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# Administrative Law

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# ADMINISTRATIVE LAW

## OVERVIEW

### INTRODUCTION

Recent Tenth Circuit decisions add little of significance to the field of administrative law, but several merit some discussion. It is clear from the increasing number of decisions concerning this area[1] that administrative agencies provide important avenues of relief to individuals who have no other accessible remedy;[2] it is also clear that the courts hesitate to substitute their discretion for that of the expert agency.[3]

### I. SCOPE AND EXTENT OF JUDICIAL REVIEW

In *Salone v. United States*[4] the Tenth Circuit denied de novo review to federal employees appealing decisions of the Equal Employment Opportunity Commission.[5] This result is consistent with other decisions which limit review to the record where the complainant is a federal employee.[6]

Other recent Tenth Circuit cases involved a review on the

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[1] There were 23 cases dealing with administrative law this year in the Tenth Circuit, compared with 15 last year. The trend seems to be that increasing numbers of decisions are being appealed; hence, it is concluded that more decisions are being made at the administrative level also.

[2] *E.g.*, Bard v. Seamans, 507 F.2d 765 (10th Cir. 1974). Note also that, where administrative agencies have been created, courts will frequently refuse relief to a complainant until all administrative remedies have been exhausted.

[3] *See* United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); St. Joseph Stockyards Co. v. United States, 298 U.S. 38 (1936).

[4] 511 F.2d 902 (10th Cir.), *petition for cert. filed*, 43 U.S.L.W. 3684 (U.S. June 19, 1975) (No. 74-1600).

[5] The complaint in *Salone* was filed under the Equal Employment Opportunity Act, 42 U.S.C. §§ 2000e-5, -16 (1970). An administrative hearing, resulting in a detailed record, preceded the judicial action.

[6] Hackley v. Johnson, 360 F. Supp. 1247 (D.D.C. 1973). *See also* Tomlin v. United States Air Force Medical Center, 369 F. Supp. 353 (S.D. Ohio 1974). These cases rely on the fact that claims brought under the civil service statutes limit review to the administrative record. Since all federal employees may seek relief pursuant to these sections, these courts would not provide a more extensive review where relief is sought under the Equal Employment Opportunity Act. This reasoning may, however, defeat the broad public policy objective evidenced in the Act. *But see* Henderson v. Defense Contract Admin. Serv. Region, 370 F. Supp. 180 (S.D.N.Y. 1973); Thompson v. United States Dep't of Justice, 360 F. Supp. 255 (N.D. Cal. 1973), *rev'd*, 372 F. Supp. 762 (N.D. Cal. 1974), *in light of* Hackley v. Johnson, 360 F. Supp. 1247 (D.D.C. 1973). On the other hand, claimants employed in private industry may have a trial de novo. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

record where appellants claimed the administrative determination was not supported by substantial evidence.[7] The Tenth Circuit found for the agencies in these decisions, which included two cases where the court examined the relationship between the determination of the administrative law judge (ALJ) and that of the agency.[8]

## II. JURISDICTIONAL AND STATUTORY INTERPRETATION ISSUES

The Tenth Circuit also based recent decisions on primary jurisdiction, exhaustion of remedies, and res judicata. In *Oklahoma Publishing Co. v. Powell*[9] the court, basing its reasoning on the doctrine of primary jurisdiction,[10] deferred its decision until the EEOC had completed administrative action.

In *Bard v. Seamans*[11] the appellate court applied the doctrine of exhaustion of remedies[12] and refused relief because Bard had

> failed to avail himself of the administrative machinery specifically provided by Congress for the purpose of reviewing and correcting military discharges.[13]

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[7] Frohlick Crane Serv., Inc. v. OSHRC, 521 F.2d 628 (10th Cir. 1975); Sage v. Weinberger, No. 74-1775 (10th Cir., Aug. 12, 1975) (Not for Routine Publication); Lowry v. Richardson, No. 74-1081 (10th Cir., June 2, 1975) (Not for Routine Publication); Thiret v. FTC, 512 F.2d 176 (10th Cir. 1975); Mandrell v. Weinberger, 511 F.2d 1102 (10th Cir. 1975); Lee Way Motor Freight, Inc. v. Secretary of Labor, 511 F.2d 864 (10th Cir. 1975); Coddens v. Weinberger, 505 F.2d 795 (10th Cir. 1974).

[8] Thiret v. FTC, 512 F.2d 176 (10th Cir. 1975); Lee Way Motor Freight, Inc. v. Secretary of Labor, 511 F.2d 864 (10th Cir. 1975).

[9] No. 74-1676 (10th Cir., Aug. 8, 1975) (Not for Routine Publication).

[10]
> The doctrine of primary jurisdiction requires a complainant in court first to seek relief in an administrative proceeding before a remedy will be supplied by the courts even though the matter is properly presented to the court in a matter within its jurisdiction.

2 AM. JUR. 2d *Administrative Law* § 788 (1962). The reasons frequently cited by courts for this deferral are related to agency expertise, availability of informed investigative agents, and the need for uniformity in ruling. *See generally* Pennsylvania R.R. v. Day, 360 U.S. 548 (1959); Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481 (1958); United States v. Western Pac. R.R., 352 U.S. 59 (1956).

[11] 507 F.2d 765 (10th Cir. 1974).

[12]
> The doctrine of exhaustion of administrative remedies requires that where a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before courts will act.

2 AM. JUR. 2d *Administrative Law* § 595 (1962). Exhaustion of remedies is analogous, in some respects, to the constitutional law principle of ripeness, in that it prevents judicial review until the matter has been finally decided by the agency and a complete record which will provide the basis for review has been compiled.

[13] 507 F.2d at 769.

Similarly, in *C. F. & I. Steel Corp. v. Morton*[14] the court refused judicial review of the correctness of a withdrawal order[15] where the steel company had failed to seek administrative review of the order.

Lack of jurisdiction based on res judicata determined *Neighbors v. Secretary of HEW.*[16] There, Neighbors filed an application for disability benefits substantially similar to one filed earlier but disallowed. No appeal from the first decision had been filed; the court would not review that decision under the guise of reviewing the second application.

Judicial review of agency decisions may be sought where there are alleged inconsistencies between decisions made by two agencies empowered to make determinations in overlapping fields of law. In two cases decided by the Tenth Circuit during 1975,[17] decisions made by HEW were attacked. Appellants argued that HEW's interpretation of words in its organic statute[18] should be controlled by an interpretation of the same words previously made by another agency. In both cases the court upheld HEW's "inconsistent" interpretation of the contested phrase or word.

A similar question was presented in *Cooley v. Weinberger.*[19] There the court was asked to decide what effect, if any, should be given by the Social Security Commission to a conviction for murder imposed by an Iranian court. The Commission's regulations preclude a convicted felon from receiving any benefits which would ordinarily accrue to the surviving spouse of one covered by Social Security.[20] The court, in upholding the Commission's

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[14] 516 F.2d 868 (10th Cir. 1975).

[15] A withdrawal order may be issued if the Interior Department finds that an "imminent danger" exists in a coal mine. All persons are ordered withdrawn from the mine and prohibited from entering. 30 U.S.C. § 814(a) (1970).

[16] 511 F.2d 80 (10th Cir. 1974). For a detailed discussion of res judicata as applied to administrative agencies, *see generally* Comment, *Administrative Law—Res Judicata—Application of Res Judicata to Administrative Agencies with Parallel Jurisdiction,* Umberfield v. School District 11, 522 P.2d 730 (Colo. 1974), 52 DENVER L.J. 595 (1975).

[17] New Mexico v. Weinberger, 517 F.2d 989 (10th Cir. 1975); Mandrell v. Weinberger, 511 F.2d 1102 (10th Cir. 1975).

[18] In *Mandrell* the dispute involved HEW's refusal to award the appellant full disability benefits despite a determination by the Veterans Administration that he was "totally disabled." In *New Mexico* the issue was whether the term "wages," as defined and used by the IRS, should control a determination under the Social Security Act.

[19] 518 F.2d 1151 (10th Cir. 1975).

[20] 20 C.F.R. § 404.364 (1971).

rejection of Doris Cooley's constitutional attacks on the Iranian judgment, held that, since there was substantial evidence in the record to support the ALJ's and Commission's findings, the claim must be denied.[21] It noted that the statute under which she was convicted and the manner in which her trial was held were sufficiently similar to the proceedings contemplated by the drafters of this regulation to justify the decision to withhold benefits.[22]

An agency's interpretation of its own organic statute[23] or its internal operating rules and regulations[24] may also provide a basis for seeking judicial review. Five cases seeking review of determinations by the Occupational Safety and Health Review Commission (OSHRC) were considered by the court during this term.[25] Each of these related to a disputed interpretation by OSHRC of its organic statute as applied to the appellant. In three of the cases the court found the agency's interpretation controlling.[26] In *Brennan v. OSHRC*,[27] however, the court held that OSHRC's interpretation of a time limitation established by a regulation authorized by its statute,[28] if upheld, would defeat the public policy reflected in adoption of the Occupational Safety and Health Act (OSHA). It overruled the Commission and held in favor of the interpretation of the Secretary of Labor.

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[21] 518 F.2d at 1155.

[22] *But see* Lennon v. INS, No. 74-2189 (2d Cir., Oct. 7, 1975). The Second Circuit looked at the standards required for conviction under British law and found that they were inconsistent with historic precedent in the United States which requires that liability be predicated upon some knowledge. British law does not, according to the court, require that the defendant possess "guilty knowledge" to be found guilty of possession of marijuana. Thus, according to their interpretation, the Immigration and Naturalization Act, 8 U.S.C. § 1182(a)(23) (1970), does not, per se, bar a grant of permanent residency status to one so convicted.

[23] C.F. & I. Steel Corp. v. Morton, 516 F.2d 868 (10th Cir. 1975); Brennan v. OSHRC, 513 F.2d 553 (10th Cir. 1975); Tennyson v. Gas Serv. Co., 506 F.2d 1135 (10th Cir. 1974); Brennan v. OSHRC, 505 F.2d 869 (10th Cir. 1974).

[24] Hall v. Fry, 509 F.2d 1105 (10th Cir. 1975).

[25] Frohlick Crane Serv., Inc. v. OSHRC, 521 F.2d 628 (10th Cir. 1975); Transcon Lines v. OSHRC, No. 74-1413 (10th Cir., April 16, 1975) (Not for Routine Publication); Brennan v. OSHRC, 513 F.2d 553 (10th Cir. 1975); Lee Way Motor Freight, Inc. v. Secretary of Labor, 511 F.2d 864 (10th Cir. 1975); Brennan v. OSHRC, 505 F.2d 869 (10th Cir. 1974).

[26] Frohlick Crane Serv., Inc. v. OSHRC, 521 F.2d 628 (10th Cir. 1975); Transcon Lines v. OSHRC, No. 74-1413 (10th Cir., April 16, 1975) (Not for Routine Publication); Lee Way Motor Freight, Inc. v. Secretary of Labor, 511 F.2d 864 (10th Cir. 1975).

[27] 513 F.2d 553 (10th Cir. 1975).

[28] 29 U.S.C. § 658(a) (1970). The regulation passed pursuant to this authorization set the time for abatement at 15 days. 29 C.F.R. § 1903.14a (1975).

In another case, also entitled *Brennan v. OSHRC*,[29] the court overruled a determination by the Commission that a standard, enacted by the Secretary of Labor, was unenforceably vague. The court noted that the case was an example of the continuing conflict between the Secretary of Labor and OSHRC over their respective roles in implementing the policy behind OSHA.[30] It found that, in the context in which the regulation was to be applied, the term "near proximity" was not so vague that it could not be applied to further the objective of the statute.

### CONCLUSION

Although several of the cases decided by the Tenth Circuit this year were interesting from a factual standpoint,[31] no unusual interpretations of administrative law were made. The court consistently restricted its scope of review to that required by statute, and only rarely did it find that an agency did not measure up to the statutory standard. By limiting its interference with the "agency process," the court furthers the basic principles which justify the existence of administrative agencies.

*Sandy Gail Nyholm*

## THE TENTH CIRCUIT VIEW OF TITLE VII DISCOVERY *EEOC v. University of New Mexico*, 504 F.2d 1296 (10th Cir. 1974); *Rich v. Martin Marietta Corp.*, 522 F.2d 333 (10th Cir. 1975)

### INTRODUCTION

Through Title VII of the Civil Rights Act of 1964 (the Act),[1] Congress created the Equal Employment Opportunity Commission (EEOC), authorized to "prevent any person from engaging in any unlawful employment practice" and empowered "to elimi-

[29] 505 F.2d 869 (10th Cir. 1974).

[30] The court, citing the Act, held that its purpose is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b) (1970).

[31] Gaspar v. Burton, 513 F.2d 843 (10th Cir. 1975), involved a constitutional challenge to the procedure utilized in dismissing the appellant from a publicly funded vocational school. For a discussion of *Cooley v. Weinberger*, see text accompanying notes 19-22 *supra*. For a discussion of *Salone v. United States*, see text accompanying notes 4-6 *supra*.

[1] 42 U.S.C. §§ 2000e-1 to -15 (1970).

nate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[2] A series of political compromises, first by the House Judiciary Committee and then by the Senate,[3] left the EEOC with no enforcement power of its own except the relatively inadequate ability to seek judicial aid in securing obedience to EEOC investigatory demands.[4]

The EEOC was created at a time of increasing public interest in eliminating employment discrimination. The EEOC's relative lack of power, coupled with this pressure to eliminate employment discrimination, meant that the EEOC's effectiveness depended upon its power of investigation and the public exposure gained through recourse to the judicial system. In such an atmosphere, courts generally enforced EEOC demands for information,[5] the rationale being that

> "it would be incongruous for Congress to create an administrative agency to function in a new sensitive and socially and economically important field", and at the same time curtail the agency's functions in investigation and persuasion.[6]

In 1972 the Act was amended to enable the EEOC to initiate civil actions in its own name in cases in which it was unable to secure voluntary compliance.[7] Although this amendment added a powerful remedy, the EEOC still lacked the administrative power of other agencies,[8] so the necessity for a broad scope of discovery remained. Furthermore, a liberal interpretation of EEOC discovery provisions, especially in the case of an EEOC-instituted Title VII suit, would render them comparable to the

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[2] *Id.* § 2000e-5(a).

[3] *See generally Developments, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971). The House Judiciary Committee took away the EEOC's power of enforcement and substituted the power to bring court actions in its own name; the Senate then eliminated the power to bring court actions.

[4] *See* 42 U.S.C. §§ 2000e-5(i), -9(b) (1970). The Attorny General also has the power to bring a court action against a pattern or practice of discrimination under 42 U.S.C. § 2000e-6 (1970).

[5] *See* cases cited note 10 *infra*.

[6] Sparton Southwest, Inc. v. EEOC, 461 F.2d 1055, 1059 (10th Cir. 1972), *quoting* Local 104, Sheet Metal Workers v. EEOC, 439 F.2d 237, 242 (9th Cir. 1971).

[7] 42 U.S.C. § 2000e-5(f)(1) (Supp. II, 1972).

[8] *See, e.g.*, 15 U.S.C. §§ 41-46 (1970), for the powers of the Federal Trade Commission, which include the ability to hold hearings, issue cease and desist orders, obtain judicial review and enforcement of actions, and the imposition of a civil penalty for violations.

discovery provisions of the Federal Rules of Civil Procedure.[9]

## I. Early Tenth Circuit Cases

In a series of cases decided since 1970, the Tenth Circuit has outlined its position in regard to the permissible scope of EEOC demands for information and, like other courts,[10] has consistently favored a broad scope to EEOC investigations of alleged Title VII violations.

### A. *Sparton Southwest, Inc. v. EEOC*, 461 F.2d 1055 (10th Cir. 1972)

In *Sparton Southwest, Inc. v. EEOC*[11] two corporations filed petitions to set aside EEOC demands for the production of records, alleging that the charges filed by the EEOC were too general and did not set forth the facts upon which they were based, as required by section 2000e-5(a) of the Act.[12] The EEOC filed cross-petitions for enforcement. In reversing the district court and holding that the charges were sufficient to actuate the discovery process, the Tenth Circuit discussed the discovery function of the EEOC:

> To require the charge to contain a specific bill of particulars would necessarily limit the scope of the investigation to the particular

[9] *See* Fed. R. Civ. P. 26-37.

[10] *See, e.g.*, the following cases which have upheld broad discovery in Title VII actions: Motorola v. McLain, 484 F.2d 1339 (7th Cir. 1973) (authority to require production of relevant documents to be broadly construed); Parliament House Motor Hotel v. EEOC, 444 F.2d 1335 (5th Cir. 1971) (EEOC entitled to examine records on departments not contained in charge); Graniteville Co. v. EEOC, 438 F.2d 32 (4th Cir. 1971) (no reasonable cause prerequisite to enforcement of demand; EEOC investigatory powers at least as broad as NLRB); Blue Bell Boots, Inc. v. EEOC, 418 F.2d 255 (6th Cir. 1969) (records on other job classifications relevant); Manpower, Inc. v. EEOC, 346 F. Supp. 126 (D. Wis. 1972) (investigative powers extend to records of any person under investigation if relevant to any unlawful employment practice); Chromcraft Corp. v. EEOC, 337 F. Supp. 653 (N.D. Miss. 1972) (no reasonable cause prerequisite to enforcement); Cameron Iron Works, Inc. v. EEOC, 320 F. Supp. 1191 (S.D. Tex. 1970) (complaint by hourly employees justified company-wide investigation); South Cent. Bell Tel. Co. v. EEOC, 314 F. Supp. 349 (E.D. La. 1970) (scope of investigation not limited to period 90-180 days prior to filing charge). *But see* General Ins. Co. of America v. EEOC, 491 F.2d 133 (9th Cir. 1974) (demand reaching back 8 years unduly broad; discovery not extended to discrimination not alleged); Georgia Power Co. v. EEOC, 295 F. Supp. 950 (W.D. Ga. 1968) (demand does not compel compilation; demand limited to 5-year period prior to violation).

[11] 461 F.2d 1055 (10th Cir. 1972). This case was consolidated with United Nuclear-Homestake Partners v. EEOC, since both involved identical issues.

[12] The 1972 amendment to Title 42 renumbered this section to section 2000e-5(b) and changed the requirement to read: "Charges shall . . . contain such information and be in such form as the Commission requires."

> transaction or transactions meticulously described, and at the same time would curtail the discovery mission of the Commission, whereby the function Congress charged it to carry out would surely fail.[13]

In subsequent decisions in which the sufficiency of EEOC charges was treated by the Tenth Circuit,[14] the court followed its decision in *Sparton*. It found that charges which contained general statements of alleged employment discrimination would support the EEOC's demands for information.[15]

### B. *Joslin Dry Goods Co. v. EEOC*, 483 F.2d 178 (10th Cir. 1973)

In a decision often cited for its effect on the scope of EEOC investigatory demands, *Joslin Dry Goods Co. v. EEOC*,[16] the Tenth Circuit heard the allegation of an employee of Joslin's downtown store that her termination was racially discriminatory. As a part of its investigation, the EEOC requested information on employees in *all* Joslin stores, including information on hiring practices.[17] The district court had held, *inter alia*, that to supply the requested information in regard to all of the Joslin stores would be to require Joslin to compile information, a duty not required by section 2000e-8 or section 2000e-9.[18] Additionally, it held that the EEOC investigation could not extend to hiring practices, inasmuch as it could not be shown that the complainant

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[13] 461 F.2d at 1060.

[14] United States Steel Corp. v. United States, 477 F.2d 925 (10th Cir. 1973); Mountain States Tel. & Tel. Co. v. EEOC, 466 F.2d 541 (10th Cir. 1972); Adolph Coors Co. v. EEOC, 464 F.2d 1270 (10th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973).

[15] The charges in question generally followed 42 U.S.C. § 2000e-2(a) (1970) in alleging discriminatory failure and/or refusal to recruit and/or hire.

[16] 483 F.2d 178 (10th Cir. 1973).

[17] *Id.* at 180-81. In paragraph 5 of its subpoena, the EEOC demanded "[a]ny like or related records retained in a different form from the documents heretofore enumerated, but reflective of the substance of the evidence in the DEMAND." *Id.* at 181. The Tenth Circuit "suggested" that this demand was too broad and too vague to be enforceable. *Id.* at 184.

[18] *See* the decision of the district court at 336 F. Supp. 941 (D. Colo. 1971). The Act states that:

> In connection with any investigation of a charge filed under Section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

42 U.S.C. § 2000e-8(a) (1970). The 1972 amendment, *id.* § 2000e-9 (Supp. II, 1972), incorporates section 161 of Title 29, which provides, in part, for the issuance of a court order requiring obedience to an administrative subpoena.

was injured by these practices and, therefore, the requirement of reasonable cause was not met.[19]

The Tenth Circuit ruled that the EEOC could investigate hiring and termination policies, but limited the EEOC's investigation to the store where the complainant had been employed.[20] In effect, then, this decision broadened the possible scope of EEOC discovery in regard to discriminatory practices, but limited the scope geographically.

C. *Circle K Corp. v. EEOC*, 501 F.2d 1052 (10th Cir. 1974)

In *Circle K Corp. v. EEOC*,[21] the Tenth Circuit further extended the scope of EEOC discovery. The charge in this case, made by an unsuccessful job applicant, was of discrimination on the basis of national origin. The EEOC wanted information on company policy relating to polygraph testing; the company alleged that, since the complainant had not taken such a test, the EEOC demand was not relevant and was too burdensome. The EEOC appealed from the denial of enforcement, and the Tenth Circuit reversed. In holding that the EEOC was entitled to this information, the court determined that "[s]tanding may be upheld absent any subjection to a discriminatory employment practice."[22] The Tenth Circuit also held that, if the charge is sufficient and the information is relevant, the demand is proper and enforceable, regardless of the potential burden to the employer.[23] The Tenth Circuit thereby extended the scope of EEOC discovery to include discriminatory practices not mentioned in the original charge, much as it had in *Joslin*. However, the Tenth Circuit was more explicit in *Circle K* than it had been in *Joslin* when it defined relevancy to include a suspected discriminatory practice which may or may not have affected the complainant.[24]

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[19] According to the Act:

> If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge . . . .

42 U.S.C. § 2000e-5(b) (Supp. II, 1972). Furthermore, "[t]he Commission shall make its determination on reasonable cause as promptly as possible . . . ." *Id.* These requirements relate solely to post-discovery actions by the EEOC.

[20] 483 F.2d at 184.

[21] 501 F.2d 1052 (10th Cir. 1974).

[22] *Id.* at 1054.

[23] *Id.* at 1055.

[24] *Id.* at 1054.

Since the *Circle K* decision, the Tenth Circuit has attempted to clarify and expand its position in regard to the scope of discovery in Title VII actions in two cases, *EEOC v. University of New Mexico*[25] and *Rich v. Martin Marietta Corp.*[26]

## II. *EEOC v. University of New Mexico*, 504 F.2d 1296 (10th Cir. 1974)

The Tenth Circuit's decision in *EEOC v. University of New Mexico*[27] is its most extensive statement to date regarding EEOC discovery in Title VII actions. As articulated in this decision, the policy of the Tenth Circuit is to give the broadest possible scope to EEOC discovery, limited only by the indefinite requirements of: (1) Lawful purpose, (2) relevancy, and (3) precise description.

### A. *Case Facts and History*

The case involved an appeal taken by the University of New Mexico from an order of the district court which required compliance with an EEOC subpoena duces tecum. The complainant, Dr. Jovan Djuric, an associate professor in the Department of Electrical Engineering, charged that the University had terminated him because of his national origin.[28] The University supplied the EEOC with, among other things, Djuric's personnel file and copies of documents relating to employees terminated for the same reason as Djuric.[29] The EEOC subpoena requested copies of personnel files of faculty then employed by the department and copies of personnel files of terminated employees for a period of time which was longer than that covered by the information the University had provided.[30]

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[25] 504 F.2d 1296 (10th Cir. 1974).

[26] 522 F.2d 333 (10th Cir. 1975).

[27] 504 F.2d 1296 (10th Cir. 1974).

[28] Djuric's original complaint, filed with the New Mexico Human Rights Commission, was based on discrimination in salary and promotion since 1966 because of national origin (Yugoslav) and religious creed. The New Mexico Commission dismissed the complaint. Subsequently, Djuric was terminated and filed a charge with the EEOC alleging discrimination because of national origin. The Tenth Circuit found that none of the causes of termination, as set forth in a memorandum from the Chairman of the Engineering Department to Djuric, was related to ancestry, national origin, or religious creed. *See* 504 F.2d at 1299.

[29] The University also produced information relating to terminations within the Engineering Department between September 1970 and the time of the action, and minutes of meetings of the Engineering Department at which Djuric's termination was discussed.

[30] The subpoena issued by the EEOC requested additional information, specifically, copies of personnel files of College of Engineering faculty who were terminated between

The University refused to comply with the subpoena. The EEOC contended that the information sought was necessary to the investigation, arguing that, if faculty members with similar jobs and similar performance records were not similarly treated, then Djuric's termination was not related to job performance.

B. *Scope of Discovery*

The Tenth Circuit's opinion in this case was concerned solely with the scope of EEOC investigation, and the policy statement it made appeared early in the decision:

> The sole limitation imposed upon the discovery procedures of the EEOC in the conduct of investigations triggered by charges filed under 42 U.S.C. § 2000e-5 is whether the information sought is "relevant" to or "relates to any matter" under investigation or in question.[31]

1. Relevancy

The main argument propounded by the University was that the EEOC subpoena was not relevant and was overbroad.[32] Section 2000e-8(a) of the Act gives broad investigatory powers to the EEOC, limited only in that the information must be relevant to investigation of a charge.[33] In its decision, the court made it clear that the investigation must be initiated by a Title VII charge of employment discrimination. Thereafter, the scope of EEOC discovery is virtually unlimited, because "relevancy" is defined in terms of what is under investigation or in question. Such a broad, circuitous definition does little to clarify the Tenth Circuit's posi-

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January 1970 and May 14, 1973 (an extension of 9 months over the time period covered by the information the University provided) and copies of all personnel files of College of Engineering faculty as of May 14, 1973 (rather than lists of relevant information which the University provided).

[31] 504 F.2d at 1301, *citing* 42 U.S.C. § 2000e-8(a) (1970) and 29 U.S.C. § 161(1) (1970). This statement by the Tenth Circuit paraphrased one made in *Cudahy Packing Co. v. NLRB*, 117 F.2d 692 (10th Cir. 1941):

> The only limitation upon the power of the Board to compel the production of documentary or oral evidence is that it must relate to or touch the matter under investigation or in question. The Board may not go beyond this limitation and pry into the affairs of a business concern generally.

*Id.* at 694.

[32] *See* 504 F.2d at 1298-99. The University argued that the EEOC had already obtained documents showing that Djuric's termination was for poor job performance. These documents included all memoranda to Djuric regarding poor job performance, including one signed by all of the other faculty in the department and several from the head of the department.

[33] *See* note 18 *supra*.

tion, except perhaps to indicate that the court does not intend to be bound by a restrictive definition.[34]

2. Subpoenas

In answer to the University's request for modification of the subpoena, the Tenth Circuit discussed standards which must be met by an administrative subpoena. Essentially, the information sought is to be as precisely described as feasible, but "cannot be so broadly stated as to constitute a 'fishing expedition.' "[35] However, the Tenth Circuit explained later, "administrative 'fishing expeditions' are often permitted," and this requirement will be "entitled to a flexible interpretation" analagous to that given the statements in an EEOC charge.[36] The Tenth Circuit, in fact, did not define the scope of investigation, but added an elusive procedural requirement. By not requiring a precise description of the information requested from faculty personnel files, the Tenth Circuit impliedly rejected the University's arguments that the subpoena, as unmodified, would lead to public disclosure of confidential information and a violation of fourth amendment rights.[37]

3. Time Period

The argument by the University that some of the information related to faculty personnel files and events prior to the 1972 amendment to the Act was given summary treatment by the court. The Tenth Circuit stated that "while Title VII speaks to the future, it necessarily embraces a backward glance in order to

[34] In the Tenth Circuit's previous cases which concerned the scope of discovery, it briefly, albeit unsatisfactorily, defined "relevancy." In Circle K Corp. v. EEOC, 501 F.2d 1052 (10th Cir. 1974), the court stated:

> The charge is sufficient to state the unlawful practice to be investigated, and the information sought is relevant to the EEOC investigation; therefore the Demand is proper.

*Id.* at 1055. In Joslin Dry Goods Co. v. EEOC, 483 F.2d 178 (10th Cir. 1973), the court noted that the question was more one of relevance than of standing: "The factual statement of a wrongful discharge is enough to justify an investigation of employment practices and policies, as to hiring as well as to firing." *Id.* at 184.

[35] 504 F.2d at 1301-02.

[36] *Id.* at 1303-04. In support of its position that the requirement of specificity will be flexibly interpreted, the Tenth Circuit analogized from previous cases construing the sufficiency of charges filed by lay complainants or the EEOC: United States Steel Corp. v. EEOC, 477 F.2d 925 (10th Cir. 1973); Mountain States Tel. & Tel. Co. v. EEOC, 466 F.2d 541 (10th Cir. 1972); Adolph Coors Co. v. EEOC, 464 F.2d 1270 (10th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973).

[37] The Tenth Circuit noted that the faculty were protected from public disclosure of confidential personnel information by 42 U.S.C. § 2000e-8 (1970), which makes such disclosure a misdemeanor.

determine whether present employment practices are perpetuating past discriminations."[38]

4. Probable Cause

The University had also argued that, since the EEOC already possessed sufficient information to show that Djuric was terminated for poor job performance, the EEOC had no probable cause to believe there had been discrimination. In response to this argument, the Tenth Circuit cited cases dealing with other administrative agencies to support its holding that an administrative investigation need not be based upon a showing of probable cause.[39]

5. Probable Outcome

The University argued hypothetically that, even if the investigation proceeded to its conclusion and the EEOC found that Djuric was lawfully terminated and that other faculty with equally poor job performances had not been terminated, Djuric would not be rehired. To answer this argument, the Tenth Circuit adopted the EEOC's position that comparative data is necessary and reiterated its liberal policy in regard to discovery.[40] The court noted: "[T]he 'broad sweep' of the Act dictates that such an inquiry may be pursued. In any event, no relief or remedy can be effected under the Act until the investigation is concluded."[41]

This policy statement followed the Tenth Circuit's earlier decisions and gave a broad scope to EEOC discovery. However, the decision in *EEOC v. University of New Mexico* went further than previous cases, stating that discovery will not be limited by

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[38] 504 F.2d at 1304. In support of this proposition, the Tenth Circuit cited previous cases in which the scope of discovery extended backwards in time: Joslin Dry Goods Co. v. EEOC, 483 F.2d 178 (10th Cir. 1974) (hiring and termination practices included in scope); Local 104, Sheet Metal Workers v. EEOC, 439 F.2d 237 (9th Cir. 1971) (access to information not limited to effective date of the Act); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970) (transfer policy discriminatory as to employees hired prior to effective date of Act); Georgia Power Co. v. EEOC, 412 F.2d 462 (5th Cir. 1969) (5-year period of investigation prior to alleged discrimination not overbroad for discovery, although 8-year period was overbroad. *See* note 10 *supra*.)

[39] United States v. Powell, 379 U.S. 48 (1964) (IRS); United States v. Morton Salt Co., 338 U.S. 632 (1949) (FTC); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1945) (Wage and Hour Administration). The *Joslin* decision also touched upon reasonable cause. *See* text accompanying note 19 *supra*.

[40] The Tenth Circuit reaffirmed the necessity for finding out whether "presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision." 504 F.2d at 1306, *quoting* McDonnell Douglas v. Green, 411 U.S. 792, 804-05 (1973).

[41] 504 F.2d at 1305.

requirements of probable cause, availability of redress, confidentiality, or procedure.

## III. *Rich v. Martin Marietta Corp.*, 522 F.2d 333 (10th Cir. 1975)

In its most recent decision relating to scope of discovery in Title VII actions, *Rich v. Martin Marietta Corp.*,[42] the Tenth Circuit appeared to be less concerned with overall policy. This may have been due, in part, to its extensive statements in the *EEOC v. University of New Mexico* decision. However, because of its concern for the particular fact situation before it, the Tenth Circuit did clarify and expand its position in several significant areas.

### A. *Case Facts and History*

The action was originally a rule 23 class action brought by seven employees[43] of Martin Marietta's Waterton plant who alleged discrimination in promotion on behalf of all females, Negroes, and Hispano-Americans who were employed or might be employed at the plant. The district court effectively defeated the class action aspect of the case by its definition of the classes, sustained the defendant's objection to the plaintiffs' interrogatories, and dismissed the matter because of the failure of the plaintiffs to prove a prima facie case.[44]

The plaintiffs' requests for discovery depended upon their definition of the plaintiff class. The district court reduced the class to 40 employees,[45] and held that the plaintiffs were to limit their interrogatories to requests for information regarding em-

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[42] 522 F.2d 333 (10th Cir. 1975).

[43] Jewel Rich, Thomas Franklin, Lawrence Collier, John Craig, John Langley and Bobby Chappell were blacks. Jose Tafoya was an Hispano-American.

[44] The district court held that: Rich and Franklin were promoted according to ability and qualifications; Langley,Collier, Craig, and Chappell failed to show that they were qualified for higher positions; and Tafoya failed to meet the criteria set forth in *McDonnell Douglas* which required the complainant to show: (1) That he was a member of a racial minority, (2) who applied and qualified for the job, but (3) was rejected despite his qualifications, and (4) that the position remained open and the employer sought other applicants. *See* 411 U.S. 792, 802 (1973). However, the Tenth Circuit made it clear that these criteria are not to be used as an approach to all Title VII cases. *See* 522 F.2d at 346-47.

[45] The district court limited the class to those 40 persons in precisely the same employment situations as the plaintiffs. As a consequence, the class was limited to female or Negro engineers, Negro Class B millwrights, Negro accountants, and Hispano-American electrical engineers.

ployees of Martin Marietta who could be specifically named.[46] The Tenth Circuit overturned the decision limiting the class as "contrary to the decisions of the Supreme Court and other federal courts."[47] The court then discussed the scope of discovery in the revised class, where the class would include all employees of the Waterton plant who were discriminated against as a result of the company's policies.

B. *Scope of Discovery*

1. Relevancy

The defendant had successfully argued at the district court level that the compilation of plant-wide statistics requested in plaintiffs' interrogatories would be too burdensome and expensive. The Tenth Circuit responded to the company's argument with a summary of its previous decisions in regard to the scope of EEOC discovery, and concluded that "[i]t cannot be said . . . that the policy of this court has been to narrowly circumscribe discovery in EEOC cases."[48] The court noted that the broad scope given to EEOC discovery under Title VII is necessary, and especially where

> immediate evidence and circumstances pertaining to the plaintiffs are not sufficient to constitute a prima facie case, plant-wide statistics and department statistics are of the highest relevance.[49]

This statement by the Tenth Circuit is reminiscent of the argument of plaintiff in *EEOC v. University of New Mexico* that

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[46] Through interrogatories, plaintiffs had requested information regarding the entire Waterton plant, including information on hiring and promotion policies. After the class was limited to four subgroups, the defendant objected that plant-wide statistics were no longer relevant, and the district court sustained this objection. The plaintiffs, therefore, were limited to statistical information already obtained from defendant showing promotions of minorities and the reports that defendant had filed with the EEOC. The Tenth Circuit noted that the reports required by the EEOC were not probative of defendant's promotion policies.

[47] 522 F.2d at 340.

[48] *Id.* at 344.

[49] *Id.* at 345. The Tenth Circuit's concern for the case as it will be tried on remand apparently stems from what it felt to be the inequities of the trial at the district court level. For example, the Tenth Circuit noted:

> [I]t was grossly unjust to allow the defendant company to utilize plant-wide statistics involving large classes of people, plus statistics of other employers in this five-county area, while at the same time restricting the plaintiffs to the narrowest possible scope.

*Id.* at 343. *See also* note 50 *infra*.

comparative data is needed,[50] inasmuch as it "very likely would prove crucial to the establishing or failure to establish a prima facie case"[51] and would be relevant to rebut any argument by defendant of business necessity.[52]

Having already discussed the relevancy standard in *EEOC v. University of New Mexico*, the Tenth Circuit did not accord it further treatment, except tangentially in relation to the balancing test discussed below. However, it is clear from the decision that "defendant's hiring, promotion and lay-off practices within individual departments on a plant-wide level"[53] were all relevant, notwithstanding the fact that the plaintiff's complaint dealt only with discrimination in promotion. The Tenth Circuit's position in *Martin Marietta* was a logical application of its previous decisions.[54]

2. Private Actions

Perhaps one of the most important aspects of the opinion is the Tenth Circuit's application of the policies, standards, and requirements developed in EEOC-initiated actions to private actions under Title VII. The Tenth Circuit made it clear that, since the elimination of employment discrimination is the objective of

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[50] In the *Martin Marietta* case, comparative data would be needed to determine the meaning of "qualified" as it related to white, male employees and the plant-wide layoff and promotion procedure.

[51] 522 F.2d at 344. The Tenth Circuit devoted approximately one-fourth of its opinion to the issue of the establishment of a prima facie case. The Tenth Circuit noted that the district court's ruling that plaintiffs had failed to establish a prima facie case largely depended upon a showing by defendant resulting from the use of statistics covering the years 1966 to 1973. In the Tenth Circuit's view this period was excessive, inasmuch as the EEOC complaint was filed in 1969 and much of the improvement in employment practices on the part of the defendant occurred between 1969 and 1973. *Id.* at 346. Additionally, the Tenth Circuit noted that the statistical information which Martin Marietta did provide the plaintiffs was not responsive to the issues, in that these statistics included Orientals and American Indians in the classification of minorities; and, since Orientals were heavily represented in the upper management, the statistics in regard to blacks, females and Hispano-Americans were distorted.

[52] In using the word "relevant" in regard to rebutting defendant's business necessity argument, the Tenth Circuit defined it as "necessity." Previously it had defined "relevancy" in connection with scope of investigations, but here the Tenth Circuit defined the term in connection with proof of the case.

[53] 522 F.2d at 343.

[54] EEOC v. University of New Mexico, 504 F.2d 1296 (10th Cir. 1974) (extended scope to include personnel files of others); Circle K Corp. v. EEOC, 501 F.2d 1052 (10th Cir. 1974) (extended scope to test not required of complainant); Joslin Dry Goods Co. v. EEOC, 483 F.2d 178 (10th Cir. 1973) (extended scope to hiring practices not a part of complaint).

both the EEOC and private court actions, "information relevant in an EEOC inquiry is equally relevant in a private action."[55] The Tenth Circuit applied its policy in regard to the requirements and limits of discovery expressed in previous cases to Title VII actions brought by private individuals.

3. Balancing Test

As to the scope of plaintiffs' interrogatories regarding plant-wide policies, the Tenth Circuit stated:

> It is plain that the scope of discovery through interrogatories and requests for production of documents is limited only by relevance and burdensomeness and in an EEOC case the discovery scope is extensive. This is a factor which the court should balance on the benefit side as against the burden of the defendant in answering the interrogatories.[56]

In addressing itself to the question of the burden to the answering party, the Tenth Circuit added another qualification to those set out in *EEOC v. University of New Mexico* and considered a restriction it had only summarily treated in *Circle K*.[57]

The court retreated from its inflexible position in *Circle K* by stating that a balancing test is involved. The burden to the defendant is to be weighed against the circumstantial nature of the evidence, the inability of the plaintiffs to obtain the information elsewhere, its importance to the establishment of a prima facie case, and its usefulness in rebutting a "business necessity" defense.[58] In the case of Martin Marietta, the Tenth Circuit noted that the figures were, in all probability, already isolated and computed. Hence, this relatively insignificant burden to the defendant was to be balanced against the relevancy (or necessity) to the plaintiffs' case.

4. Compilation

Perhaps most important from a practical standpoint is the Tenth Circuit's position regarding the compilation of requested information. The Act itself requires only that the EEOC have access to evidence and the right to copy.[59] The district court's

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[55] 522 F.2d at 344.

[56] *Id.* at 343.

[57] The Tenth Circuit had said in Circle K Corp. v. EEOC, 501 F.2d 1052 (10th Cir. 1974): "Nor can enforcement of the demand be defeated on Circle K's allegation that compliance would be unduly burdensome." *Id.* at 1055.

[58] 522 F.2d at 345.

[59] *See* note 18 *supra*.

holding in *Joslin*, untouched by the Tenth Circuit, was that "[t]here is no way that the statute can be read to require an employer to compile information."[60] This is consistent with the Federal Rules of Civil Procedure.[61] The Tenth Circuit in *Martin Marietta* initially took an equivocal position by stating "it is not at all clear that a general invitation to inspect records satisfies the defendant's obligations under the discovery rules."[62] It later suggested, however, that Martin Marietta "ought to proceed forthwith with compiling [the statistics] or at least compiling information from which plaintiffs can prepare their evidentiary tables of statistics."[63]

## CONCLUSION

In both *EEOC v. University of New Mexico* and *Martin Marietta*, the Tenth Circuit continued the trend, begun in earlier Title VII cases,[64] of giving a liberal interpretation to the scope of discovery. In these decisions, however, the Tenth Circuit began to speak more particularly of the factors to be considered in acting on motions to compel discovery, defining them in such a way that they do not restrict discovery. In *EEOC v. University of New Mexico* the requirements of relevancy, lawful purpose, precision, protection of confidentiality, and probable cause are defined so that they do not limit discovery. Similarly, in *Martin Marietta* the requirement of relevancy is broadly defined, and the burden on the answering party is balanced against the necessity of the information to the case. The Tenth Circuit moved in these cases to define more clearly the scope of discovery in Title VII actions, without limiting that scope.

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[60] Joslin Dry Goods Co. v. EEOC, 483 F.2d 178 (10th Cir. 1973), *quoting the district court*, 336 F. Supp. 941, 947 (D. Colo. 1971).

[61] *See* FED. R. CIV. P. 33.

[62] 522 F.2d at 343 n.5.

[63] *Id.* at 345.

[64] *See* text accompanying notes 11-24 *supra*.