of Colorado appealed an order of the United States District Court[205] directing that the state close the maximum security unit of the Colorado State Penitentiary at Canon City (Old Max) because conditions at the prison violated the eighth amendment prohibition of cruel and unusual punishment. Implementation of the closing order was deferred on the condition that the state present proper plans for eradicating constitutional violations.[206]

The primary constitutional issue presented was whether the district court had applied the correct constitutional standard in finding that the totality of conditions at Old Max violated plaintiffs' eighth amendment rights. The state argued that there was insufficient evidence of a violation if the correct constitutional standard were applied.[207]

With respect to the constitutional standard, the court of appeals quoted its opinion in *Battle v. Anderson*:[208] "[T]he United States Supreme Court has not wavered in its holding that the Eighth Amendment . . . is, *inter alia*, intended to protect and safeguard a prison inmate from an environment where degeneration is probable and self-improvement unlikely because of the conditions existing which inflict needless suffering, whether physical or mental."[209] The court emphasized that an inmate does not have a constitutional right to rehabilitation, although he is entitled to be confined in an environment which does not result in his "degeneration."[210]

200. *Id.* at 177.
201. *Id.*
202. *Id.* at 179.
203. *Id.*
204. 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 1759 (1981).
205. 485 F. Supp. 122 (D. Colo. 1979).
206. 639 F.2d at 562.
207. *Id.* at 566.
208. 564 F.2d 388 (10th Cir. 1977).
209. *Id.* at 393.
210. 639 F.2d at 568.

The state argued that it was error to apply the *Battle* "degeneration standard." The state urged instead the adoption of the rule enunciated in *Newman v. Alabama*:[211] "If the State furnishes its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety, so as to avoid the imposition of cruel and unusual punishment, that ends its obligations under Amendment Eight."[212]

The Tenth Circuit stated that there was no conflict between its decision in *Battle* and the Fifth Circuit's decision in *Newman*, despite the fact that the *Newman* court expressly rejected the degeneration test, referring to it as an "uncharted bog."[213] The appellate court concluded that in the core areas of the eighth amendment claim—shelter, sanitation, food, personal safety, and medical care—the district court's findings and conclusions of violations were justified.[214]

The district court had also made findings with respect to idleness, classification, and motility and had ordered that each inmate be involved in some kind of productive activity—jobs, recreation, treatment, or education—at least eight hours out of every twenty-four. The court further ordered that no prisoner be housed in less than eighty square feet for twenty or more hours per day, and that any systems of classification, placement, and assignment be "clearly understandable, consistently applied, and conceptually complete."[215]

The court of appeals reversed the district court on these issues and stated that the record did not justify exploring the concepts of penology respecting motility, classification, and idleness adopted by the district court because "the shortcomings in these areas are not of constitutional dimension."[216] The court did state, however, that there may be a point where abuse in these areas would constitute an actual violation of the eighth amendment.[217]

With respect to the sufficiency of the evidence to support the findings of the district court in the core areas of shelter, sanitation, food, personal safety, and medical care, the state argued that the undisputed evidence did not support the court's ultimate findings and conclusions.

Deficiencies in shelter and sanitation found by the district court included, *inter alia*, inadequate cell size, leaky roofs, inadequate heating systems, inadequate ventilation resulting in mold and fungus growth, accumulation of sewage in the cells, and rodent infestation. The court of appeals sustained the trial court's conclusion that these conditions were

211. 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

212. 559 F.2d at 291.

213. *Id.* In its petition for certiorari, the state argued that because the degeneration standard contains virtually no constraints on the ability of federal courts to impose their concepts of penology on the states, the standard must be replaced by a more objective one. Under the degeneration standard, argued the state, "when a judge sees prison programs which differ from those he favors, and when he sees degeneration (as he always will), he is free to declare the conditions at the prison unconstitutional." Petition for Certiorari at 12.

214. 639 F.2d at 566.

215. 485 F. Supp. at 170.

216. 639 F.2d at 566-67.

217. *Id.* at 567.

"grossly inadequate and constitutionally impermissible."[218]

The district court had found that conditions in the food service areas failed to meet any known health standards. The court of appeals held that part of the "healthy habilitative environment" that the state must provide an inmate is "nutritionally adequate food that is prepared and served under conditions which do not present an immediate danger to the health and well being of the inmates who consume it."[219] The court further held that although the state health code does not establish constitutional minima it is relevant in making a finding regarding the constitutionality of existing conditions.[220] Deficiencies included rotting food on the floors, standing water in the kitchen, mold on the walls of the walk-in coolers where food was stored, and food left uncovered allowing rodents and roaches to contaminate it. The appellate court found that the record amply supported the district court's conclusion that the conditions in the food service areas had a substantial detrimental impact upon the health of the inmate population.[221]

The district court also found that the inmates and staff lived in constant fear in the prison and that the design and staffing of the prison contributed to violence among inmates. It concluded that this lack of safety deprived prisoners of their constitutional right to be free from constant threats of violence and sexual assault from other inmates.[222] The court of appeals upheld the court's conclusion that failure to provide for the physical safety of the inmates also violated the eighth amendment.[223]

The district court found the inadequate health care to be "perhaps the most appalling" problem at Old Max.[224] The court of appeals held that under *Estelle v. Gamble*[225] accidental or inadvertent failure to provide adequate medical care is not a violation of the eighth amendment; only "deliberate indifference" to the serious medical needs of the inmates or intentional failure to provide for them are unconstitutional.[226] The court of appeals upheld the findings of the district court that health care was inadequate in primary care physician on-site coverage, on-site dental care, staff and vehicles for transporting inmates to health care facilities, and mental health care.[227]

The trial court also held that restrictions on visitation improperly infringed upon the inmates' rights of association, privacy, and liberty under the first, ninth, and fourteenth amendments.[228] The challenged regulations permitted each inmate a total of five full days or ten half-days of visiting privileges per month. Visitors were required to be on an approved list. Limited contact was allowed—kisses at the beginning and end of each visit,

218. *Id.* at 570 (citing 485 F. Supp. at 155).
219. 639 F.2d at 570-71.
220. *Id.* at 571.
221. *Id.* at 571-72.
222. 485 F. Supp. at 155-56.
223. 639 F.2d at 574.
224. *Id.* (citing 485 F. Supp. at 158).
225. 429 U.S. 97 (1976).
226. 639 F.2d at 575.
227. *Id.* at 578.
228. *Id.*

hand-holding, and holding small children on laps. Any other type of bodily contact was prohibited. The district court had found the regulations to be "overbroad, unrelated to any legitimate penological purpose, and an exaggerated and excessive response to concerns for prison security."[229] The court of appeals disagreed, noting that there is no constitutional right to contact visitation[230] and that contact visits provide a unique opportunity for passing contraband into the prison. The court found that the record shows that the challenged regulations had been successful in discouraging the transfer of contraband between inmates and their visitors. The court stated further that "[t]he existence of less restrictive alternatives is not dispositive of the matter . . . for we are convinced that the discretion of prison officials in these matters should stand unless patently unreasonable."[231]

The court of appeals upheld the district court declaration of invalidity of a number of policies relating to prisoners' mail.[232] The policy of refusing to deliver mail in a language other than English was held to infringe the rights of inmates without any reasonable justification, particularly in light of the fact that one-third of the population of Old Max was Hispanic.[233] The policy of refusing to deliver mail when the correspondence would allegedly cause severe psychiatric or emotional disturbance to an inmate was held not unreasonable on its face, but unreasonable as applied because there was no qualified psychiatrist or psychologist at the prison to make the determination. The regulations were also deficient because they did not make clear that in those exceptional circumstances when outgoing privileged mail may be opened it must be opened only in the presence of the inmate.[234]

Finally, the regulation defining "legal mail" stated that it was "any mail directed between an inmate and any public official or agency or any lawyer with respect to either his criminal conviction or a complaint he might have concerning the administration of the prison under exceptional circumstances."[235] The court of appeals held that the protection afforded legal correspondence applies equally to criminal and civil matters and cannot be thus confined.[236] The court concluded that the prisoner mail standards were invalid under the first and fourteenth amendments and were unjustified by the standards laid down by the United States Supreme Court in *Procunier v. Martinez*.[237]

With respect to access to the courts, the court of appeals upheld a district court determination that the law libraries at Old Max were inadequate.[238] Under *Bounds v. Smith*,[239] prison authorities must provide adequate law libraries or adequate assistance from persons trained in the

229. *Id.* at 580.
230. *Id.* n.26.
231. *Id.* at 580.
232. *Id.* at 581.
233. *Id.*
234. *Id.* at 582.
235. Canon Correction Facility Reg. 302-18(6).
236. 639 F.2d at 582.
237. 416 U.S. 396 (1974).
238. 639 F.2d at 584.
239. 430 U.S. 817 (1977).

law.[240] The court of appeals held that the state provided neither, thus denying the prisoners meaningful access to the courts.[241]

The court remanded the case to the district court to reconsider the proper remedy in light of present conditions. The district court was instructed to consider, *inter alia*, the present state of the new facility, the specific plans regarding transfer and housing of inmates in the new facility, the specific commitments for enlarged staff personnel to remedy the deficiencies found, and the actual progress in these areas.[242]

There were a number of less significant prisoners' rights cases during the past year. One such case was *Brown v. Bigger*,[243] in which the court held that prison guards' forcibly putting the plaintiff into bed while he was at a hospital for treatment of stab wounds did not constitute cruel and unusual punishment.

In *Major v. Benton*,[244] the court of appeals held that an allegation of simple negligence was not sufficient to support a section 1983 claim. Plaintiffs' decedent was an Oklahoma state prisoner who died in a sewer ditch cave-in. The court rejected the plaintiffs' claim that the deceased was deprived of life without due process of law simply because the state had not formulated the proper safety measures.[245]

In *Littlefield v. Deland*,[246] the court of appeals affirmed a lower court holding that the plaintiff had been unconstitutionally punished. Plaintiff had been arrested and charged with disorderly conduct based on "certain bizarre but nonviolent activities" in a service station. The court held that holding the plaintiff in a strip cell without notice or opportunity to be heard constituted punishment without due process of law.[247]

In *Barton v. Malley*,[248] the Tenth Circuit court rejected an appeal from the dismissal of a habeas corpus petition. Plaintiff claimed that his parole was revoked because he had spoken critically about the New Mexico corrections system to a prison reform group. The trial court found that the petitioner had violated an earlier parole because he was outside the county (where he was involved in an accident). His parole was revoked, but subsequently reinstated. The petitioner then left the state and was arrested in Pennsylvania. Again, his parole was revoked.[249]

Barton maintained that he was denied equal protection because New Mexico selectively enforced its laws. Citing *United States v. Torquato*,[250] the court of appeals held that to support a claim of selective enforcement based upon a discriminatory revocation of parole, the petitioner must establish two

240. *Id.* at 828.
241. 639 F.2d at 585.
242. *Id.* at 586.
243. 622 F.2d 1025 (10th Cir. 1980) (per curiam).
244. 647 F.2d 110 (10th Cir. 1981).
245. *Id.* at 113.
246. 641 F.2d 729 (10th Cir. 1981).
247. *Id.* at 732.
248. 626 F.2d 151 (10th Cir. 1980).
249. *Id.* at 153.
250. 602 F.2d 564 (3d Cir.), *cert. denied*, 444 U.S. 941 (1979).

facts. First, he must show that he has been singled out for prosecution when others similarly situated have not. Second, he must show that selection of petitioner for parole revocation was based on intentional, purposeful discrimination stemming from impermissible considerations such as race, religion, or the desire to prevent the exercise of a constitutionally secured right.[251] Because the court found that Barton had not met his burden of proof, the dismissal of his habeas corpus petition was upheld.[252]

VI. CASE DIGESTS

A. *Drug Paraphernalia*

In *Hejira Corp. v. MacFarlane*,[253] the Tenth Circuit Court of Appeals upheld the constitutionality of the Colorado Drug Paraphernalia Act.[254] The trial court had held that the statutory definition of "drug paraphernalia" was unconstitutionally vague. Although the lower court recognized the power of the state to enact laws regulating drug paraphernalia, it held that the statutory standard of "primarily adapted, designed, and intended" was not adequate.[255] The trial court further held that the eleven factors enumerated in the statute for determination of whether an article is an item of drug paraphernalia were not adequate notice either to possible violators or to police.[256]

The court of appeals recognized that the standard "adapted, designed,

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251. 626 F.2d at 155.

252. *Id.*

253. No. 80-2062 (10th Cir. May 5, 1981).

254. COLO. REV. STAT. §§ 12-22-501 to -506 (Supp. 1980).

255. No. 80-2062, slip op. at 5. COLO. REV. STAT. § 12-22-502(2) (Supp. 1980) provides:

"Drug Paraphernalia" means any machine, instrument, tool, equipment, or device which is primarily adapted, designed, and intended for one or more of the following:

(a) To introduce into the human body any controlled substance under circumstances in violation of the laws of this state;

(b) To enhance the effect on the human body of any controlled substance under circumstances in violation of the laws of this state;

(c) To conceal any quantity of any controlled substance under circumstances in violation of the laws of this state;

(d) To test the strength, effectiveness, or purity of any controlled substance under circumstances in violation of the laws of this state.

256. No. 80-2062, slip. op. at 5. COLO. REV. STAT. § 12-22-503(1) (Supp. 1980) provides:

In determining whether an object is drug paraphernalia, a court, in its discretion, may consider, in addition to all other relevant factors, the following:

(a) Statements by an owner or by anyone in control of the object concerning its use;

(b) The proximity of the object to controlled substances;

(c) The existence of any residue of controlled substances on the object;

(d) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons who he knows intend to use the object to facilitate a violation of this part 5;

(e) Instructions, oral or written, provided with the object concerning its use;

(f) Descriptive materials accompanying the object which explain or depict its use;

(g) National or local advertising concerning its use;

(h) The manner in which the object is displayed for sale;

(i) Whether the owner, or anyone in control of the object, is a supplier of like or related items to the community for legal purposes, such as an authorized distributor or dealer of tobacco products;

(j) The existence and scope of legal uses for the object in the community;

(k) Expert testimony concerning its use.

and intended" was defective. The terms "adapted" and "designed" are contradictory—"designed" means that something was devised for a specific purpose; "adapted" means that something is changed so that it can be used for purposes for which it was not designed. The court, however, finding that the term "adapted" contributed virtually nothing to the standard, held that the legislative intent was "fostered and promoted" by severance of the term.[257] Consequently, the court was left to determine whether the remaining standard, "primarily designed and intended," was vague and overbroad.

With respect to the argument that the law does not provide the notice of proscribed conduct required by *Lanzetta v. New Jersey*,[258] the court held that because the statute requires intent on the part of the violator it provides adequate notice.[259] With respect to the argument that the statute does not provide adequate standards for law enforcement officers as required by *Papachristou v. City of Jacksonville*,[260] the court, quoting *United States v. Patrillo*,[261] stated that the fact that different minds could reach different results with respect to a given item of drug paraphernalia is not sufficient reason to hold the language unconstitutionally vague.[262] The court found that the eleven factors listed in the statute provided adequate guidance.

The court also held that the statute was not overbroad. It held that the word "primarily" preceding the word "designed" eliminates the concern that any item that conceivably may be used with illegal drugs may be declared illegal.[263]

B. *Access to the Ballot*

In *Skeen v. Hooper*,[264] the court of appeals upheld the constitutionality of a New Mexico statute that provided that if a vacancy occurred after a primary election in the list of nominees of a politicial party for a general election, the central committee of the state party could fill the vacancy.[265] The action arose out of the primary election of June 3, 1980, in which the five-term Democratic incumbent won a position on the general ballot for Congress. The Republicans did not nominate a candidate. On August 5, 1980, the Democratic nominee died. Both Democratic and Republican State Central Committees then met to select candidates for the general election. The Democratic nominee was certified by the secretary of state, but the Republican nominee was rejected on the ground that his nomination was not permitted under the statute because there was no vacancy to fill. The plaintiff argued that the statute violated article I of the United States Constitution and the first and fourteenth amendments. The court of appeals relied on

257. No. 80-2062, slip op. at 14.
258. 306 U.S. 451 (1939).
259. No. 80-2062, slip op. at 24.
260. 405 U.S. 150, 162 (1972).
261. 332 U.S. 1 (1947).
262. No. 80-2062, slip op. at 25.
263. *Id.* at 18.
264. 631 F.2d 707 (10th Cir. 1980).
265. N.M. STAT. ANN. § 1-8-8.A (Supp. 1979).

Storer v. Brown[266] for the proposition that not every substantial restriction on the right to vote or associate is automatically invalid. The court then held that the statute met the strict scrutiny test because it served the compelling state interest of ensuring fair, honest, and orderly elections.[267] The court noted that Skeen still had the right to wage a write-in campaign.[268]

Anderson v. Hooper[269] arose out of the same election as *Skeen*. After her husband's death, the widow of the deceased congressman decided to run as an independent candidate. On September 3, 1980, she changed her party affiliation from Democrat to Independent. Her declaration of candidacy was rejected because it did not contain the statutorily required statement that she had been unaffiliated since January 1st of the year of the general election.[270] The court of appeals again relied on *Storer v. Brown*,[271] which upheld a California statute denying a position on the general election ballot to an independent candidate who had a registered affiliation with a qualified political party within one year prior to the immediately preceding primary election. Because the New Mexico statute was actually less restrictive temporally, the court found it to be constitutional.[272]

C. *Religious Freedom*

In *Espinosa v. Rusk*,[273] the Tenth Circuit was presented with the question of whether an Albuquerque ordinance regulating solicitation violated the first and fourteenth amendments as applied to the Seventh Day Adventist annual solicitation drive known as the Ingathering. The money collected by the Ingathering goes to medical, community, evangelical, and educational services, which the church maintained were all part of its religious mission. The ordinance excepted solicitations by religious groups solely for "evangelical, missionary, or religious but not secular purposes."[274] Compliance with the ordinance for non-exempt activities required payment of a twenty-five dollar fee plus the filing of an application which called for information about the organization. The district court found the ordinance invalid because it employed a religious test.[275]

The court of appeals affirmed the holding of the district court, deeming *Cantwell v. Connecticut*[276] controlling.[277] *Cantwell* had invalidated a statute prohibiting non-religious solicitations. The court of appeals stated that "although the ordinance does not express any anti-religious effort or object, it is

266. 415 U.S. 724 (1974).
267. 631 F.2d at 711.
268. The court noted that state election codes in 45 states and the District of Columbia contained, at the time of the appeal, replacement provisions substantially the same as New Mexico's election statute. *Id.* at 712.
269. 632 F.2d 116 (10th Cir. 1980).
270. N.M. STAT. ANN. § 1-8-48 (1978).
271. 415 U.S. 724 (1974).
272. 632 F.2d at 120. The California statute requires no party affiliation for more than one year; the New Mexico statute requires no party affiliation for less than one year.
273. 634 F.2d 477 (10th Cir. 1980).
274. *Id.* at 479.
275. *Id.* at 480.
276. 310 U.S. 296 (1940).
277. 634 F.2d at 480.

objectionable because it involves municipal officials in the definition of what is religious."[278]

Judge Barrett, dissenting, argued that the question should be whether the ordinance imposes an "undue, excessive restraint" upon the activities of the church by requiring a prior application for a permit to solicit funds intended for secular activities.[279] Judge Barrett would have answered the question in the negative because he felt the burden on religious organizations to be *de minimis* in relation to the city's compelling interest in preventing fraudulent solicitations.[280]

D. *The Supremacy Clause*

In *United States v. Colorado*,[281] the Tenth Circuit Court of Appeals held that an attempt by Jefferson County, Colorado, to tax Rockwell International for the use of land at the Rocky Flats nuclear weapons plant was unconstitutional as violative of the supremacy clause.[282] The land and buildings at Rocky Flats are owned by the United States, and Rockwell is presently operating and managing the plant under contract. In 1975, the Colorado General Assembly enacted a statute providing that "[w]hen any property . . . exempt from taxation is . . . used by a . . . corporation in connection with a business conducted for profit, the . . . user thereof shall be subject to taxation . . . to the same extent as though the . . . user were the owner of such property."[283] Pursuant to the statute, the county assessor for Jefferson County assessed Rockwell over $4.5 million in taxes for the year 1976. The United States brought an action against the state and county seeking a declaratory judgment that the tax sought to be imposed was a tax on property owned by the United States and therefore, under *McCulloch v. Maryland*,[284] barred by the supremacy clause. The trial court entered judgment in favor of the United States.[285]

The court of appeals affirmed, emphasizing that Rockwell did not have a lease, permit, or license to the property, but merely used the property in performance of its contract. Therefore, the court held, the efforts of the state to impose a tax on Rockwell was in reality an effort to impose a tax on the property itself.[286] The court distinguished a number of cases relied upon by the state. For example, in *United States v. Boyd*,[287] the Supreme Court upheld the imposition of a "contractor's use tax" on two corporations that had contracts with the Atomic Energy Commission relating to services to be performed at the nuclear plant at Oak Ridge, Tennessee. The companies procured materials which were used by them in performance of their con-

278. *Id.* at 481.
279. *Id.* at 483 (Barrett, J., dissenting).
280. *Id.*
281. 627 F.2d 217 (10th Cir. 1980).
282. *Id.* at 221.
283. COLO. REV. STAT. § 39-3-112 (Supp. 1980).
284. 17 U.S. (4 Wheat.) 316 (1819).
285. 627 F.2d at 219.
286. *Id.*
287. 378 U.S. 39 (1964).

tractual obligations. The tax was measured by the purchase price of the property used by the contractors and was imposed on contractors who purchased personal property from third parties and thereafter used the property in the course of their performance under the contracts. The court of appeals distinguished *Boyd* on the basis that Colorado was not seeking to impose a tax on goods acquired and then used by Rockwell, but rather seeking to impose a tax on Rockwell measured by the value of the plant, which is wholly government owned.[288]

The court of appeals also discussed *United States v. Detroit*,[289] in which the city of Detroit was permitted to tax an industrial plant owned by the United States but leased to Borg-Warner Corporation and used in a private manufacturing business. The court distinguished *Detroit*, stating that Rockwell is merely going onto government-owned property where it performs management services.[290] The court also distinguished *United States v. Township of Muskegon*,[291] in which the state was permitted to tax a government-owned manufacturing plant used by Continental Motors Corporation under a "permit," in the performance of government contracts to make goods which were then sold to the government.

The court of appeals found that *United States v. County of Allegheny*[292] approximated the instant case, although the reasoning of *Allegheny* has been questioned.[293] In *Allegheny*, a company entered into a contract to manufacture ordnance for the United States. Equipment was installed in the company's plant at government cost and was to remain the property of the United States. The Supreme Court rejected an attempt by Pennsylvania to increase the plant's assessed value for ad valorem taxes, holding that the "substance of this procedure is to lay an ad valorem general property tax on property owned by the United States."[294] The court of appeals in the instant case held that the substance of Jefferson County's attempted taxation also was an attempt to impose a general property tax on United States property.[295]

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288. 627 F.2d at 220.
289. 355 U.S. 466 (1958).
290. 627 F.2d at 220.
291. 355 U.S. 484 (1958).
292. 322 U.S. 174 (1944).
293. *See* United States v. County of Fresno, 429 U.S. 452, 462 n.10 (1977); American Invs-Co Countryside, Inc. v. Riverdale Bank, 596 F.2d 211, 217 n.11 (7th Cir. 1979); United States v. Town of Windsor, 496 F. Supp. 581, 590 (D. Conn. 1980).
294. 322 U.S. at 185.
295. 627 F.2d at 221.