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Constitutional Law

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OVERVIEW

During the 1977-78 term, the Tenth Circuit Court of Appeals enjoyed its usual quiet time in the constitutional law area and had a few occasions to consider new issues of major import. More than half of the cases discussed in this overview are statute-related, only five being purely constitutional in nature. The more interesting cases involve employees' rights, the newsman's privilege, and obscenity. This overview is not intended as a comprehensive review of every case considered by the Tenth Circuit but is, instead, an attempt to isolate and condense the major issues of the more significant cases.

I. DIRECT CONSTITUTIONAL CLAIMS

A. *Commerce Clause:* Aldens, Inc. v. Ryan[1]

At issue was the constitutionality of provisions of the Oklahoma Consumer Credit Code which imposed a maximum interest rate on credit sales and prohibited state actions to collect balances on which the interest rate exceeded the statutory maximum.[2]

Aldens, a nationwide mail-order business, sought a declaratory judgment that the code provisions, as they applied to the plaintiff's business, violated the commerce clause and the fourteenth amendment of the United States Constitution. The Tenth Circuit affirmed the trial court decision that the provisions were constitutionally valid. In so doing, it joined the Seventh and Third Circuits which had reached similar conclusions on the same issue.[3]

In holding that the doctrines of place-of-contracting and performance must give way to considerations of the degree of state interest and the local consequences of contracts, the court cited *Travelers Health Association v. Virginia.*[4] The court observed that "the state's interest in the cost of credit . . . to its residents

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[1] 571 F.2d 1159 (10th Cir.), *cert. denied,* 99 S. Ct. 180 (1978).

[2] OKLA. STAT. ANN. tit. 14A, §§ 1-201(5)(a), 1-201A (West 1972 & Supp. 1978-79).

[3] *See, e.g.,* Aldens, Inc. v. Lafollette, 552 F.2d 745 (7th Cir. 1977); Aldens, Inc. v. Packel, 524 F.2d 38 (3d Cir. 1975).

[4] 339 U.S. 643 (1950). *Travelers Health Ass'n* involved a mail order insurance business. *See also* Hoopeston Canning Co. v. Cullen, 318 U.S. 313 (1943).

is sufficient to overcome due process objections."[5]

The court applied the balancing test to the commerce clause argument and stated that "states can . . . pass Acts which affect commerce unless the burden so imposed *greatly* exceeds the extent of the local benefits."[6] The appellate court agreed with the lower court that the burden on the plaintiff was not excessive when compared to the state interest in protecting state consumers.[7]

B. *First Amendment—Newsman's Privilege:* Silkwood v. Kerr-McGee Corp.[8]

The principal action was filed by the administrator of Karen Silkwood's estate and involved claims which had accrued during her life and which survived her death. The main allegations were that the defendant Kerr-McGee had violated the decedent's constitutional rights by 1) conspiring to prevent her from organizing a labor union; 2) conspiring to prevent her from filing complaints against the defendant; and 3) willfully and wantonly contaminating her with toxic plutonium radiation.[9]

Arthur Hirsch, the appellant, was a nonparty witness in the principal action. As a free-lance reporter, he had conducted his own investigation of the death of Karen Silkwood, in preparation for a documentary film. During pretrial discovery, the defendant-appellee Kerr-McGee sought to depose the appellant. Hirsch applied for an order which would protect the information gathered during his investigation, but protective relief was denied. Hirsch was ordered to produce the materials and answer questions which probed his sources and this appeal followed.

The trial court stated as its primary ground for denial that the motion was not timely filed, but went on to hold that, even

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[5] 571 F.2d at 1161.

[6] *Id.* at 1162 (emphasis added)(citing Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977); Great Atlantic and Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976); Head v. New Mexico Bd. of Examiners, 374 U.S. 424 (1963)).

[7] The cost to the plaintiff Aldens, Inc. would total $160,000 per annum; the gross credit sales to 13,800 Oklahoma consumers were approximately $1,800,000. In light of these figures, the appellate court agreed with the trial court that "on balance, a conformance with the Oklahoma cost of credit rules would not constitute an undue burden on interstate commerce." 571 F.2d at 1162.

[8] 563 F.2d 433 (10th Cir. 1977).

[9] *Id.* at 434-35.

had the motion been timely, protective relief would have been denied for lack of merit.

On appeal, the Tenth Circuit reversed and remanded for further proceedings. The court observed that due to the importance of the motion it should have been considered out of time.[10] As to the merits of the motion, the Tenth Circuit stated that the trial court had erred in failing to give any consideration to the existence of a qualified privilege for newsmen.[11]

The appellate court engaged in a three-pronged inquiry: 1) Whether a nonparty witness has a privilege which allows him to resist pretrial discovery which probes his confidential sources; 2) whether such a privilege applies to one in the position of the appellant; and 3) how the trial court should proceed if the appellant indeed has such a privilege.[12]

The circuit court cited *Branzburg v. Hayes*[13] as the "guiding light" in determining the existence and scope of a newsman's privilege. In a footnote,[14] the court quoted a portion of the *Branzburg* decision to support the existence of a qualified privilege.[15] The court inferred from this that "the present privilege is no longer in doubt."[16]

The court, having "found the privilege in *Branzburg*,[17] then concluded that its scope and extent was unaffected by the fact that appellant Hirsch was not a "regular" newsman.[18]

In advising the trial court as to the proper procedure, the

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[10] *Id.* at 436.

[11] *Id.* at 435.

[12] *Id.* at 435-36.

[13] 408 U.S. 665 (1972).

[14] 563 F.2d at 437 n.1.

[15] The relevant portions quoted are as follows:

> Nor is it suggested that news gathering does not qualify for First Amendment protection . . . . But these cases involve . . . no express or implied command that the press publish what it prefers to withhold . . . . No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.

Id. (quoting 408 U.S. at 681-82).

[16] 563 F.2d at 437.

[17] Lest this feat be underestimated, it should be pointed out that the main thrust of *Branzburg* was the holding that a newsman has no privilege to resist a grand jury subpoena to appear and testify as to his sources. In fact, the *Branzburg* majority stressed the administrative difficulties concomitant to a judicially-created privilege for newsmen. 408 U.S. at 703-04.

[18] 563 F.2d at 437 (citing Lovell v. City of Griffin, 303 U.S. 444 (1935)).

Tenth Circuit cited several cases by which the trial court should be guided on remand.[19] The essential thrust of these cases is that courts should engage in a weighing process and assure that any infringement of first amendment rights be kept to an absolute minimum.

The court found that the trial court record was inadequate to enable it to conduct any meaningful weighing process and remanded the case with instructions that additional evidence be taken and considered in determining the extent of the appellant's privilege.[20]

C. *First Amendment—Freedom of Religion:* Tate v. Akers[21]

Plaintiffs, "literature evangelists" of the Seventh Day Adventist Church, sought a declaratory judgment that a city ordinance[22] barring door-to-door solicitation was inapplicable to them

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[19] *See, e.g.*, Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974) (holding need for testimony outweighed newsman's claim of privilege); Baker v. F&F Investment, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) (holding that first amendment considerations outweighed the need for information and stressing the significance of the type of civil action); Cervantes v. Time, 464 F.2d 986 (8th Cir. 1972) (denying disclosure where the demand therefore was vague); Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958) (compelling the disclosure because of the paramount public interest therein).

The Tenth Circuit singled out *Garland* for the importance of the criteria set forth therein:

> The important thing about the *Garland* case is, however, that it laid down criteria for solving a problem such as the present one:
>
> 1. Whether the party seeking information has independently attempted to obtain the information elsewhere and has been unsuccessful.
> 2. Whether the information goes to the heart of the matter.
> 3. Whether the information is of certain relevance.
> 4. The type of controversy.

563 F.2d at 438.

[20] Specifically, the court suggested that the appellee catalog the specific evidence it was seeking and state the extent of its efforts to obtain the information elsewhere. Conversely, appellant-Hirsch was to provide a general description of the information and witnesses sufficient for the trial court to weigh the competing interests. *Id.*

The Tenth Circuit, while recognizing a qualified privilege, has adopted a sliding scale type of privilege, the strength of which will vary according to the facts of each case. Lower courts may find it difficult to administer a privilege which is qualified but not "quantified."

[21] 565 F.2d 1166 (10th Cir. 1977).

[22] LARAMIE, WYO., CITY CODE § 28-3. The ordinance provides that "[t]he practice of going in and upon private residences . . . by solicitors, peddlers, hawkers, itinerant merchants, not having been requested or invited to do so . . . is hereby declared to be unlawful and a nuisance . . . ."

and, if applicable, was unconstitutional under the first and fourteenth amendments of the United States Constitution.

The Tenth Circuit sidestepped the constitutional question by affirming the lower court holding that the ordinance was inapplicable to the plaintiffs.[23] The majority opinion concluded, in what might be considered dictum, that if the ordinance were rewritten to include the plaintiffs and others similarly situated, such an ordinance would pose "serious constitutional objection."[24]

The logic of the dissent is compelling in its criticism of the majority for employing the "good purpose doctrine" to exempt the plaintiffs from the operation of a constitutionally valid ordinance.[25] The dissent cited *Reynolds v. United States*[26] as evidence of the historic distinction between protecting *belief* and protecting *activity*.

The majority opinion blurs the separation of church and state by condoning prohibited activity on the basis of its marginally religious nature. The decision created the potential that all who cloak themselves in religious fervor will be able to circumvent such ordinances and ignores the right to privacy which the ordinance was designed to protect.

D. *Due Process—College Athletics:* Colorado Seminary v. NCAA[27]

In a justifiably brief opinion, the Tenth Circuit upheld the lower court decision that the right to participate in college athletics is not a property interest entitled to constitutional protection. In the action to enjoin the NCAA from imposing sanctions upon

[23] The Tenth Circuit agreed with the trial court that "the dominant and primary mission of the colporteur is to spread the gospel, and the sale of church literature is incidental thereto and does not convert a minister into a peddler." 565 F.2d at 1170.

It is clear from similar statements throughout the opinion that the court focused on the purpose rather than the nature of the activity. The court did not discuss the rights of private landowners which have been given renewed protection by recent opinions of the United States Supreme Court. *See, e.g.*, Hudgens v. N.L.R.B., 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

[24] 565 F.2d at 1170.

[25] The dissent cites several Supreme Court cases to refute the less persuasive authority cited by the majority. *See, e.g.*, Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); Lemon v. Kurtzman, 403 U.S. 602 (1971); Scull v. Virginia, 359 U.S. 344 (1959).

[26] 98 U.S. 145 (1878).

[27] 570 F.2d 320 (10th Cir. 1978).

certain University of Denver athletic teams, the trial court granted the defendant's motion for summary judgment. In affirming, the appellate court observed that federal and state courts have no jurisdiction over athletic association sanctions which affect no legal rights.[28]

The appellate court stated that the appeal was controlled by *Albach v. Odle*[29] and *Oklahoma High School Athletic Association v. Bray*,[30] Tenth Circuit cases which had considered the same issue in the high school setting. The court reiterated its holding in *Albach* that *Goss v. Lopez*,[31] while protecting certain property rights in education, had not established a property interest in each separate component of the educational process.[32]

E. *Fourteenth Amendment—Employment:* Martin v. Harrah Independent School District[33]

In a somewhat convoluted opinion, the Tenth Circuit reversed the district court and held that the dismissal of a tenured teacher violated due process and equal protection safeguards even though procedural due process may have been observed.[34]

Under Oklahoma law, the plaintiff's contract of employment was automatically renewed unless she had been guilty of immorality, willful neglect, cruelty, incompetency, teaching disloyalty to the Constitution, or moral turpitude.[35] The plaintiff's contract incorporated by reference the rules and regulations of the defendant school board. One such regulation required teachers to take certain continuing education courses and allowed them three years in which to complete the required courses. The only sanction for failure to complete the courses was that the teacher would have to forego salary increases in the event of such failure.

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[28] *Id.* at 321-22. The court also found nonmeritorious a secondary argument that the action of the defendant was a violation of equal protection, citing San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), as authority for its rejection of the equal protection argument.

[29] 531 F.2d 983 (10th Cir. 1976).

[30] 321 F.2d 269 (10th Cir. 1963).

[31] 419 U.S. 565 (1975).

[32] 570 F.2d at 321.

[33] 579 F.2d 1192 (10th Cir. 1978), *petition for cert. filed*, 47 U.S.L.W. 3227 (Sept. 15, 1978) (No. 78-443).

[34] *Id.* at 1200.

[35] OKLA. STAT. ANN. tit. 70, § 6-122 (West Supp. 1973) (repealed 1977).

For three years, the plaintiff, among others, chose to give up the increased pay rather than take the courses.

In 1973, the Oklahoma legislature provided for mandatory salary increases, thereby nullifying the school board's sanction. The board immediately adopted a new policy of discharge for failure to comply with the continuing education regulation. In September, 1973, the school board notified the plaintiff and three other teachers that their contracts would not be renewed unless they completed the required courses within seven months. Plaintiff, in January, 1974, appeared before the board to protest the deadline and state that she would be unable to comply within the allotted time. In April, 1974, the school board voted not to renew the plaintiff's contract; the plaintiff then instituted an administrative appeal and an action in the state courts for injunctive relief.[36] After failing to obtain satisfaction from either of these proceedings, the plaintiff filed suit in federal district court alleging a denial of equal protection and deprivation of property without due process.

After finding that there was no impermissible classification in the board's regulation and concluding that the board had satisfied the procedural due process requirements by complying with the statutory requirements of notice and a hearing, the trial court dismissed the plaintiff's complaint.

In reversing, the Tenth Circuit stated that the term "due process of law" refers not only to procedural safeguards but "also protects substantive aspects of [life, liberty, and property] interest[s] against unconstitutional restrictions by the states."[37] Referring to the term "due process" as an "almost amorphous phrase,"[38] the court observed that the equal protection clause was a more specific safeguard which increased the protection of the due process clause.[39] After cataloging various theories of due pro-

[36] Plaintiff lost at the first level of her administrative appeal and failed to pursue the administrative action; the Oklahoma Supreme Court reversed the state trial court decision ordering plaintiff's reinstatement, holding that the state court was without jurisdiction due to plaintiff's failure to exhaust her administrative remedies. *See* Martin v. Harrah Independent School Dist., 543 P.2d 1370 (Okla. 1975).

[37] 579 F.2d at 1198.

[38] *Id.* at 1196.

[39] *Id.* at 1197. The court did not enunciate the factors which render the phrase "equal protection" any less amorphous than the term "due process."

cess and equal protection,[40] the court settled on the "sliding scale" approach.[41]

The appellate court agreed with the trial court that the plaintiff's right to continued employment was a property right under Oklahoma law and, therefore, was entitled to constitutional protection.[42] The Tenth Circuit found that the board's imposition of unequal time limitations within which teachers could avoid the penalty, followed by the decision not to renew the plaintiff's contract, was a violation of the fourteenth amendment.[43] The court stated that there was no rational basis for the board's action, whether viewed as an unreasonable classification or as arbitrary and capricious conduct.[44]

It is unclear exactly which portion of the fourteenth amendment is the real basis for the reversal. The court's commitment to the sliding scale theory is blurred in its extensive discussion of equal protection. That the court itself is aware of the confusion is exemplified by its statement that "[i]t is . . . not surprising that in the same case some justices have employed an equal protection analysis while other justices have used a due process analysis to reach the same result . . . ."[45]

II. STATUTORY CLAIMS

A. *State Action and 42 U.S.C. § 1983*[46]

1. Employment: *McGhee v. Draper*[47]

Plaintiff was a nontenured teacher who had been employed

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[40] *Id.* at 1197-98.

[41] *Id.* at 1198. The court stated as follows:

> In each case the reviewing court must consider the constitutional importance of the affected individual interests, the character of the state action or classification in question and the state's asserted interests in support of its action or classification. As these factors vary from case to case, . . . courts must . . . apply a "spectrum of standards" . . . .

[42] *Id.* The court prefaced this finding by the rather mysterious statement that "not all property interests are protected by the Constitution," but did not give any examples of those property interests which do not have "constitutional dimensions." *Id.*

[43] "The gravaman of the board's action was . . . the imposition of unequal time limitations . . . ." *Id.* at 1199.

[44] *Id.*

[45] *Id.* at 1197.

[46] 42 U.S.C. § 1983 (1976) provides:

> Every person who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured . . . [in a] proper proceeding for redress.

[47] 564 F.2d 902 (10th Cir. 1977).

for two years when the school board voted not to renew her contract. She brought this 1983 action for an injunctive order for reinstatement, for damages, and for attorneys' fees, alleging violations of the due process clause of the fourteenth amendment. Before trial, the lower court dismissed as to the defendant school district on the basis of the eleventh amendment and that dismissal was not appealed. At trial, the trial court sustained a motion for a directed verdict in favor of the individual defendants, members of the school board and the superintendent of schools. The court based its decision on the grounds that 1) no property interest was involved; 2) no liberty interest had been infringed; 3) no denial of constitutional rights was shown; and 4) the unrefuted evidence of the defendants' good faith rendered them immune from damages.[48] On review, the appellate court affirmed in part and reversed in part. It agreed with the trial court holding as to the property interest and damage claims, but held that the liberty interest claim should have been submitted to a jury.

a. *The property interest claim*

In March, 1974, the school board voted to renew the plaintiff's teaching contract for the 1974-75 year. However, following a later meeting at which numerous persons appeared to protest the renewal, the board unanimously resolved not to renew the contact and so informed the plaintiff by a letter which stated no reasons for the change of mind. The plaintiff argued that the initial vote to renew her contract created a legitimate claim of entitlement which could not be abridged without due process.[49] The Tenth Circuit agreed with the trial court that the decision to renew the contract had created no property interest under Oklahoma law.

b. *The liberty interest claim*

Plaintiff alleged that she was the innocent victim of community gossip, that she was denied the opportunity to clear her

[48] *Id.* at 904-05.

[49] Brief of Plaintiff-Appellant, 27-28, 564 F.2d 902 (10th Cir. 1977).

name at a hearing, and that, as a direct consequence of the denial, she had been unable to secure another teaching job.[50] The trial court noted the holding of *Board of Regents v. Roth*[51] that notice and a hearing are essential when a person's reputation is at stake because of what the government is doing to him,[52] but held that the board itself had taken no action which required it to provide the plaintiff with a hearing.[53]

On appeal, the plaintiff argued that, even though the board had made no charges, it had adopted the public charges of immorality. She argued further that the rescission of her renewal, following such charges, imposed a stigma upon her. The appellate court noted that the board minutes focused on allegedly pornographic material and allegations of misconduct by the plaintiff and held that discharge against this background raised a substantial question as to whether the board had imposed a stigma which limited the plaintiff's freedom to obtain future employment. The court attached great importance to evidence submitted by the plaintiff as to her inability to obtain another teaching job.[54] The court held that the trial court had erred in directing a verdict on the liberty issue and remanded the case for further proceedings.

c. *The procedural due process claim*

The holding on appeal was that, if a liberty interest had in fact been affected, the plaintiff should have been provided with notice of the reasons for her discharge and a hearing thereon. The trial court was instructed to provide a remedy for the denial of due process if, on remand, it found that a liberty interest existed.[55]

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[50] 564 F.2d at 906. Evidence that the plaintiff was unable to obtain other employment, *id.* at 908, was vital to the success of her action. The Tenth Circuit has adopted the view that there is no infringement of the liberty interest without actual foreclosure of future employment. *See, e.g.* Weathers v. West Yuma County School Dist. R-J-1, 530 F.2d 1335 (10th Cir. 1976).

[51] 408 U.S. 564 (1972).

[52] Record, vol. 3, at 424-26.

[53] *Id.*

[54] *See* note 50 *supra*.

[55] Since the appellate court agreed that the school board members were entitled to a qualified immunity, 564 F.2d at 914, it is not clear what remedy would be provided for the denial of procedural due process. Reinstatement is not the appropriate remedy when a teacher's contract is terminated for cause. *See* Unified School Dist. No. 480 v. Epperson, 551 F.2d 254 (10th Cir. 1977) which held that denial of procedural due process is not enough in itself to justify reinstatement; *see also* Hostrop v. Board of Jr. College Dist. No.

d. *The substantive due process claim*

The appellate court ruled that it was not error to refuse to submit the substantive due process claim to a jury since there is no basis for such a claim independent of a liberty or property interest. However, the court did assert that the allegations of arbitrary and capricious action could be considered on remand in determining whether or not a liberty interest was implicated.

e. *Conclusion*

The Tenth Circuit offers no firm guidelines for determining those instances in which procedural due process must be afforded in order to protect the liberty interest. The United States Supreme Court has stated that termination by itself does not affect the liberty interest when no stigma attaches that substantially forecloses future employment.[56] The Tenth Circuit has held that injury to reputation is not a sufficient deprivation of a protected liberty interest so as to invoke due process protection.[57] The opinion does little to clarify the extent of job foreclosure necessary before due process is required, although the court has stated in prior opinions that the foreclosure must be more than a "disadvantage in obtaining other employment."[58] Until the matter is further clarified, employers who discharge employees without procedural due process run the risk of being charged with the responsibility for a stigma imposed by others.

2. Integration: *Fitzpatrick v. Board of Education*[59]

On this appeal by black elementary school students, the Tenth Circuit affirmed the trial court decision that the Enid, Oklahoma, Board of Education had not violated the Civil Rights Acts of 1866 and 1871.[60]

The action arose over the closing of an elementary school in a predominantly black neighborhood.[61] The specific issues in dis-

515, 523 F.2d 569 (7th Cir. 1975).

[56] 408 U.S. at 573.

[57] Mitchell v. King, 537 F.2d 385 (10th Cir. 1976).

[58] 530 F.2d at 1339. For a general discussion of prior cases involving the rights of teachers' rights upon terminiation, see *Rights of Governnment Employees on Termination: Recent Tenth Circuit Cases*, 54 DEN. L.J. 128 (1977).

[59] 578 F.2d 858 (10th Cir. 1978).

[60] 42 U.S.C. §§ 1981, 1983 (1976).

[61] The closure of Roosevelt Elementary School was in response to a notice received from HEW that the decision in Adams v. Weinberger, 391 F. Supp. 269 (D.C. Cir. 1975),

pute were 1) the board's failure to keep open any schools in the predominantly black neighborhood of Southern Heights; 2) the bussing of a higher ratio of black students than white; and 3) the board's failure to employ more black faculty and staff.[62]

The court cited six factors to be considered in determining whether an integration plan passes constitutional muster, but noted that no one factor was determinative in itself.[63] Citing *Brice v. Landis*[64] in support, the Tenth Circuit framed the issue as follows: "[T]he key question . . . [is] whether the school district's plan is a good faith, reasonably adequate plan . . . and whether the district considered available alternative options and courses of action."[65] Noting that the initial burden of proving discrimination falls on the plaintiffs, the court held that the plaintiffs had not demonstrated that the defendants had abused their discretion in closing the schools.[66] Having found that the board had ample nonracial justification for the school closings,[67] the court reiterated the *Brice* holding that "the bussing of negro children to achieve integration . . . is not in itself discrimination."[68] Finally, the court found that there was overwhelming evidence of the board's good faith efforts to attract minority teachers and staff and that their lack of success was attributable to outside factors over which the board had no control.[69]

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prohibited a 20% disproportion in any school. 578 F.2d at 859. Since only 6% of the district students were black, Roosevelt school, with 45.5% black students, was in violation of the stated guideline. The appellants argued that the school board should have bussed in a sufficient number of white students to bring the school into comformity with the guideline. This alternative would have necessitated the acquisition of 3 portable classrooms and 2 busses to transport 102 white students. The closure of the school required the bussing of only 25 students, 13 white and 12 black. 578 F.2d at 860.

[62] *Id.* at 861.

[63] *Id.* at 861-62. The factors cited were as follows: 1) The existence of valid nonracial factors mandating closure; 2) the condition and adequacy of the school being closed; 3) the adequacy of the school to which transfer is made; 4) whether the primary or sole reason for the closure is the fear of "white flight"; 5) whether the entire or primary burden of integration is placed on the minority; and 6) whether the school board considered the alternatives prior to closing the subject school.

[64] 314 F. Supp. 974 (N.D. Cal. 1969).

[65] 578 F.2d at 862.

[66] *Id.*

[67] *Id.*

[68] *Id.* (quoting *Brice*, 314 F. Supp. at 977-78).

[69] The factors noted were "the generally lower wages available in Oklahoma and the fact that black professionals prefer to live in areas with larger black populations." 578 F.2d at 863.

3. Color of Law. *Ve-ri-tas, Inc. v. Advertising Review Council of Metropolitan Denver, Inc.*[70]

The plaintiffs brought suit against the Better Business Bureau (BBB) and various merchants alleging that the defendants had acted under color of law to violate rights of the plaintiffs protected by the fourteenth amendment of the Constitution. On the record, it is clear that the defendants were exchanging information with official agencies of the state on a regular basis.[71] The plaintiffs argued that complaints filed by the agencies were the direct result of this symbiotic relationship, rather than the result of the independent judgment of the agencies.[72] Although noting that the relationship closely approached the public function line,[73] the appellate court affirmed the lower court decision that the defendants were not an "arm of official enforcement" and were not acting under the color of law.[74]

B. *Employment Discrimination and Title VII*[75]

1. Race: *Higgins v. Gates Rubber Co.*[76]

The action was brought under a provision of the 1964 Civil Rights Act which makes it unlawful to discharge an employee on account of race.[77] In a brief opinion, the appellate court affirmed the lower court decision that plaintiff's discharge had not violated the Act.

Employed by Gates in 1949, the plaintiff in 1962 was transferred to a predominantly white department. From that time

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[70] 567 F.2d 963 (10th Cir. 1977).

[71] *Id.* at 964.

[72] *Id.*

[73] The appellate court found it significant that the BBB reported to the official agencies only those nonmembers who on request refused to comply with BBB standards. The misdeeds of a nonmember who responded to the threats of the BBB were not reported. The court stated that "[t]his reporting or non-reporting takes much of the luster from the image of a 'good citizen' reporting a transgression." 567 F.2d at 965.

[74] *Id.* The court noted that the official agencies did not use the BBB as an intergral part of their official functions, but rather initiated their own investigations and filed complaints only on the basis of these investigations.

[75] Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976). Title VII was drafted specifically to provide a remedy for employment discrimination.

[76] 578 F.2d 281 (10th Cir. 1978).

[77] 42 U.S.C. § 2000e-2(a)(1) provides: "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual . . . because of such individual's race . . . ."

until the 1971 incident which caused his dismissal, plaintiff was "occasionally teased, ridiculed, and harrassed" by white coworkers.[78] However, the appellate court approved the trial court holding that there was no evidence that Gates itself was aware of or condoned such conduct.[79] On May 6, 1971, plaintiff wore a new cap to work; two white coworkers ridiculed him and tried to knock the cap off his head. When they persisted after plaintiff Higgins warned them to stop, Higgins picked up a metal bar and struck one of them over the head.[80] As the result of the incident, plaintiff was discharged and the assaulted white worker was suspended for two weeks. The sole issue of the action was whether this disparity in penalties was the result of racial discrimination.[81]

In affirming the trial court, the Tenth Circuit stated that they were "not prepared to accept plaintiff's argument that an employer must mete out a sanction for emotional . . . harassment that is equal to its sanction for the infliction of serious bodily injury."[82] The court found that the variance in sanctions was attributable to the difference in conduct rather than to any radical factor[83] and that the reasons given for firing the plaintiff were not mere pretexts.[84]

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[78] 578 F.2d at 282.

[79] *Id.* at 282, 283. There *was* evidence that the plaintiff had complained of his work environment to his foreman and that another foreman had been reprimanded for telling a racial joke in the plaintiff's presence. However, neither the trial court nor the appellate court felt that this knowledge should be imputed to the defendant employer. The Tenth Circuit implicitly approved the lower court conclusion that an employer "cannot be an insurer against all racial insults and racial incidents" and cannot be expected to provide a workplace free of racial prejudice. *Id.* at 283 (citing the Record, vol. 5, at 8-9).

[80] Employees witnessing the attack restrained the plaintiff to prevent his continued assault. 578 F.2d at 282.

[81] *Id.* at 283. Although the appellate court ruled that the issue of a discriminatory workplace need not be considered on appeal because the issue was not set forth in the pretrial order, it is clear that the court was "aware" of the issue: "Absent a finding that Gates was or should have been aware of this unfavorable atmosphere, we cannot hold that the trial court erred . . . ." *Id.; see also* note 79 *supra*.

[82] 578 F.2d at 284.

[83] *Id.* The court distinguished McDonald v. Santa Fe Trail Transp. Co., 427 U. S. 273 (1976). The court observed that in *McDonald* employees engages in the same conduct had been sanctioned solely on the basis of race.

[84] 578 F.2d at 284. The court noted that the plaintiff had submitted statistical evidence of discrimination and stated that such evidence is not conclusive on the issue of discrimination. The defendant had also submitted a statistical compilation to refute the statistics provided by the plaintiff and the appellate court ruled that it was the province of the trial court to weigh such conflicting evidence. *Id.* at 284-85.

2. National Origin: *Subia v. Colorado & Southern Railway*[85]

Plaintiff, a former employee of the defendant, brought suit alleging that the company had discriminated against her in refusing her request for a leave of absence and in refusing to rehire her. The trial court held that the "plain facts" of the case were that the plaintiff had failed to comply with a long established leave policy of the company and that the defendant's refusal to rehire the plaintiff was justified by legitimate business reasons. The Tenth Circuit affirmed.

The appellate court noted the lower court's recognition that the plaintiff had established a primi facie case of discrimination as defined by *McDonnell Douglas Corp. v. Green*,[86] but sustained the finding that the defendant had effectively rebutted the plaintiff's case.[87] Observing that the strict leave policy had been justified and that it had not been implemented discriminatorily,[88] the court found that the evidence showed that the plaintiff was not rehired "because of the manner in which she personally terminated her employment . . . ."[89] The court stated further that it was not the intent of either Title VII or of the decisions construing it to force an employer to rehire an employee solely because of the employee's national origin.[90]

3. Former Employees: *Rutherford v. American Bank of Commerce*[91]

The most interesting of the Title VII cases involved the issue of whether the statute gives any protection to former employees

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[85] 565 F.2d 659 (10th Cir. 1977).

[86] 411 U.S. 792 (1973). Subia met the *McDonnell Douglas* standard by showing that 1) she applied for and was qualified for an available job; 2) she was a member of a racial minority; 3) her application was rejected; and 4) the job applied for remained available. 565 F.2d at 661.

[87] 565 F.2d at 663. The court also stated that the plaintiff had failed to prove either discriminatory intent or impact.

[88] There was testimony by Subia's former supervisor that no exceptions had been made to the leave-of-absence rules during the past 30 years. The court also noted that "all leaves of absence, including Subia's, have been consistently controlled by . . . the bargaining agreement since its adoption on July 1, 1954." 565 F.2d at 661.

[89] *Id.* at 662.

[90] *Id.* at 663. The court stated that the primary purpose of Title VII was to assure employment equality by eliminating discriminatory practices. *Id.* at 662 (quoting Teamster v. United States, 431 U.S. 324, 348 (1977)).

[91] 565 F.2d 1162 (10th Cir. 1977).

or whether only present employees are protected. The Tenth Circuit affirmed the lower court decision that protection under section 704(a) of the Civil Rights Act of 1964[92] extends to former employees even though the statute does not expressly grant such protection.[93]

Plaintiff Rutherford was a female loan-officer trainee of the defendant American Bank (American) who resigned her employment rather than accept certain clerical duties, the assignment of which she considered to be a demotion. Following her resignation, the plaintiff filed an unsuccessful sex discrimination suit against American.[94] Before she filed that suit, Phil White, a vice president of American, gave the plaintiff a glowing letter of recommendation.

In the course of seeking other employment, Rutherford applied for a position with the Citizens Bank. When contacted by Citizens Bank, White, having learned of the sex descrimination suit, *volunteered* information thereof to Citizens Bank which subsequently denied employment to the plaintiff.[95] In later applying for a job with Frontier Air Lines, Rutherford requested from American an updated letter of recommendation, at which time White informed her that any new letter would carry information as to her prior suit. Rutherford then brought the instant suit alleging that American's retaliatory actions violated 42 U.S.C. § 2000e-3(a).

The main issue on appeal was whether, even assuming retaliatory action, there was any violation of the statute which *expressly* protected only present employees. The Tenth Circuit approved the trial court's rejection of American's contention that former employees were entitled to no statutory protection, stating that "[a] statutue which is remedial in nature should be liberally construed."[96] In support of its conclusion, the appellate court

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[92] 42 U.S.C. § 2000e-3(a) (1976).

[93] 42 U.S.C. § 2000e-3(a) provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge . . . under this subchapter."

[94] Rutherford v. American Bank of Commerce, No. 74-1313 (10th Cir. Jan. 27, 1975) (Not for Routine Publication).

[95] The question arises as to whether the conveyance of such information on the *request* of the prospective employer would constitute an unlawful practice under the statute.

[96] 565 F.2d at 1165.

cited *Dunlop v. Carriage Carpet Shop*[97] and *Hodgson v. Charles Martin,*[98] cases which "liberally construed" the Fair Labor Standards Act[99] in a similar manner. By its decision, the Tenth Circuit extended Section 2000e-3(a) to protect former employees from retaliation by employers resentful of the fact that a suit has been filed against them.[100]

III. Statutory Challenges

A. *18 U.S.C. § 1696:*[101] United States v. Black[102]

Defendants were charged with knowingly and unlawfully establishing a private postal express for the conveyance of letters. They admitted by stipulation that they were in violation of the statute[103] but challenged its constitutionality. The trial court found that the statute was constitutionality valid and convicted the defendants; the Tenth Circuit affirmed.

The defendants contended that the private express statute was beyond the power granted Congress by the Constitution. The appellate court answered this argument by stating that "the proposition . . . is at odds with judicial precedent."[104] Citing two ancient cases,[105] the Tenth Circuit held the statute constitutional and stated that the plain intent of the statute was to grant the federal government a monopoly in the delivery of letters.[106] The court took the position that the statute implemented the constitutional mandate that Congress establish and maintain post offices and post roads.[107]

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[97] 548 F.2d 139 (6th Cir. 1977).

[98] 459 F.2d 303 (5th Cir. 1972).

[99] 29 U.S.C. § 215(a)(3) (1976).

[100] The court reiterated the holdings of *Dunlop* and *Charles Martin* in support of its conclusion that the possibility of such retaliation is very real unless former employees are given such protection. 565 F.2d at 1166.

[101] 18 U.S.C. § 1696 (1976).

[102] 569 F 2d 1111 (10th Cir.), *cert. denied,* 435 U.S. 944 (1978).

[103] 18 U.S.C. § 1696 (1976).

[104] 569 F.2d at 1112.

[105] *Ex Parte* Jackson, 96 U.S. 727 (1877); Blackham v. Gresham, 16 F. 609 (C.C.S.D.N.Y. 1883).

[106] 569 F.2d at 1112. The court observed further that "[i]f private agencies can be established, the income of the government might be so reduced that economy might demand a discontinuance of the [federal] system . . . ." In the court's view, this discontinuance would be undesirable because a private system might exclude from service those localities which were unprofitable. *Id.* at 1112-13.

[107] U.S. Const. art. I, § 8, cl. 7.

B. *Federal Obscenity Statutes:* United States v. Blucher[108]

Quoting at length Justice Brennan's dissent in *Hamling v. United States*,[109] the Tenth Circuit reluctantly[110] upheld the constitutionality of prosecution under 18 U.S.C. § 1461[111] and 18 U.S.C. § 3237.[112]

Defendant Blucher, the distributor of certain questionable materials, resided in Oregon, a state under whose "community standards" the materials would not be adjudged obscene.[113] Perhaps frustrated by his inability to stem the tide of the defendant's publications and motivated by a desire to obtain a venue with a more restrictive community standard, an Oregon postmaster asked a Wyoming postmaster to solicit materials from the defendant. Over a three-year period, the Wyoming postmaster solicited the materials under a false name. On three occasions, the defendant mailed allegedly obscene materials to Wyoming and sent advertisements for similar materials seventeen times. Based on these contacts, initiated solely by federal postal authorities, defendant was indicted on twenty counts of violating 18 U.S.C. §

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[108] 581 F.2d 244 (10th Cir. 1978).

[109] 418 U.S. 87 (1974). For a discussion of the holding, see note 111 *infra*.

[110] This reluctance is obvious from the tone of the entire opinion; *e.g.*, the court statement that "so long as *Hamling* is the law, publishers and distributors everywhere who are willing to fill subscriptions are subject to the creative zeal of federal enforcement officers who are . . . free to shop for . . . venue . . . with the most restrictive views . . . ." 581 F.2d at 245-46 (citations omitted). This writer shares the court's distaste for this decision, even though it is amply supported by legal authority.

[111] 18 U.S.C. § 1461 (1976) prohibits the mailing of obscene materials. In *Smith v. United States*, 431 U.S. 291 (1977), the United States Supreme Court upheld the constitutionality of section 1461 against an allegation that the statute was unconstitutionally vague, stating as follows:

> Our construction of the statute flows directly from the decisions in *Hamling*, *Miller*, *Reidel*, and *Roth*. The possibility that different juries might reach different conclusions as to the same material does not render the statute unconstitutional (citations omitted). We find no vagueness defect . . . attributable to the fact that federal policy with regard to distribution of obscene material through the mail was different from Iowa policy . . . .

431 U.S. at 308-09.

[112] 18 U.S.C. § 3237 (1976).

[113] Miller v. California, 413 U.S. 15 (1973), held that there was no uniform national standard for determining whether or not materials were obscene; obscenity was to be determined by local community standards. *Hamling* held that the *Miller* "local community standard" was to be applied in federal prosecutions and that "the fact that distributors . . . may be subjected to varying community standards in . . . various federal judicial districts . . . does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity." 418 U.S. at 106.

1461. The defendant pled guilty to one count and reserved an appeal on the constitutionality of the statute; the Government dismissed the remaining counts. The action was brought in Wyoming under 18 U.S.C. § 3237 which allows prosecution in the federal district from which obscene materials are mailed, the districts through which the materials pass while enroute through the mails, and the district in which the materials are received.

On appeal, the defendant alleged that the liberal venue provisions of section 3237, in combination with the *Hamling* rule that local community standards should be applied to determine whether materials are obscene, violated his right to due process. Although noting that the validity of section 3237 was not an issue in *Hamling*,[114] the Tenth Circuit took the view that the majority opinion in *Hamling* mandated their affirmance of the defendant's conviction.[115] In support of its decision, the court also observed that "lower federal courts . . . have unaimously concluded that it is both permissible and logical to try a defendant in the district to which he . . . mailed obscene materials."[116]

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[114] 581 F.2d at 245 n.4.

[115] *See* note 111 *supra*.

[116] 581 F.2d at 246 n.4.