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CONSTITUTIONAL LAW

OVERVIEW

Actions brought under the nineteenth century Civil Rights Acts[1] or Title VII of the Civil Rights Act of 1964[2] dominated the field of constitutional law considered by the Tenth Circuit last term. Of the major constitutional law cases before the court, only two dealt with other issues.[3] While none of these cases were of monumental significance, the court did clarify several previously cloudy areas of the statutes.

I. CASES UNDER THE NINETEENTH CENTURY CIVIL RIGHTS ACTS

Section 1983 of the Civil Rights Act of 1871 requires a showing that a violation of a constitutional right occurred under color of state law. Other sections of the acts[4] require a showing that the aggrieved party was a member of a discriminated class. Questions arose last term as to who may be sued, what immunities are available to defendants, what rights are afforded constitutional protection, and what is state action. Two cases appealed to the Tenth Circuit questioned the existence of a discriminated class under the facts presented.[5]

A. *Who May Be Sued and What Immunities Are Available?*

During the last term of the United States Supreme Court, a landmark decision was handed down. In *Monell v. Department of Social Services*,[6] after reviewing the legislative history of section 1983,[7] the Court held for the first time that local governing bodies and local officials acting in their offficial capacity are subject to suit under 1983.[8] In doing so the Court in essence overturned the earlier decision of *Monroe v. Pape*.[9] However, in *Monell* the Court specifically limited municipal liability to cases where "action pursuant to official municipal policy of some nature caused a constitutional tort."[10] Thus, a municipality may not be held liable under the theory of *respondeat superior* merely because it employed a tortfeasor.

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1. 42 U.S.C. §§ 1981-1986 (1976).
2. 42 U.S.C. § 2000e (1976).
3. Coleman v. Darden, 595 F.2d 533 (10th Cir. 1979) (Rehabilitation Act of 1973); Hardage v. Atkins, 582 F.2d 1264 (10th Cir. 1978) (commerce clause of the United States Constitution).
4. 42 U.S.C. §§ 1981, 1985(b)-(c), 1986 (1976).
5. Manzanares v. Safeway Stores, Inc., 593 F.2d 968 (10th Cir. 1979); Lessman v. McCormick, 591 F.2d 605 (10th Cir. 1979).
6. 436 U.S. 658 (1978).
7. *Id.* at 664-89.
8. *Id.* at 690.
9. 365 U.S. 167 (1961).
10. 436 U.S. at 691.

1. *Stoddard v. School District No. 1*[11]

In *Stoddard*, the Tenth Circuit confronted a situation similar to *Monell*. Annabell Stoddard, a nontenured elementary school teacher in Cokeville, Wyoming, was denied renewal of her teaching contract. She filed an action under section 1983 alleging that the nonrenewal was constitutionally impermissible. Named as defendants were the school district, its board of trustees, the superintendent and principal in their official capacities, two members of the board in their individual capacities, and the principal in his individual capacity.

The plaintiff alleged that in a conversation with the principal the real reasons given for her dismissal were (1) recurring rumors that she was having an affair, (2) dissatisfaction in the community because she played cards and did not attend church regularly, and (3) her unattractive physical appearance. The principal had also stated that he had been informed by phone that there would be "hell to pay" if the plaintiff's contract were renewed. Evidence adduced at the trial indicated that a member of the board had told the principal over the phone that he was "definitely opposed" to rehiring the plaintiff.

The jury was given both general verdict and special interrogatory forms. On the general form, the jury returned a verdict only against the school district, the members of the board in their official capacities, and the superintendent in his official capacity. The plaintiff was awarded compensatory damages of $33,000; punitive damages of $5,000; and attorney's fees of $5,800. In answering one of the special interrogatories, the jury found that the individual defendants, two members of the board and the principal, had acted in bad faith for reasons that were constitutionally impermissible in not renewing the plaintiff's contract. The trial court, acting pursuant to rule 49(b) of the Federal Rules of Civil Procedure,[12] entered judgment against these defendants in their individual capacities notwithstanding the general verdict in their favor.

On defendants' subsequent motion for judgment notwithstanding the verdict, the trial court held that the school district was not a "person" under section 1983 and vacated the judgment against it. In addition, the court set aside the award of punitive damages and attorney's fees.

On cross-appeal, the plaintiff argued successfully that under *Monell* she had a right to have the verdict against the school district reinstated. The defendants argued that even under *Monell* the district remained immune from liability because all it did was employ a tortfeasor—the school principal. The Tenth Circuit, rejecting the defendants' argument, found that the district had been held liable for the actions of the board of directors in its official capacity. The court found no problem with the doctrine of *respondeat superior* because the only way that the district could act was through its

11. 590 F.2d 829 (10th Cir. 1979).

12. Rule 49(b) reads in part: "When the answers [to special interrogatories] are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict . . . ."

board.[13] The court also rejected the defendants' alternative argument that the board was an arm of the state and therefore immune under the eleventh amendment. The court, citing *Mt. Healthy City Board of Education v. Doyle*[14] and *Unified School District No. 480 v. Epperson*,[15] found that a Wyoming school district is more like a city or county than an arm of the state.[16] Therefore, the school district was not protected by the eleventh amendment.

2. *Bertot v. School District No. 1*[17]

The United States Supreme Court decision in *Monell* specifically reserved the question of whether municipal officials and governments have some type of qualified "official" immunity.[18] Almost immediately after the *Monell* decision was handed down, the Tenth Circuit was faced with this question in *Bertot v. School District No. 1*.[19]

This was the second time that the *Bertot* case had come before the Tenth Circuit on appeal.[20] On the first appeal, the court held that a teacher has a cause of action under section 1983 without a showing of a property or liberty interest if the teacher was dismissed for exercising her first amendment rights.[21] The case had been remanded to the district court for determination of the immunities and defenses available to the school board in its official capacity against liability for monetary damages, including basic pay.[22]

In its second *Bertot* opinion the Tenth Circuit concluded that the dismissal of the plaintiff was a "decision officially adopted" by the board.[23] Therefore, applying *Monell*, the court found that the school board and the school district were proper defendants under section 1983.

Having so held, the court then addressed the issue of qualified immunity for the school district and the individual defendants in their official capacities. It found that "[t]he reasons for the application of the doctrine of qualified immunity are as compelling when considering the members individually as they are to the evaluation of the members acting collectively . . . . It is apparent that conscientious board members will be just as concerned that their decisions or actions might create a liability for damages on the board or local entity as they would on themselves."[24] Thus, the Tenth

13. 590 F.2d at 835.

14. 429 U.S. 274 (1977).

15. 583 F.2d 1118 (10th Cir. 1978). The court in *Epperson* primarily relied on two tests to determine if a school board were an arm of the state: "(1) To what extent does the board . . . function with substantial autonomy from the state government and, (2) to what extent is the agency financed independently of the state treasury." *Id.* at 1121-22.

16. 590 F.2d 829, 835 (10th Cir. 1979).

17. No. 76-1169 (10th Cir. Nov. 15, 1978) (petition for rehearing granted). Reheard May 15, 1979. No decision had been handed down on the rehearing at the time this overview was initially prepared. The decision on rehearing was issued on Nov. 26, 1979. For a discussion of the court's opinion on rehearing, *see* text accompanying notes 99-115 *infra*.

18. 436 U.S. 658, 701 (1978).

19. No. 76-1169 (10th Cir. Nov. 15, 1978) (petition for rehearing granted).

20. Bertot v. School Dist. No. 1, 522 F.2d 1171 (10th Cir. 1975).

21. *Id.* at 1179.

22. *Id.* at 1185.

23. No. 76-1169, slip op. at 3 (10th Cir. Nov. 15, 1978).

24. *Id.* at 5.

Circuit extended the same qualified immunity to local officials in their official capacity as previously protected such officials in their individual capacities.

Chief Judge Seth, writing for the majority, relied on the California Supreme Court decision in *Lipman v. Brisbane Elementary School District*.[25] The *Lipman* court, however, disagreed with the Tenth Circuit's basic premise that officials would be just as concerned about the liability of the governmental agency as they are about their own personal liability. In the opinion of the California court: "It is unlikely that officials would be as adversely affected in the performance of their duties by the fear of liability on the part of their employing agency as by the fear of personal liability."[26] Consequently, the *Lipman* court refused to find that the immunity of the school district was coextensive with the immunity of its officials. Its rationale was that the community as a whole "benefits from official action taken without fear of personal liability, and it would be unjust in some circumstances to require an individual injured by official wrongdoing to bear the burden of his loss rather than to distribute it throughout the community."[27] In the context of personnel cases, however, the court went on to say "[t]here is a vital public interest in securing free and independent judgment of school trustees . . . and trustees, being responsible for the fiscal well-being of their districts, would be especially sensitive to the financial consequences of suits for damages against the districts."[28] Thus, the California court concluded that the good faith immunity did extend to the discretionary acts of school boards within the scope of their official authority. Therefore, the school district was not liable in tort for the alleged acts.

The Tenth Circuit further extended the *Lipman* decision to provide qualified protection against liability for violations of constitutional rights. Chief Judge Seth tried to distinguish a series of cases[29] which, although not thoroughly discussing the issue, held local governments liable for monetary damages. To do so, he simply said: "Some courts have stated, but not necessarily held, that qualified immunity should not be applied to a defendant board."[30]

In separate opinions, Judge Lewis and Judge Breitenstein differed with the majority as to whether a court should assume the existence of no immunity or a qualified immunity without legislative directives. Judge Lewis found that the question of absolute immunity was of constitutional significance—properly a judicial question—but that the extension of a qualified immunity was a question for the legislature.[31] Nevertheless, Judge Lewis

25. 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961) (the California decision concerned actions sounding in tort and breach of contract; no issue of constitutional rights was involved).

26. *Id.* at 227, 359 P.2d at 467, 11 Cal. Rptr. at 99.

27. *Id.*, 359 P.2d at 467, 11 Cal. Rptr. at 99.

28. *Id.*, 359 P.2d at 467, 11 Cal. Rptr. at 99.

29. Bursey v. Weatherford, 528 F.2d 483 (4th Cir. 1975); Hostrop v. Board of Jr. Col. Dist. No. 515, 523 F.2d 569 (7th Cir. 1975); Hander v. San Jacinto Jr. Col., 519 F.2d 273 (5th Cir. 1975).

30. No. 76-1169, slip op. at 6 (10th Cir. Nov. 15, 1978).

31. *Id.*, slip op. (Lewis, J., concurring).

concurred with Chief Judge Seth in finding that the defendants should not have been liable. His concurrence was based upon the jury's finding that the defendants at all times acted in good faith.[32]

Judge Breitenstein found that "no anomoly or inconsistency exists when the same individuals who were found not liable in their individual capacities are held liable for the same actions when sued in their official capacities."[33] He recognized the need for spreading the economic cost of a violation over the entire community. His primary concern was that providing qualified immunity to officials in their official capacity would preclude any recovery by a worthy plaintiff in many situations.[34]

The majority opinion failed to recognize that the community benefits from qualified immunity from personal liability for its officials. In doing so, it failed to see the need for spreading the costs of this benefit throughout the community and extended the doctrine of qualified immunity to municipal employees in their official capacity. Thus, it eliminated the possibility of monetary recovery by an aggrieved party for violation of his constitutional rights when officials act in good faith.

B. *What Rights are Constitutionally Significant?*

Section 1983 requires that a constitutional right be violated by some state action. In two cases before the Tenth Circuit last term the violation of a *constitutional* right was the issue appealed.

1. *Brenna v. Southern Colorado State College*[35]

A tenured professor sued his college after his contract was terminated and a nontenured professor in the same department was retained. The court, per Judge McKay, found that since Brenna was tenured he "had a property interest deserving of the procedural and substantive protections of the Fourteenth Amendment."[36]

The court went on to find that there would have been no constitutional violation if the procedure chosen for selecting terminations was reasonable and if its results were not arbitrary or capricious. In *Brenna*, since budgetary necessities had caused the layoffs and the decisions were based upon substantive evidence, it was held that there had been no denial of a constitutional right.[37]

2. *Lessman v. McCormick*[38]

In *Lessman v. McCormick*, the plaintiff was arrested at her Topeka, Kansas, home by local police officers and taken to the station to pay an overdue parking ticket. There she was detained until an official from the Topeka

32. *Id.*
33. *Id.*, slip op. at 3 (Breitenstein, J., dissenting in part).
34. *Id.*
35. 589 F.2d 475 (10th Cir. 1978).
36. *Id.* at 476.
37. *Id.* at 477.
38. 591 F.2d 605 (10th Cir. 1979).

Bank and Trust Company came to talk to her about a loan she had with the bank. Lessman contended that she had been arrested so that the bank could intimidate her.

The trial court, in dismissing the action, held that since the arrest had been technically lawful, the only unlawful detention occurred during the time that it took the bank officer to arrive. The trial court then concluded that this was an "insubstantial case" where the unlawful detention did not rise to the level of a constitutional violation, and therefore no cause of action existed under section 1983.

The Tenth Circuit reversed the lower court decision on the grounds that: "We do not consider the fact that the arrest was made upon a valid warrant necessarily means that the time of false imprisonment begins only after the fine was paid."[39] They found that this may be a "case of an arrest not to collect on the overdue parking ticket, but to give improper aid to the bank."[40] The Tenth Circuit then remanded the case to determine how often, if ever, arrests are made to collect overdue fines.

C. *What Constitutes State Action?*

Section 1983 also requires that the violation of the constitutional right be under color of state law. Two more cases in the Tenth Circuit clarified this requirement.

1. *Torres v. First State Bank*[41]

The plaintiff, an automobile dealer, had obtained financing through the defendant bank. The plaintiff defaulted and the bank obtained a temporary restraining order preventing him from "disposing of, conveying, or encumbering any property, real or personal, presently owned by him."[42] The defendant demanded possession of the vehicles in which it had a security interest, falsely claiming that right under the provisions of the temporary restraining order. The plaintiff then brought this action on the grounds that the temporary order deprived him of his right to due process by restraining him from disposing of any property, not just the property in which the bank had an interest.

The Tenth Circuit, in affirming the dismissal of the action, held that there was insufficient state action to bring suit under section 1983. The statute under which the order was granted was not attacked. The controversy was between private litigants. One of the parties claimed he was injured by the decision of the state court; however, the temporary restraining order was immediately open to modification by the court upon application by the plaintiff and subject to appeal. In affirming the dismissal of the action, Judge Logan quoted from an earlier Tenth Circuit opinion:[43] " 'To hold otherwise would open the door wide to every aggrieved litigant in a state

39. *Id.* at 610-11.
40. *Id.* at 611.
41. 588 F.2d 1322 (10th Cir. 1978).
42. *Id.* at 1324.
43. Bottone v. Lindsley, 170 F.2d 705 (10th Cir. 1948).

court proceedings, and set up the federal courts as arbiter of the correctness of every state court decision.' "[44]

2. *T & W Investment Co. v. Kurtz*[45]

In *T & W Investment Co.*, the Tenth Circuit was again faced with the question of state action arising in the state courts, but it declined to address the issue. A corporation brought suit against the court appointed receiver of a wholly owned subsidiary for violating its due process rights. The Tenth Circuit disposed of the case solely on the immunity question, sidestepping the issue of state action. Citing *Kermit Construction Corp. v. Banco Credito y Ahorro Ponceno*,[46] the Tenth Circuit held that a receiver who carries out the orders of the judge shares the judge's absolute immunity.[47]

D. *What Constitutes a Discriminated Class?*

Sections 1981, 1985(b)-(c), and 1986 of the nineteenth century Civil Rights Acts require that the aggrieved party be a member of a discriminated class and that his rights be violated because of such membership. Two cases before the Tenth Circuit last term help define what constitutes a discriminated class under these sections.

1. *Manzanares v. Safeway Stores, Inc.*[48]

The plaintiff filed an action under section 1981 against his former employer and his union. He had been dismissed because of charges of theft of Safeway property. After his acquittal on the theft charges, Safeway offered to rehire him but without back pay. Manzanares alleged that he was a member of a discriminated class—Mexican-Americans—and that Anglo employees of the company had confessed to stealing and nevertheless had been retained.

The trial court granted the defendant's motion to dimiss on the grounds that relief under section 1981 is available only for discrimination on the basis of race or color and not on the basis of national origin.

Tenth Circuit Chief Judge Seth reversed and remanded the case for trial. While section 1981 only says that "all persons" shall have the rights and benefits of "white citizens," this language does not limit its protections to the technical or restrictive definition of race. The court cited its own opinion in *Valdez v. Van Landingham*:[49]

> The issue is whether a Spanish surname constitutes a racial class which is protected by section 1981. The term "race" in our language has evolved to encompass some non-racial but ethnic groups. This Circuit has recognized Spanish speaking or Spanish-surnamed Americans as a minority for purposes of sections 1981, 1983, and

44. 588 F.2d at 1326 (quoting Bottone v. Lindsley, 170 F.2d at 707).
45. 588 F.2d 801 (10th Cir. 1978).
46. 547 F.2d 1 (1st Cir. 1976).
47. *Id.* at 3.
48. 593 F.2d 968 (10th Cir. 1979).
49. No. 76-1373 (10th Cir. July 27, 1977).

1985(3).[50]

Thus the Tenth Circuit reaffirmed its position that in certain situations national origin may be a sufficient class to give rise to protections under section 1981.

2. *Lessman v. McCormick*[51]

In this case, the plaintiff alleged that a bank, its employees, and the police conspired to deprive her of her constitutional rights in violation of sections 1985(b)-(c) and 1986. To bring the action under these sections, Ms. Lessman claimed to be a member of a discriminated class; *i.e.*, all debtors. The Tenth Circuit, noting that such a class had never before been recognized and that it would be the "largest class in America," rejected the plaintiff's claims under these sections and affirmed the dismissal by the district court.[52]

II. CASES UNDER TITLE VII

The Tenth Circuit struggled with cases under Title VII of the Civil Rights Act of 1964. Difficult questions arose on what constitutes a prima facie showing of discrimination under the *McDonnell Douglas*[53] test, what remedies are available under the Act, and how the 1972 amendments[54] are to be applied.

A. *What Constitutes a Prima Facie Case?*

In *McDonnell Douglas v. Green*,[55] the United States Supreme Court announced the procedure to be followed at trial for establishing a case under Title VII:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications . . . . The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.[56]

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50. 593 F.2d at 970.

51. 591 F.2d 605 (10th Cir. 1979).

52. *Id.* at 608. For a discussion of the issue of whether the police action invaded plaintiff's constitutional rights, see text accompanying notes 38-40 *supra*.

53. McDonnell Douglas v. Green, 411 U.S. 792 (1973).

54. Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e (1976). The relevant changes made by the amendments were the inclusion within the term "person" governments, governmental agencies, and political subdivisions; the authorization of the EEOC to intervene in civil actions brought under § 2000e-5 when the respondent is other than a government, governmental agency, or political subdivision; the authorization to refer matters to the Attorney General for such respondents; the extension of time periods for filing charges under the Act; and the subjection of the federal government to Title VII.

55. 411 U.S. 792 (1973).

56. *Id.* at 802.

1. *Diggs v. Western Electric Co.*[57] and *EEOC v. Navajo Refining Co.*[58]

Two cases before the Tenth Circuit last term concerned claims involving discriminatory hiring practices. In *Diggs v. Western Electric Co.*,[59] it appeared at first glance that the trial court did not follow the *McDonnell Douglas* test. The plaintiff had applied to the defendant three times for employment and was rejected each time. Neither the trial court nor the Tenth Circuit specifically found a prima facie case. The Tenth Circuit only found that the evidence of discrimination was "sketchy."[60] The plaintiff's case established that she was black, that Western Electric was hiring at the time of her application, and that she was not hired. Her qualifications remained an issue.

In defense Western Electric showed that since 1967 it had maintained an affirmative action program which had been audited and approved by the government on a regular basis. "The evidence also showed that there was no pattern of employment discrimination by Western, and that actually its employment of members of minority groups exceeded the percentage of minority members in the Oklahoma City area work force."[61] Furthermore, the employees of Western Electric who had interviewed the plaintiff testified that she had no manufacturing experience and that she had wanted to start work on the day shift while Western Electric's contract with the union required workers to start on the night shift.

After presentation of the employer's case, the Tenth Circuit found that Western Electric had met its burden of articulating nondiscriminatory reasons for the plaintiff's rejection without first requiring the plaintiff to establish a prima facie case.

In *EEOC v. Navajo Refining Co.*,[62] the Tenth Circuit disagreed with the district court's finding of a prima facie case. A complaint was filed by the EEOC on behalf of three Spanish-surnamed complainants claiming that requiring a high school diploma (or a GED equivalent) and a passing grade on an aptitude test prior to approval of these employment standards by the EEOC constituted a violation of Title VII.

From May 1969 to July 1973, Navajo used a test administered by the New Mexico Employment Security Commission to determine qualified applicants. In 1973 it was notified that the test was considered invalid by the EEOC and consequently substituted another aptitude test. Since 1975, statistical adjustments had been made to equalize the raw scores of Spanish-surnamed Americans and Anglos.

The trial court concluded that with the statistical adjustments there was no discriminatory impact on minorities. Nevertheless, because the educational requirement and aptitude test had not received EEOC approval, the

57. 587 F.2d 1070 (10th Cir. 1978).
58. 593 F.2d 988 (10th Cir. 1979).
59. 587 F.2d 1070 (10th Cir. 1978).
60. *Id.* at 1071.
61. *Id.* at 1071-72.
62. 593 F.2d 988 (10th Cir. 1979).

trial court granted injunctions barring their use by Navajo and awarded damages to the complainants.

The Tenth Circuit stated that a prima facie case is established "when it is demonstrated that a defendant's employee selection practices, while perhaps facially neutral and lacking in intent to discriminate, have a discriminatory effect or disparate impact on minority hiring."[63] In this case, however, the employment requirements eliminated a greater number of Spanish-surnamed Americans, but the actual percentage of such persons hired was statistically favorable to Spanish-surnamed Americans.

The Tenth Circuit, in reversing the lower court, held that the questions of disparity in educational requirements and the pass ratio on an aptitude test do not arise until "there is discrimination in fact in actual numbers hired."[64] Quoting from *Hester v. Southern Railway*,[65] the court said:

> "[N]onvalidated tests and subjective hiring procedures are not violative of Title VII *per se*. Title VII comes into play only when such practices result in discrimination . . . . The missing ingredient in the proof here was the necessary showing of discrimination. Without such proof the district court lacked authority to enjoin the further use of the testing and interviewing procedures . . . ."[66]

If *Navajo* is to be followed, a new element seems to have been added to the prima facie requirement—actual discrimination in numbers. However, in another case the Tenth Circuit held that "[t]he prima facie showing is not the equivalent of a factual finding of discrimination."[67] The distinction appears to be that actual discrimination must be found for an attack against the general hiring practices of a company, while it need not be shown for an isolated incident of alleged discrimination against an individual.

2. *James v. Newspaper Agency Corp.*[68]

The question of what constitutes a prima facie case again arose in the *James* case, this time in the context of alleged discrimination in promotions. The plaintiff brought suit against her former employer alleging that she had been passed over for promotion because of her sex. At trial, after the plaintiff's case, the judge denied the defendant's motion for dismissal. After the presentation of the defense, the lower court concluded that the plaintiff had not proven by a preponderance of the evidence that she had not been promoted because of her sex.

In *Rich v. Martin Marietta*,[69] the Tenth Circuit had set forth a procedure for dealing with promotion cases similar to the *McDonnell Douglas* test: "Once a plaintiff has shown that he is qualified, he need only show a discriminatory impact and that he was among the class of employees who could have been considered for promotion. Defendant may, of course, rebut this

63. *Id.* at 990.
64. *Id.* at 991.
65. 497 F.2d 1374 (5th Cir. 1974).
66. 593 F.2d at 991-92 (quoting 497 F.2d at 1381).
67. Silberhorn v. General Iron Works Co., 584 F.2d 970, 971 (10th Cir. 1978).
68. 591 F.2d 579 (10th Cir. 1979).
69. 522 F.2d 333 (10th Cir. 1975).

prima facie showing . . . ."[70]

Judge McWilliams, writing for the Tenth Circuit majority, believed that the *James* case had met the guidelines of *McDonnell Douglas* and *Rich*. The denial of the defendant's motion for dismissal was in effect the trial court's finding of a prima facie case. The defendant then rebutted this prima facie showing. On this basis, the Tenth Circuit upheld the trial court's decision.

Judge McKay, in his partially dissenting opinion, disagreed. He believed that the trial court's finding that the plaintiff had failed to prove her case was a departure from the *McDonnell Douglas* approach. In support of his position, he quoted from *Blizard v. Fielding*:[71] " 'It may be that the district court will find, after three steps, what it found after one step.' . . . Nonetheless, I . . . 'do not feel free . . . to say that the *McDonnell Douglas* approach can be dispensed with.' "[72]

It would appear, however, as the majority found, that the general procedures of *McDonnell Douglas* had been met and that a remand for retrial along its precise wording would not have proven useful.

B. *What Remedies are Available?*

Another area with which the Tenth Circuit struggled was the remedies available to an aggrieved party under Title VII. Particularly troublesome were the questions of back pay and attorney's fees.

1. *Comacho v. Colorado Electronic Technical College, Inc.*[73]

In *Comacho*, the plaintiff brought a successful Title VII action against her former employer. The trial court awarded the plaintiff back pay for 56 1/2 months reduced by the amount she had earned during that period. The defendant appealed on the grounds that two years prior to the date of the judgment it had offered to reinstate the plaintiff without back pay. It argued that any award of back pay should have been cut off as of that date.

In a per curiam opinion, the Tenth Circuit upheld the trial court's award of damages. "Congress clearly intended that the remedies employed would 'make whole' as nearly as possible any person injured under the Act. . . . An offer of reinstatement without back pay does not 'make whole' the person injured by an illegal firing."[74]

2. *Carreathers v. Alexander*[75]

In a case similar to *Comacho*, the Tenth Circuit considered the retroactive application of the 1972 amendments to Title VII. In 1962, Carreathers was employed at the GS-2 level after working for the Internal Revenue Serv-

70. *Id.* at 348.
71. 572 F.2d 13, 15 (1st Cir. 1978).
72. James v. Newspaper Agency Corp., 591 F.2d 579, 584 (10th Cir. 1979).
73. 590 F.2d 887 (10th Cir. 1979).
74. *Id.* at 889.
75. 587 F.2d 1046 (10th Cir. 1978).

ice for thirty years. In 1963, after filing a complaint based on his lack of promotion, he was promoted to GS-3. He was promoted to GS-4 in 1968, where he remained until this complaint was filed in 1972. The EEOC found that Carreathers had been discriminated against, and the Internal Revenue Service admitted the discrimination. Consequently, the IRS promoted him to the GS-5 level retroactive to 1971.

After the agency's action was reviewed and approved by the Civil Service Commission, the plaintiff sought further relief. No additional administrative relief was granted, and the plaintiff filed suit in district court. The trial court ordered the IRS to provide job training for the plaintiff and awarded the plaintiff $4,673.60 in back pay plus attorneys' fees and costs. No back pay was awarded for any period prior to the effective date of the 1972 amendments to Title VII.

On appeal the plaintiff sought three things: (1) a trial de novo before the district court;[76] (2) a retroactive application of the 1972 amendments in order to recover back pay for the period prior to their enactment; and (3) a finding that the award of attorneys' fees was unreasonable.[77]

Prior decisions of the United States Supreme Court[78] and the Tenth circuit[79] had held that the 1972 amendments may have a retroactive application if the complaint was pending administratively or judicially on their effective date. This filing requirement was designed to safeguard against contrived claims. In *Huntley v. Department of Health, Education & Welfare*,[80] the Fifth Circuit held, however, that the Act was applicable to violations prior to the amendments without the necessity of a prior filing. Therefore, it believed that the amendments were more the recognition of a remedy rather than the creation of a new right.

The Tenth Circuit specifically declined to follow the *Huntley* decision.[81] Judge Doyle, writing for the majority, saw *Carreathers* as a unique case strong on equities. As a result of the statute of limitations in the Act,[82] retroactive application of the amendments in *Carreathers* would be effective for less than two years. The discrimination admitted by the IRS occurred over a much longer period of time. Furthermore, the plaintiff had not slept on his rights but had filed complaints twice prior to 1972.

Thus, while the Tenth Circuit was reluctant to open the door to all past employment practices of government agencies, it recognized that in this unique case the plaintiff was especially worthy. The remedy which the trial court had awarded the plaintiff had not made him "whole" as Title VII

76. The Tenth Circuit concluded that, since the IRS had already admitted the discrimination, no useful purpose would be served by having a trial de novo on the facts in the district court. However, a trial de novo might be available if the district court found that plaintiff had a sufficient basis for his claim of harassment. *Id.* at 1050.

77. The Tenth Circuit concluded that an award of attorneys' fees amounting to $35 per hour for an experienced lawyer and $30 per hour for a less experienced lawyer was not unreasonably low. *Id.* at 1052.

78. Place v. Weinberger, 426 U.S. 932 (1976).

79. Weakhee v. Powell, 532 F.2d 727 (10th Cir. 1976).

80. 550 F.2d 290 (5th Cir. 1977).

81. Carreathers v. Alexander, 587 F.2d 1046, 1051 (10th Cir. 1978).

82. 42 U.S.C. § 2000e-5(g) (1976).

intended. The Tenth Circuit recognized that it could not make the plaintiff whole either, but awarded him what it could under a liberal interpretation of the Act. The court retroactively applied the 1972 amendments for the maximum allowable period, somewhat less than two years. The plaintiff thus received additional back pay for those years which had previously been denied by the trial court.

C. *Requirements Under the 1972 Amendments*: EEOC v. Zia Co.[83]

Another perplexing problem arose out of the 1972 amendments in *EEOC v. Zia Co.*[84] The amendments allowed the EEOC for the first time to file suit in district court for a violation of Title VII. The Act has a prerequisite to filing suit: "[T]he Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[85]

The primary defendant, the Zia Company, was under contract to the Atomic Energy Commission. Consequently, conciliation between the EEOC and Zia required the approval of the AEC. The EEOC sent Zia a proposed conciliation agreement containing the following "boilerplate" clause:

> "The Commission shall determine whether the Respondent has complied with the terms of this agreement. In the event the Commission shall determine that the Respondent has failed or refused to comply with the terms of this Agreement, the Commission shall . . . notify the Respondent . . . . If within thirty days . . . the Respondent has failed to comply with the terms of this Agreement, or show good cause why he should not comply, all waivers, releases and covenants not to sue shall be null and void, and such failure or refusal to comply shall be deemed *prima facie* evidence of breach of this Agreement."[86]

After negotiations this paragraph was modified to eliminate the conclusiveness of the Commission's findings upon a trial court. Zia then agreed to the conciliation and forwarded the agreement to the AEC for approval. The AEC refused to approve this agreement and negotiations then began directly between the EEOC and the AEC at the regional level. After these proved fruitless, counsel for the EEOC sent failure of conciliation notices to all parties and forwarded the case to its litigation department.

Negotiations were then initiated at the Washington level between the EEOC and the AEC. In January 1974, the general counsel for the AEC recommended approval of the conciliation agreement. Subsequently, the officials at Zia attempted to reopen conciliation talks. They were advised by the EEOC that the case was no longer in the conciliation stage and that a complaint had been filed in district court. The EEOC's complaint prayed for many claims which were never a part of the conciliation discussions, such as back pay for all improperly laid off employees from 1965 to the date of the

83. 583 F.2d 527 (10th Cir. 1978).
84. *Id.*
85. 42 U.S.C. § 2000e-5 (1976).
86. EEOC v. Zia Co., 582 F.2d 527, 530 (10th Cir. 1978).

complaint. EEOC's trial counsel informed Zia that these new claims would have to be resolved before an out of court settlement could be made.

In the district court, the judge found:

> "that at the time referral of the case was made to the Denver Litigation Center the local EEOC official knew or should have known that the AEC and the EEOC were negotiating a conciliation agreement at the Washington level; and that the regional EEOC officials improperly refused to continue to conciliate in good faith."
>
> He found "the essential condition precedent of the exhaustion of efforts to conciliate has not been accomplished . . . I do not think I have any jurisdiction at all to grant any relief in this case because of the total failure to comply with the statutory mandate."[87]

However, the trial judge did address the merits of the case and found that the plaintiff had failed to prove any discrimination by the defendants.

On the question of the district court's jurisdiction, the Tenth Circuit held that "the court had jurisdiction over the parties and the cause of action. The inquiry into the duty of 'good faith' on the part of the EEOC is relevant to whether the court should entertain the claim, or stay the proceedings for further conciliation effort, not to its power over the cause."[88] The case was remanded for further conciliation negotiations subject to suit in the district court if the negotiations failed.

III. OTHER CASES

A. Coleman v. Darden[89]

In another employment related case, a plaintiff brought suit under the Rehabilitation Act of 1973[90] and the fifth amendment. The defendants were various officials of the EEOC. Coleman, although completely blind, received an undergraduate degree from Louisiana State University and a law degree from the University of Denver. During law school, he was employed by the EEOC as a part-time case analyst for one year and then promoted to law clerk. He understood that if he did not gain admission to the bar within fourteen months of this promotion, he would be terminated. He was not admitted to the bar during the requisite period; consequently, he was terminated.

Coleman did not question this termination, but rather the rejection of his application for the position of research analyst. He contended that he was denied his constitutional right to due process under the fifth amendment because the defendants created an irrebuttable presumption that he could not perform the job of research analyst because of his blindness. He further alleged that his rejection was a violation of the Rehabilitation Act of 1973. The trial court granted summary judgment in favor of the defendants on all of the plaintiff's claims.

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87. *Id.* at 532.
88. *Id.* at 533.
89. 595 F.2d 533 (10th Cir. 1979).
90. 29 U.S.C. § 791 (1976).

1. The Fifth Amendment Claim

The Tenth Circuit held that the conclusive presumption doctrine was inapplicable to an employment situation such as this. Whenever an applicant is rejected from a job, there is a presumption that someone else could have performed the job more successfully. Such presumptions are "a fact of business life" and do not mean "that 'trial periods' should be required for all, or even all handicapped applicants . . . ."[91]

Furthermore, the Tenth Circuit rejected Coleman's due process claim on the ground that he did not have a sufficient property or liberty interest in obtaining the desired employment.[92] Since Coleman could not show a legal entitlement to the position, his due process rights had not been violated.

2. The Statutory Claims

The Tenth Circuit likewise found grounds to reject each of Coleman's statutory claims. The Tenth Circuit joined the four other circuits which have decided the issue when it held that a private cause of action may be implied from the Rehabilitation Act of 1973.[93] However, it held that under the regulations promulgated pursuant to the Act, federal agencies are not proper defendants. Thus, Coleman's suit against the EEOC was not actionable.

Coleman had further contended that the Administrative Procedure Act[94] gave him a right to judicial review of the agency's action. The Tenth Circuit again agreed with him but found that the applicable standard of review allowed reversal only if the action was arbitrary or capricious. "The Court's function is exhausted where a rational basis is found for the agency action taken."[95] Coleman had worked for the EEOC for over two years, and the agency was aware of his abilities. This fact showed the court that the EEOC was not adverse to hiring visually handicapped persons and that the defendants had rational grounds for not rehiring Coleman. Thus, the Tenth Circuit upheld the trial court's dismissal on all counts.

B. Hardage v. Atkins[96]

Hardage v. Atkins was the only purely constitutional case to come before the Tenth Circuit last term. Title 63, section 2764 of the Oklahoma statutes banned the shipment of solid waste into Oklahoma from any other state unless the other state had entered into a reciprocal agreement with

91. Coleman v. Darden, 595 F.2d 533, 537 (10th Cir. 1979).

92. *Id.* at 538.

93. Davis v. Southeastern Community Col., 574 F.2d 1158 (4th Cir. 1978), *cert. granted*, 99 S. Ct. 830 (1979); United Handicapped Fed. v. Andre, 558 F.2d 413 (8th Cir. 1977); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977); Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977).

94. 5 U.S.C. § 701 (1976).

95. Coleman v. Darden, 595 F.2d 533, 539 (10th Cir. 1979) (quoting from Sabin v. Butz, 515 F.2d 1061, 1067 (10th Cir. 1975)).

96. 582 F.2d 1264 (10th Cir. 1978).

Oklahoma.[97] Hardage owned and operated a disposal facility in Oklahoma and sought customers from Texas which had not entered into the necessary reciprocal agreement.

The trial court held that solid waste material was not commerce and therefore not subject to the commerce clause of the United States Constitution. The trial court, however, went on to say that if solid waste were commerce, the Oklahoma statute would be unconstitutional.

On appeal, the Tenth Circuit found that a recent United States Supreme Court decision had decided the status of solid waste material. In *Philadelphia v. New Jersey*,[98] the Court held that solid waste material was commerce and that a ban on its shipment into a state was a violation of the commerce clause. Consequently, the Tenth Circuit reversed the trial court and held the Oklahoma statute invalid.

IV. GOOD FAITH IMMUNITY FOR LOCAL ENTITIES RECONSIDERED

The Tenth Circuit has reversed en banc the decision of the three-judge panel in *Bertot v. School District No. 1*,[99] which has been previously discussed in depth in this overview.[100] At the time of the rehearing, Chief Judge Seth was the only judge from the original panel remaining on the Tenth Circuit Court of Appeals.

The only issue before the court on rehearing was the scope of the immunity of school officials and the commensurate liability of the school district.[101] Other issues decided by the three-judge panel were not raised on rehearing.[102]

The majority opinion on rehearing, written by Judge McKay, emphasized three points, each of which was attacked in the dissenting opinions of Chief Judge Seth and Judge Barrett. First, the majority found that common law immunities are applicable to section 1983 actions against local governing bodies.[103] Next the court characterized back pay as an element of equitable relief rather than compensatory damages.[104] Finally, Judge McKay emphasized that the infringement of the plaintiff's first amendment rights "provide[d] further justification for insuring that full relief is available to the appellant and that the unconstitutional behavior of the appellees, no matter how well intentioned, is deterred."[105]

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97. OKLA. STAT. ANN. tit. 63, § 2764 (West Supp. 1978) reads in part:
The Division shall disapprove any plan which entails the shipping of controlled industrial waste into the State of Oklahoma, unless the state of origin of such waste has enacted substantially similar standards for controlled industrial waste disposal as, and has entered into a reciprocity agreement with, the State of Oklahoma.

98. 437 U.S. 584 (1978).

99. No. 76-1169 (10th Cir. Nov. 26, 1979).

100. *See* text accompanying notes 17-34 *supra*.

101. No. 76-1169, slip op. at 2 n.1, 4 n.3.

102. *See, e.g., id.* at 4 n.3 in which the court en banc disposed of the eleventh amendment issue by noting its agreement with the three-judge panel.

103. No. 76-1169, slip op. at 4-8.

104. *Id.* at 9-10.

105. *Id.* at 13.

The rationale of the majority was that at common law the good faith immunity only protected officials in their individual capacities from personal liability. Public entities were not granted the same common law immunity although some entities were protected by the eleventh amendment.[106] The court refused to write into section 1983 any immunity not recognized at common law. Since common law allowed recovery of monetary damages from public entities in appropriate cases, the court held that Congress did not intend "good faith individual immunity to preclude recovery altogether."[107] Thus, the immunity of the school district is not coextensive with the immunity of the officials as individuals.

Chief Judge Seth disagreed with the majority's holding on the applicability of common law immunities under section 1983. In doing so, he relied on the rationale rather than the holding of *Imbler v. Pachtman*[108] for the proposition that the question is not whether common law immunities apply in an action against a municipality, but whether considerations of public policy underlying those immunities " 'countenance' immunity under section 1983."[109] Again specifically refusing to distinguish between officials in their individual and official capacities,[110] the Chief Judge concluded that public policy required good faith immunity protection for the school board since future board decisions could be influenced by the possibility of monetary liability to the district.

In his separate dissent, Judge Barrett was concerned with the economic danger to local governing bodies from the majority's holding that "equitable relief is not precluded by a good faith defense."[111] Judge Barrett further rejected the majority's distinction between back pay as equitable relief and compensatory damages.[112] In his opinion, removal of the good faith defense exposed local entities to dire financial liability for compensatory damages.

Both dissenting judges took issue with the majority's view that the first amendment implications made the school board's action even more reprehensible and thus subject to absolute liability. For the dissenters, the fact that constitutional rights were involved weighed in favor of a good faith immunity for the board rather than vice-versa. Quoting from the *Bertot II* opinion, Judge Barrett emphasized that " '*we cannot say that the defendants knew or reasonably should have known that their actions would violate constitutional rights*.' "[113] Since it is difficult to make a "rough predication about the scope of constitutional rights" as the majority would require the school district to

106. *Id.* at 5.

107. *Id.* at 7.

108. 424 U.S. 409 (1976). The *Bertot III* majority opinion cited *Imbler*'s holding as support for incorporation of common law immunities into § 1983. No. 76-1169, slip op. at 4.

109. No. 76-1169, slip op. at 1 (Seth, C.J., dissenting).

110. *Id.* at 2. *See also* text accompanying notes 24-30 *supra*.

111. No. 76-1169, slip op. at 9.

112. *Id.*, slip op. at 4 (Barrett, J., dissenting).

113. *Id.* at 2-3 (Barrett, J., dissenting) (quoting 522 F.2d 1171, 114-85 (10th Cir. 1975)) (emphasis added by Judge Barrett).

do,[114] the dissenters argued that the school board or the district as such should not be held liable for making an erroneous prediction.[115]

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114. No. 76-1169, slip op. at 14.

115. *Id.*, slip op. at 3 (Seth, C.J., dissenting); *id.*, slip op. at 2-3 (Barrett, J., dissenting). Both dissenting judges emphasized that the board had followed the Tenth Circuit's own prediction in Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970), where a similar claim of failure to renew a nontenured teacher's contract on constitutionally impermissible grounds was dismissed for failure to state a claim upon which relief could be granted. The *Bertot III* majority, however, found that the board's reliance on *Jones* only went to the issue of good faith which had been conceded by the parties on appeal. No. 76-1169, slip op. at 12-13.