Denver Law Review

Volume 55
Issue 3 *Tenth Circuit Surveys*

Article 7

January 1978

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INTRODUCTION

Judicial expansion of both the procedural and substantive due process protection afforded teachers[1] in the nineteen seventies has been paralleled by a growing recognition that these protections are pre-empted by the protection the eleventh amendment offers local school districts. While in earlier decisions, the eleventh amendment[2] was consistently used to avoid the imposition of damages against a school district, in *Unified School District No. 480 v. Epperson*[3] the Tenth Circuit, for the first time, concluded that local school districts are not immune from responding in damages if a teacher's employment contract is terminated in violation of that teacher's fourteenth amendment right to a hearing.[4] Thus, by its finding in *Epperson* that School District No. 480 was not an alter-ego of the state and, hence, not immune under the eleventh amendment,[5] the Tenth Circuit offered a remedy for the violation of constitutional rights, and provided a framework for the future analysis of the eleventh amendment's applicability to school districts.

I. THE DECISION

Oleta Peters and Lila Epperson had been teaching in Seward County, Kansas, for eleven and seventeen years, respectively, when they were notified in February of 1972 that their teaching contracts would not be renewed for the upcoming school year.[6]

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[1] *See* Perry v. Sinderman, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

[2] *See* Comment, *The Dwindling Rights of Teachers and the Closing of the Courthouse Door,* 44 FORDHAM L. REV. 511, 544 (1975). The eleventh amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. For a recent discussion by the Supreme Court of the policy behind eleventh amendment immunity, *see* Edelman v. Jordan, 415 U.S. 651 (1974).

[3] 551 F.2d 254 (10th Cir. 1977).

[4] *Id.* at 258.

[5] *Id.* at 260.

[6] *Id.* at 256. Under KAN. STAT. § 72-5411 (1972), both teachers had one-year teaching contracts which were automatically renewed for the following school year unless notice of termination is given to the teacher by March 15. The appellate opinion indicates that other teachers, as well as the plaintiffs, had their employment terminated. *Id.*

According to the school district, the contracts were not renewed because of budgetary cuts necessitated by a declining student population coupled with a concomitant reduction in state funds available for local education.[7] The plaintiffs, however, had a different viewpoint regarding the reason behind the termination of their contracts: Peters was president and Epperson was president-elect of the local branch of the National Education Association (NEA) which had recently engaged in negotiations with District 480's school board.[8] The two plaintiffs believed that their termination was retaliatory and in violation of their first amendment rights.[9] They retained counsel and requested a hearing by the school board. Their request was denied because, in the board's opinion, a hearing was not required when a teacher is fired solely for budgetary reasons.[10]

Plaintiffs each instituted proceedings against the District's 480 school board members, in both their individual and official capacities, in the United States District Court for the District of Kansas.[11] Their complaint alleged that (1) Each educator had been denied both procedural and substantive due process under the fourteenth amendment because she was not given a hearing prior to the decision not to renew her contract; and (2) each had been penalized by the school district for exercising her first amendment right to free speech by virtue of her NEA activities.[12] The parties stipulated that the first amendment claim would be tried to a jury first, and that, subsequently, the other issues would be tried to the court alone on the basis of the record made in the trial of the first amendment claim.[13]

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[7] 551 F.2d at 256.

[8] *Id.* The court explained that the negotiations between the National Education Association and the school board had been "rather heated." *Id.* No explanation is given, however, regarding the content of the negotiation sessions.

[9] *Id.*

[10] *Id.* The events of the case, the court notes, transpired prior to the Supreme Court's decision in Perry v. Sinderman, 408 U.S. 593 (1972). Kansas law now requires that school districts give all teachers with two years consecutive employment notice and a hearing prior to termination. KAN. STAT. §§ 72-5436-5446 (Supp. 1976).

[11] *Id.* The school board had previously brought a declaratory judgment action in a Kansas state court to determine if the board had to afford the two teachers a hearing under the terms of the teachers' contracts and state law. The plaintiffs in *Epperson* had the declaratory judgment action removed to the district court and the actions were consolidated at trial. *Id.* Jurisdiction in *Epperson* was premised on 28 U.S.C. §§ 1331, (Supp. IV, 1977), and 1343 (1976).

[12] 551 F.2d at 256.

[13] *Id.* at 256-57.

The jury found for the school board on the first amendment issue, i.e., that the plaintiffs were discharged only for budgetary reasons. At the second preceeding, the trial court found that the plaintiffs "had a sufficient property interest to entitle them to a hearing before any final determination was made not to renew their teaching contracts."[14] Judgment was entered, however, in favor of the members of the school board in their individual capacities on the basis of a qualified privilege.[15] The trial court also entered judgment in favor of the school board members in their official capacities by reasoning that the eleventh amendment barred the entry of a monetary judgment against the school district and because reinstatement was "inappropriate," since the jury concluded that the termination of the teachers stemmed from budgetary considerations.[16]

Plaintiffs based their appeal to the Tenth Circuit solely on the remedial question. Both teachers argued that the trial court erred in holding that the eleventh amendment barred the entry of a monetary judgment and that reinstatement was inappropriate.[17]

II. Tenth Circuit Approach to Remedial Issues

The Tenth Circuit on appeal held that, despite the eleventh amendment, the plaintiffs were entitled to monetary damages for the wrongful denial of their procedural due process rights but were not entitled to reinstatement.[18] The court's treatment of the effect of the eleventh amendment on the defendants' liability for monetary damages represents a significant departure from earlier decisions which consistently protected school boards from responding in damages in spite of their disregard of employees' constitutional perogatives.[19] The case further provides a frame-

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[14] *Id.* at 257.

[15] Citing Wood v. Strickland, 420 U.S. 308 (1975); Bertot v. School Dist. No. 1, 522 F.2d 1171 (10th Cir. 1975). The *Wood* court explained that school board members are immune from damages for actions which are violative of constitutional rights if the member is acting "in good faith in the course of exercising his discretion within the scope of his official duties." 420 U.S. at 319. *See also* Comment, *Teacher's Speech and First Amendment Rights* — Bertot v. School District No. 1, 522 F.2d 1171, *Tenth Circuit Survey*, 53 Den. L. J. 95, 100 (1976) [hereinafter cited as *Teacher's Rights*].

[16] 551 F.2d at 257. The trial took place three years after the teachers' contracts were terminated. *Id.*

[17] *Id.*

[18] *Id.* at 257-60.

[19] *Id.* at 258. The court found that reinstatement was "inappropriate" because the

work for analyzing the remedies available to educators discharged in violation of their constitutional rights.

A. *Previous Tenth Circuit Decisions Regarding the Eleventh Amendment and School Board Immunity*

The eleventh amendment[20] generally has been construed as protecting a nonconsenting state from suits brought in her own courts by a citizen of a foreign state,[21] and from suits brought in federal courts by her own citizens and citizens of another state.[22] The amendment's protection extends to members of a state board or an agency acting in their official capacities.[23] Political subdivisions of the state, in general, enjoy the same immunity as the state itself if the ultimate award is derived from state revenues.[24]

Until *Epperson,* the major Tenth Circuit decision permitting school boards to escape liability for monetary damages on the basis of eleventh amendment considerations was *Harris v. Tooele County School District.*[25] *Harris,* a diversity action against a school board for personal injuries, was dismissed on eleventh amendment grounds.[26] To determine the applicability to the school board of the state's eleventh amendment immunity, the Tenth Circuit isolated the following factors: State supreme court decisions had held that school districts are instrumentalities of the state;[27] educational costs were divided between the state and

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jury found the two contracts were not renewed because of budgetary considerations. The court said:

> To grant Peters and Epperson all that they now seek, namely reinstatement, lost pay, and consequential damages, would afford them all the relief they could have obtained had they prevailed in the First Amendment claim, which they did not, and would in practical effect render the three-week trial a nullity. Such would be utterly unrealistic.

Id. at 257. *See* Hostrep v. Board of Junior College Dist. No. 515, 523 F.2d 569 (7th Cir. 1975); Zimmerer v. Spencer, 485 F.2d 176 (5th Cir. 1973); Horton v. Orange County Bd. of Educ., 464 F.2d 536 (4th Cir. 1972); in all of these cases, reinstatement of the teacher was denied on facts similar to those in *Epperson.*

[20] *See* note 2 *supra.*

[21] Ex Parte Young, 209 U.S. 123 (1908).

[22] *See* Edelman v. Jordan, 415 U.S. 651, 663-63 (1974).

[23] Ford Motor Co. v. Department of Treas., 323 U.S. 459, 463-64 (1945).

[24] Edelman v. Jordan, 415 U.S. 651, 665 (1974). Other criteria in addition to the payment of the judgment have been used by lower federal courts. *See* text accompanying note 41 *infra.*

[25] 471 F.2d 218 (10th Cir. 1973).

[26] *Id.* at 219.

[27] *Id.* at 220 citing Campbell v. Board of Educ., 15 Utah 2d 161, 389 P.2d 464 (1964);

school districts;[28] and Tooele County property taxes, supplemented by state funds, would be used to pay the judgment.[29] The court said that because there was a "possibility" that the judgment would be paid out of state funds, the eleventh amendment barred any recovery by plaintiff.[30]

In *Bertot v. School Dist. No. 1*,[31] another action against the local school district for violation of a teacher's first amendment and procedural due process rights,[32] the Tenth Circuit remanded the damage issue to the trial court. On rehearing of the school district's eleventh amendment defense, the trial court was instructed by the appellate court to look at Wyoming law regarding school boards, "local circumstances," and federal law in making its determination regarding the school board's liability for monetary damages.[33]

Two analagous cases involving state boards of regents also indicate various factors used by the Tenth Circuit's eleventh amendment analysis *vis a vis* protection for educational administrations. State control was the focus of the Tenth Circuit's analysis of whether a state board of regents was immune from liability as an arm of the state in *Brennan v. University of Kansas*.[34] In *Brennan* the court concluded that the state's eleventh amendment protection extended to the board of regents because the local courts had treated the board as an extension of the state,[35] and because the state had centralized control over the regents' activities.[36] Financial questions, *i.e.*, who was to pay the judgment, were not considered by the court.

Hamilton Manufacturing Co. v. The Trustees of the State Colleges in Colorado[37] involved a suit against the trustees for

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Brigham v. Board of Educ., 118 Utah 582, 223 P.2d 432 (1950); Woodcock v. Board of Educ., 55 Utah 458, 187 P. 181 (1920).

[28] 471 F.2d at 220.

[29] *Id.*

[30] *Id.*

[31] 522 F.2d 1171 (10th Cir. 1975).

[32] *Id.* at 1185. *See Teacher's Rights, supra* note 15, at 102-05.

[33] 522 F.2d at 1185. No explanation was given by the court of the phrase "local circumstances." *Id.*

[34] 451 F.2d 1287 (10th Cir. 1971).

[35] *Id.* at 1290, citing Murray v. State Bd. of Regents, 194 Kan. 686, 401 P.2d 898 (1965) and Board of Regents v. Hamilton, 28 Kan. 376 (1882).

[36] 451 F.2d at 1290.

[37] 356 F.2d 599 (10th Cir. 1966).

nonpayment for goods delivered to a state college.[38] The court held that the suit was barred by the eleventh amendment because the State of Colorado was the real party in interest.[39] The court isolated the following factors in reaching its decision: whether the state would pay the judgment; extent of state control over the trustees; nature of the trustees' functions; whether the trustees were a corporate body; whether the trustees could sue or be sued in their own names; whether the trustees have the power to contract, and whether the trustees serve at the pleasure of the state legislature.[40]

Thus, in determining whether a school board is protected by the eleventh amendment, the Tenth Circuit has not fastened upon any one set of criteria for determining whether or not a school board, and analogously, a board of regents, is the state's alter ego. In *Harris,* the court emphasized the possibility that the judgment might be paid from state coffers; in *Brennan,* control, not finances, was the key factor; in *Bertot,* the court alluded vaguely to local circumstances and laws; and in *Hamilton,* the court identified a cluster of criteria.[41] While the question of state control and the ability of the local board to pay the judgment are always prime factors in the court's analysis, other factors have been used by the court, seemingly at random. Moreover, of the two main factors, *i.e.,* control and ability to pay the judgment, one may be given greater weight than the other, again seemingly at random. *Brennan,* for example, focused on control, but in *Hamilton,* control was only one of many criteria reviewed by the court.

In *Harris,* the case which most clearly articulated the court's position on the financial question, the court used a standard

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[38] *Id.* at 600.

[39] *Id.* at 601.

[40] *Id.*

[41] Other jurisdictions have isolated various factors in determining whether or not a school board is the state's alter ego. For example, in Hutchinson v. Lake Oswego School Dist., 519 F.2d 961 (9th Cir. 1975), the Ninth Circuit said that the important considerations in the decision are: whether the local district could pay the judgment; whether the entity performs "essential government functions"; the district's ability to sue or be sued; its power to own property in its own name; and the school district's corporate status. *Id.* at 966. *See* Hander v. San Jacinto Jr. College, 519 F.2d 273 (5th Cir. 1975); George R. Whitten Jr., Inc. v. State Univ. Constr. Fund, 493 F.2d 177 (1st Cir. 1974); Morris v. Board of Educ., 401 F. Supp. 188 (D. Del. 1975); Smith v. Concordia Parish School Bd., 387 F. Supp. 887 (W. D. La. 1975).

which is strongly supportive of the school board's eleventh amendment defense: Even if there is only a possibility that the state will have to pay part of the judgment, that judgment will be barred.[42] The dissenting opinion in *Harris* pointed out that state funds do not actually have to be used to pay the judgment; local funds could pay for the judgment since the school district can levy a tax on local residents to meet the costs of the judgment.[43] But it is the possibility, not the actuality, which controls.

B. Epperson *and the Eleventh Amendment Connection*

As the Tenth Circuit noted,[44] the court had the benefit of a recent United States Supreme Court decision on school districts' eleventh amendment immunity when deciding *Epperson*. *Mt. Healthy City School District Board of Education v. Doyle*[45] dealt squarely with the question of whether a school district is an arm of the state and thus able to draw upon eleventh amendment protections.[46] The Supreme Court concluded that the school board was not an alter ego of the state, based on three factors: Local law treatment of school districts as distinct political entities from the state; the amount of control exerted by the state over the school board; and the power of the school district to raise money.[47] Taking these factors as a totality, the Supreme Court concluded that the local school district in question was "more like a county or city than . . . like an arm of the State."[48]

The Tenth Circuit drew upon the *Mt. Healthy* analysis in *Epperson*, utilizing the three factors isolated by the Supreme Court: Local law, control, and finances. The court found that under Kansas statutes a school district can sue and be sued in its own name, execute contracts, own real and personal property,

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[42] *See* Note, *The Educational System and the Eleventh Amendment—Prohibition of Suits Against States: Can Teachers Protect Their Constitutional Rights?* 16 WASHBURN L. J. 102, 110 n.83 (1976).

[43] Harris v. Tooele County School Dist., 471 F.2d 218, 222 (1973)(Holloway, J., dissenting). UTAH CODE ANN. § 63-30-27 (1977) gives a school district the power to levy property taxes to pay a judgment.

[44] 551 F.2d at 259.

[45] 429 U.S. 274 (1977).

[46] *Id.* at 280. *Mt. Healthy* involved the issue of whether a teacher's first and fourteenth amendment rights had been violated by the school district's refusal to renew his teaching contract. *Id.* at 276.

[47] *Id.* at 280.

[48] *Id.*

and function as a corporate entity.[49] School districts in Kansas receive "substantial state aid" for local educational needs, but also have the power to levy taxes within the school district area to fund the local budget.[50] As to control, the court found that the Kansas State Board of Education exercised a broad supervisory power over the local school districts which did not amount to "control."[51] The court concluded that, like the Ohio school district in the *Mt. Healthy* case, School District No. 480 was more akin to a municipality, rather than an alter ego of the state, and thus was deprived of eleventh amendment immunity.[52]

The court then distinguished two of its earlier decisions which had extended eleventh amendment protection to a school district and to boards of regents. The court said that *Brennan v. University of Kansas,*[53] the board of regents case, was factually quite different from *Epperson.* The Board had no taxing authority and the Board "really runs" the state university, thus exercising actual control, not mere supervision.[54] The school district case, *Harris v. Tooele County School District,*[55] was distinguished on the grounds "that [in *Harris*] a money judgment rendered in federal court against the school district might be paid, at least partially, out of state funds."[56] The judgment against School District No. 480, on the other hand, would be raised by special levy within the district and would not come from state funds.[57]

The distinction the court drew between *Harris* and *Epperson* is practically nonexistent. Both school districts had the power to

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[49] 551 F.2d at 260. *See* KAN. STAT. § 72-8201 (1972).

[50] 551 F.2d at 260. *See* KAN. STAT. §§ 72-8204(a), 8209, 7021 (1972). KAN. STAT. §§ 72-8801 to 8812 (Supp. 1976) regulate the amount of taxes which can be raised by a local school district and sets up notice to citizens and election requirements in the event the tax is opposed by ten per cent of the qualified electors.

[51] 551 F.2d at 260. In the case of State *ex rel.* Miller v. Board of Educ. of Unified School Dist. No. 398, 212 Kan. 482, 511 P.2d 705 (1973), the Kansas Supreme Court, in upholding a regulation issued by the State Board of Education, said, "Considering the frame of reference in which the term [supervision] appears both in the constitution and the statutes, we believe 'supervision' means something more than to advise but something less than to control." *Id.* at 492, 511 P.2d at 713.

[52] 551 F.2d at 260.

[53] 451 F.2d 1287 (10th Cir. 1971). *See* text accompanying notes 34-36 *supra.*

[54] 551 F.2d at 260.

[55] 471 F.2d 218 (10th Cir. 1973). *See* text accompanying notes 25-30 *supra.*

[56] 551 F.2d at 260.

[57] *Id. See* text accompanying note 50 *supra.* Under KAN. STAT. § 72-8209 (1972) the district has the power to levy a tax solely for the purpose of paying a judgment.

levy taxes within the local area to fund the school budget, and to pay judgments, and both school districts received substantial state subsidies for educational purposes.[58] The *Harris* court seemed to imply that if local educational funds were used to pay the judgment then state funds would have to be increased proportionately to take up the slack.[59] The *Epperson* court said that since the Kansas school district had the power to levy a tax solely for the purpose of paying the judgment,[60] without resorting to any general educational fund, there is no direct or indirect pipeline to the state coffers and no eleventh amendment immunity. But since the governing statutes in each respective state are virtually identical, this distinction drawn by the Tenth Circuit is without merit.

III. School District Immunity in Future Decisions

The *Epperson* decision, following the Supreme Court's lead in *Mt. Healthy,*[61] isolated three factors to be used in determining whether a local school district is an arm of the state for eleventh amendment protection purposes: Local law, control, and finances.[62] By isolating these factors, the decision focused on the critical elements which must be established by a plaintiff seeking redress of his constitutional rights to avoid the defense of eleventh amendment immunity. Other factors considered by the Tenth Circuit and other federal courts in previous decisions[63] are now extraneous. By narrowing down the critical elements of proof in school district-eleventh amendment cases, counsel should be able to assess a client's case against a school district more readily, since there are fewer factors with which to contend. This consideration is important from a practical standpoint because if eleventh amendment immunity is ultimately granted to the school district, the teacher's suit to vindicate his constitutional rights is a hero's cause, with an empty promise of monetary recovery.

The financial ability of a school district to pay a judgment without direct or indirect state aid remains the one factor which

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[58] Unified School Dist. No. 480 v. Epperson, 551 F.2d 254, 260 (1976); Harris v. Tooele County School Dist., 471 F.2d 218, 220, 222 (10th Cir. 1973). (Holloway, J., dissenting).

[59] 471 F.2d at 220.

[60] *See* note 57 *supra.*

[61] 429 U.S. 274 (1977). *See* text accompanying notes 44-48 *supra.*

[62] *See* text accompanying notes 49-52 *supra.*

[63] *See* text accompanying notes 25-43 and note 41 *supra.*

the Tenth Circuit apparently finds crucial (in an albeit hazy manner) when extending eleventh amendment protection. If there is a possibility that the judgment will be satisfied from the state treasury, then the eleventh amendment is applicable.[64] On the other hand, if there is no chance the money will come from the state, then there are no eleventh amendment protections.[65] The Tenth Circuit, however, may be relaxing the stringent standard set in *Harris* concerning the meaning of "possibility." In *Harris* the local school district's power to levy taxes to pay for a judgment was not enough to cut off the possibility of the utilization of state funds to pay the judgment; in *Epperson* the local levying power, although nearly identical to that in *Harris,* was enough to preclude the possible use of state funds and thus, eleventh amendment protections.[66] By distinguishing cases that are nondistinguishable, the court may be indicating a greater willingness to find that a school district is not an alter ego of the state, by not requiring the plaintiff to show there is no possibility of state fund utilization. Under *Harris* this showing apparently amounted to proving complete state abandonment of local education.

CONCLUSION

The *Epperson* decision makes practical suits against school districts for violation of their employees' constitutional rights, by providing for a damage award when it can be shown that a school district is not an alter ego of the state. By isolating the criteria to be used in determining whether a school district is an alter ego, the court has clarified both the critical relationship that must be established between the state and the school district and the court's less protective inclinations toward school districts.

Moreover, by upholding a damage award against a school district, the court has provided an incentive to prevent future violations of teachers' constitutional rights. Without the prospect of a damage award, a school district has little to lose by failing to comply with due process requirements.[67] Teachers have not, by virtue of their employment, consented to the denial of the same

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[64] *See* text accompanying note 59 *supra.*

[65] *See* text accompanying note 60 *supra.*

[66] *See* text accompanying notes 58-60 *supra.*

[67] *See* Edelman v. Jordan, 415 U.S. 651, 692 (1974)(Marshall, J., dissenting).

basic rights and remedies enjoyed by other citizens,[68] and *Epperson* provides a vital remedy for a constitutional right.

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[68] Comment, *The Dwindling Rights of Teachers and the Closing Courthouse Door*, 44 FORDHAM L. REV. 511, 544 (1975).