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# Constitutional Law

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# CONSTITUTIONAL LAW

## OVERVIEW

The term of the Tenth Circuit Court of Appeals covered by this survey saw surprisingly little new ground broken in the field of constitutional law; few cases of import reached the court for consideration. This overview will highlight some of the more interesting cases involving questions of constitutional law handed down by the Tenth Circuit.

### I. FIRST AMENDMENT

#### A. *School Dress Codes*: Hatch v. Goerke, 502 F.2d 1189 (10th Cir. 1974)

Plaintiff parents brought a civil rights action under section 1983[1] to reverse a lower court holding that their son was rightfully expelled from school for refusing to cut his hair in conformance with the school's rules for student appearance. The mother of the expelled child was an American Indian.

Rather than asserting the traditional free speech objection to the expulsion of their child, the parents claimed that requiring their son to cut his braided hair "violated their parental rights to raise their children according to their own religious, cultural and moral values in violation of the First, Fifth and Fourteenth Amendments."[2] In addition, the parents claimed that the expulsion without a hearing denied their son due process under the fourteenth amendment.[3]

Although in the instant case parental, not student, rights were in issue, the court applied its reasoning from *Freeman v. Flake*,[4] holding that "the duty and responsibility of supervising

[1] 42 U.S.C. § 1983 (1970). The court stated the action was brought under 42 U.S.C. §§ 1981-83, 2000d (1970). *See* 502 F.2d at 1190.

[2] 502 F.2d at 1191.

[3] Two other claims unrelated to the appearance code were advanced by the plaintiffs: (1) The compulsory attendance rules were vague and overbroad, and (2) permitting religious services to be conducted on school premises contravened the establishment and free exercise clauses of the first amendment. *Id.* at 1193. While the court rejected the argument of overbreadth, it held that the issue concerning religious services could not be dismissed, as that issue raised a substantial question regarding the constitutional rights which plaintiffs were entitled to assert. *Id.* at 1194.

[4] 448 F.2d 258 (10th Cir. 1971).

the length of a student's hair . . . is one for the states" and should be handled through state procedures.[5]

The plaintiffs based their constitutional claim on the case of *Wisconsin v. Yoder.*[6] The Tenth Circuit, however, distinguished that case as having involved a state law which "contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child."[7] The issue of hair length in the present case, said the court, did not reach the same level of significance.

Recognizing, however, that due process entitles one to at least the "rudimentary elements of a hearing" before one can be expelled,[8] the court found that the claim by the plaintiffs that their son was denied due process could not, on its face, be dismissed. Denial of a hearing, stated the court, would deny the child "the opportunity to appear and argue, at least, for leniency or special consideration [which] could be of substantial value."[9]

B. *Right to Picket:* Garcia v. Gray, 507 F.2d 539 (10th Cir. 1974)

Following inaction in the resolution of a dispute between minority city employees and the mayor and members of the city council,[10] the appellant employees decided to picket the residences of those city officials. In response to the residential picketing that ensued,[11] the city council passed an ordinance which prohibited picketing the residence of any individual, on the grounds that people should be free to enjoy, in the privacy of their homes, a "feeling of well-being, tranquility, and privacy," and on the further grounds that picketing in residential neighborhoods constitutes a nuisance.[12]

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[5] 502 F.2d at 1192 (citation omitted).

[6] 406 U.S. 205 (1972). In *Yoder* an Amish family refused to send their children to high school as required by the state. They contended that to do so was contrary to the Amish beliefs, and that sending their children to high school would hold them up to censure by the Amish community and endanger the salvation of themselves and their children. *Id.* at 209.

[7] *Id.* at 218.

[8] 502 F.2d at 1194.

[9] *Id.* at 1195.

[10] The employees were protesting a refusal of the city council to recognize a particular union as their bargaining agent and were also protesting against alleged racial discrimination in employment practices by the city. Garcia v. Gray, 507 F.2d 539, 541 (10th Cir. 1974), *cert. denied,* 95 S. Ct. 1967 (1975).

[11] Evidence indicated that at one point 300 protesters picketed the mayor's home, chanting slogans and upsetting his family. 507 F.2d at 541.

[12] *Id.* at 542.

The appellants contended that this ordinance violated their right to free speech in that: (1) Its enactment was not unrelated to the suppression of free speech; (2) its absolute ban on residential picketing violated the first and fourteenth amendments because it did not further an important governmental interest; and (3) it was overbroad in that less restrictive alternatives existed to accomplish the same goals.[13]

In upholding the district court's verdict against the appellant employees, the Tenth Circuit applied a balancing test, balancing the relationship between the picketing and the area—the residential neighborhoods—against the possible existence of "reasonably effective alternative means of communications."[14] Finding that the conduct of picketing, as an exercise of free speech, is subject to reasonable regulation and control under the police power and that there existed alternative locations for staging protests, the court held that the sanctity of the home deserved the protection afforded it by the ordinance in question:

> The balancing of competing rights generally has resulted in a determination that the privacy of the individual householder, even that of a public official, is entitled to protection.[15]

C. *Obscenity*: United States v. Harding, 507 F.2d 294 (10th Cir. 1974)

*United States v. Harding*[16] involved a conviction for receiving obscene matter transported in interstate commerce. Upon appeal the Supreme Court remanded the case for consideration in light of the Court's decision in *Miller v. California.*[17] The Tenth Circuit then remanded to the trial court to consider the sole issue of whether the materials were obscene under the standards set out in *Miller.*

The principal issue at the trial court revolved around a stipulation made by the defendant at his original trial that the materials in question were obscene. On remand the defendant contended that:

> 1. The tests set forth in *Miller* are substantially different from the *Roth-Memoirs* standards. . . .

[13] *Id.* at 542-43.
[14] *Id.* at 543.
[15] *Id.* at 544.
[16] 507 F.2d 294 (10th Cir. 1974), *cert. denied*, 95 S. Ct. 1437 (1975).
[17] 413 U.S. 15 (1973).

> 2. Given the differences in the two tests, defendant would not have stipulated to obscenity under the *Miller* case.
> 3. Failure to relieve defendant of his stipulation where the standards of obscenity have changed deprives him of his right to have the jury decide the issue of obscenity. The trial court is not authorized to decide whether the material is obscene under *Miller.*[18]

The trial court, after considering the arguments of defendants, ruled that the materials were obscene under the *Miller* standards.

The Tenth Circuit, in affirming the district court's holding, relied on the recent Supreme Court decision in *Hamling v. United States,*[19] wherein the issue was a pre-*Miller* obscenity conviction which was reconsidered and upheld by the Ninth Circuit.[20] The Tenth Circuit noted that the Supreme Court "did not require as a constitutional matter" that courts substitute standards of a smaller geographical area for uniform national standards.[21] Further relying on *Hamling*, the court ruled that, by stipulating to obscenity based on the "redeeming social value" test, the defendant also stipulated to obscenity based on the less exacting "without serious artistic or social merit" test enumerated in *Miller.*[22]

## II. EQUAL PROTECTION

### *Title VII:* Muller v. United States Steel Corp., 509 F.2d 923 (10th Cir. 1975)

At issue in *Muller v. United States Steel Corp.*[23] was the defendant's failure to promote the plaintiff, who was of Spanish American origin, to a supervisory position. After serving 15 years with defendant company without a promotion, plaintiff quit his job and brought this suit under Title VII of the Civil Rights Act.[24] Alleging discrimination in the defendant's system of promotion, plaintiff sought, inter alia, monetary damages for his alleged constructive discharge. Defendant Steel Corporation sought reversal

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[18] 507 F.2d at 297.

[19] 418 U.S. 87 (1974).

[20] The defendant in *Hamling* was convicted of using the mails to carry an obscene book. The Supreme Court directed its attention to "what rules of law shall govern obscenity convictions that occurred prior to . . . this Court's decision in *Miller v. California* . . . ." Hamling v. United States, 418 U.S. 87, 98 (1973).

[21] 507 F.2d at 297, *citing* Hamling v. United States, 418 U.S. 87, 104 (1974).

[22] 507 F.2d at 297.

[23] 509 F.2d 923 (10th Cir. 1975).

[24] Civil Rights Act of 1964 § 703, 42 U.S.C. §§ 2000e-2(a) (1970).

of the trial court's finding of discrimination and of its award of damages for plaintiff's constructive discharge.

While people of Spanish American origin were not, to any significant degree, under-employed in defendant's plant, the court found support for plaintiff's contention that defendant's promotional practices were discriminatory.[25] In addition, while the court found that plaintiff was not lacking in credentials qualifying him for promotion, he was never, in his 15 years with the defendant, selected by his superiors for the position of spell foreman[26]—a job considered to be a forerunner to possible promotion.

To rebut the allegations of defendant that evidence was insufficient to establish discrimination against the plaintiff, the court relied on two of its earlier decisions holding that no specific intent to discriminate need be found: If the employer's conduct results in discrimination, a violation of Title VII will occur.[27] The fact that discrimination did occur, coupled with evidence that there were no "meaningful standards to guide the promotion decision,"[28] led the court to conclude that the evidence of a Title VII violation was sufficient to uphold the lower court's decision against defendant.

Finally, the Tenth Circuit considered the lower court's ruling that the plaintiff had been constructively discharged, and reviewed its decision to award monetary damages as a result of that discharge.[29] On these points the Tenth Circuit reversed. The court stated that a precondition to a constructive discharge is a conscious decision on the part of the employer to render the employee's job so intolerable as to force his resignation.[30] The evi-

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[25] During 1968 and 1969, 20-25 persons were selected for the position of spell foreman; all were of Anglo origin, and only 15 had more seniority than the plaintiff. 509 F.2d at 925.

[26] Evidence showed that the plaintiff had had 5 years of previous welding experience, had a high school degree, and had exercised community leadership. *Id.* at 925.

[27] *Id.* at 927. *See also* Spurlock v. United Airlines, 475 F.2d 216 (10th Cir. 1972); Jones v. Lee Way Motor Freight, 431 F.2d 245 (10th Cir. 1970), *cert. denied,* 401 U.S. 954 (1970).

[28] 509 F.2d at 927-28. Defendant argued that everyone promoted was more qualified than the plaintiff. The court answered by saying that "there is no basis for so concluding where there is a palpable lack of objective standards." *Id.* at 929.

[29] The court also considered and rejected defendant's argument that a business necessity existed for its actions. Relying on Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Tenth Circuit ruled that to rebut a prima facie case by the business necessity rule, the employer must show that "the maintenance of safety and efficiency requires the practice which obtains." 507 F.2d at 928.

[30] 507 F.2d at 929.

dence failed to support this precondition; the finding of constructive discharge was reversed and the monetary award against the defendant was vacated.

## III. DUE PROCESS

### A. *State Action—Right to a Hearing:* Teleco, Inc. v. Southwestern Bell Telephone Co., 511 F.2d 949 (10th Cir. 1975)

Southwestern Bell Telephone, which supplies telephone service in Oklahoma under tariffs filed with the state, suspended service to plaintiff corporation after its continued violations of the "foreign attachment" tariffs.[31] Teleco received no hearing prior to the suspension of its service, and alleged that it was denied its right to due process under the fourteenth amendment. The Tenth Circuit upheld the lower court's finding that no such violation had occurred—that the action taken by Southwestern Bell was not state action.[32]

Teleco apparently maintained that because the state required Southwestern Bell to file its tariffs with the state regulatory agency, and because those tariffs automatically became effective if no timely objection were raised, state action became an issue in any attempt to terminate service. A hearing thus would be required under the fourteenth amendment before termination of service could occur.

In reaching its decision the Tenth Circuit relied on the recent Supreme Court case, *Jackson v. Metropolitan Edison Co.,*[33] in which the Court ruled that the termination of service by a power company, which was likewise subject to extensive state regulation, did not have a sufficient nexus with the state so as to render the power company's termination of customer service state action.[34] Finding that the state involvement in the present case—requirements of state approval of company policy—was the same as that in *Jackson,* the Tenth Circuit ruled that no state action was involved and, therefore, no violation of due process

[31] The tariff in question required that any direct electrical connection be made by a coupler installed by the telephone company. 511 F.2d at 950 n.1 (10th Cir. 1975).

[32] Other grounds for reversal were also advanced by Teleco, but the most significant, and, therefore, the only one considered here, is the due process claim. *See id.* at 951.

[33] 419 U.S. 345 (1974).

[34] 511 F.2d at 951, *citing* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358-59 (1974).

had occurred by denying plaintiff a hearing prior to terminating its service.

B. *Juvenile Court Proceedings:* Radcliff v. Anderson, 509 F.2d 1093 (10th Cir. 1974)

At issue in *Radcliff v. Anderson*[35] was the retroactivity of the Tenth Circuit's decision in *Lamb v. Brown*,[36] wherein the court ruled that an Oklahoma statute[37] which afforded juvenile court proceedings to females under the age of 18, yet limited these same benefits to males who were under the age of 16, was unconstitutional as a denial of equal protection under the fourteenth amendment. Yet in *Lamb* the court concluded its decision with the statement: "This ruling shall not apply retroactively."[38]

Petitioners in the present case were, at the age of 17, prosecuted as adults for various crimes they had committed. They contended in their habeas petitions that they should have been afforded, retroactively, the benefits of the court's ruling in *Lamb*, and alleged that the statement therein regarding its retroactivity was mere dictum, and not binding on their claims. The Tenth Circuit agreed.

While conceding that the denial to the petitioners of juvenile court proceedings did not in any way affect the accuracy of the fact finding process, the court concluded that to deny plaintiffs these proceedings raised questions of "basic fairness and essential justice."[39] The court found support for its position in a Fourth Circuit case which also involved the retroactivity of a holding that the different treatment of juveniles amounted to a violation

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[35] 509 F.2d 1093 (10th Cir. 1974), *cert. denied*, 95 S. Ct. 1667 (1975). The Tenth Circuit's opinion in *Radcliff*, decided in June of 1974, did not appear in the Federal Reporter until almost a year later. The court's denial of a rehearing is found immediately following the court's decision. 509 F.2d 1093 (10th Cir. 1974).

[36] 456 F.2d 18 (10th Cir. 1972).

[37] Okla. Stat. Ann. tit. 10, § 1101(a) (Supp. 1969). The statute has since been amended and now reads: "The term 'child' means any person under the age of eighteen (18) years." *Id.* (Supp. 1974).

[38] 456 F.2d at 20.

[39] Some of the benefits available to those prosecuted under the juvenile proceedings which are not available to adults, are:

> [T]he form of petition, custody, release to parents, temporary detention, conduct of hearings, including a provision for privacy, and discretionary certification for adult proceedings after a preliminary hearing.

509 F.2d at 1095 (citations omitted).

of the fourteenth amendment.[40] In that decision the Fourth Circuit stated that to deny to those in one municipality the same proceedings available to those in all other areas of the state "seems to us so fundamentally unfair as to impeach the validity of the adult proceedings."[41]

As no question of retroactivity was raised in *Lamb* and because the court considered "basic fairness" and "essential justice" to be in issue, the Tenth Circuit ruled that, despite the dictum in the case to the contrary, *Lamb* be given retroactive effect.

## IV. NINTH AMENDMENT

*Deportation:* Cervantes v. Immigration and Naturalization Service, 510 F.2d 89 (10th Cir. 1975)

Petitioners Ramon and Ocana Cervantes, husband and wife, faced deportation for being illegally in the United States.[42] Petitioners had married subsequent to their arrival in the United States and, while in this country, Ocana gave birth to petitioner Joe Alfred.

Petitioners relied on a novel argument in an effort to avoid deportation. They claimed that "the deportation order contravenes Joe Alfred's rights under the Ninth Amendment to the United States Constitution."[43] Relying on *Griswold v. Connecticut*[44] and *Roe v. Wade*,[45] petitioners asserted that under the ninth amendment their son, a United States citizen, had a right to the continued love and affection of his parents in the country of his birth.[46]

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[40] Woodall v. Pettibone, 465 F.2d 49 (4th Cir. 1972), *cert. denied,* 413 U.S. 922 (1973). Yet Judge Seth, in a strong dissent in *Radcliff,* attacked the court's "complete reliance on the rationale of Woodall v. Pettibone." 509 F.2d at 1097 (Seth, J., dissenting).

[41] Woodall v. Pettibone, 465 F.2d 49, 52 (4th Cir. 1972).

[42] Ramon had remained in the United States past the 6-month period he was authorized to stay. His wife had never presented herself for inspection upon entering the country. 510 F.2d at 89.

[43] *Id.* at 90. The ninth amendment states:

> The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

U.S. CONST. amend. IX.

[44] 381 U.S. 479, 486 (1965) (Goldberg, J., concurring).

[45] 410 U.S. 113 (1973).

[46] In *Griswold,* Justice Goldberg argued that

> [t]he language and the history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental

The court rejected the petitioners' argument. In a previous Tenth Circuit case[47] the fifth amendment formed the basis of the plaintiff's claim that "the deportation would be unconstitutional because a family would be divided and the children would be deprived of their constitutional right to the family unit's continuation."[48] The court there found that the incidental impact the immigration laws had on the family unit was not so significant as to raise constitutional problems.[49]

Ruling on petitioners' ninth amendment claim in the present case, the court stated that the deportations threatened only an "incidental impact" on the child, and concluded that:

> We cannot agree with petitioners that the Ninth Amendment as interpreted in a concurring opinion in *Griswold* and in *Roe* compels a different result than we reached [after a consideration of the fifth amendment claim] in *Robles*.[50]

*Robert W. Drake*

## School Segregation Northern Style in Denver, Colorado

## *Keyes v. School District No. 1*, 521 F.2d 465 (10th Cir. 1975)

### Introduction

In *Keyes v. School District No. 1*,[1] plaintiffs alleged public

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rights, protected from governmental infringement, which exist along side those fundamental rights specifically mentioned in the first eight constitutional amendments.

381 U.S. 479, 488 (1965) (concurring opinion).

[47] Robles v. Immigration & Naturalization Serv., 485 F.2d 100 (10th Cir. 1973).

[48] 510 F.2d at 89.

[49] 485 F.2d at 102.

[50] 510 F.2d at 91-92.

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[1] Keyes v. School Dist. No. 1, 303 F. Supp. 279 (D. Colo. 1969) (granting plaintiffs a preliminary injunction), 313 F. Supp. 61 (D. Colo. 1970) (memorandum opinion following trial on the merits), 313 F. Supp. 90 (D. Colo. 1970) (remedial desegregation order), *aff'd in part and rev'd in part*, 445 F.2d 990 (10th Cir. 1971), *aff'd in part and rev'd in part*, 413 U.S. 189 (1973), *on remand*, 368 F. Supp. 207 (D. Colo. 1973), *aff'd in part and rev'd in part*, 521 F.2d 465 (10th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3399 (Jan. 13, 1976) (No. 75-701).

schools in Denver, Colorado were segregated.[2] Upon a finding of de jure segregation in only one part of the school district, Park Hill,[3] the district court ordered district-wide desegregation.[4] The district court found the School Board had engaged in intentionally segregative acts in Park Hill but was unable to find the Board had engaged in similar acts toward core city schools even though these schools had high concentrations of black and Chicano students. In ordering a remedy covering both Park Hill and the core city schools, the district court consciously adopted a *Plessy v. Ferguson*[5] line of reasoning.

> [S]eparate educational facilities (of the *de facto* variety) may be maintained, but a fundamental and absolute requisite is that these shall be equal. Once it is found that these separate facilities are unequal in the quality of education provided, there arises a substantial probability that a constitutional violation exists. This probability becomes almost conclusive where minority groups are relegated to inferior schools.[6]

Appeal was taken from the district court's finding and order to the Tenth Circuit[7] and was ultimately reviewed by the Supreme Court.[8] The Supreme Court focused on the district court's finding of de jure segregation in only one geographic area within the school district.

> [A] finding of intentionally segregative school board action in a meaningful portion of a school system, as in this case, creates a presumption . . . . It establishes a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions.[9]

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[2] At the outset of this litigation in 1969 plaintiffs were granted a preliminary injunction against the defendant School Board. The newly elected Board was enjoined from implementing a resolution which would have rescinded resolutions passed by the previous Board which were designed to mitigate or reduce segregation. 303 F. Supp. 279 (D. Colo. 1969).

[3] 313 F. Supp. 61 (D. Colo. 1970).

[4] 313 F. Supp. 90 (D. Colo. 1970).

[5] 163 U.S. 537 (1896).

[6] 313 F. Supp. at 83.

[7] The Tenth Circuit reversed that part of the remedy ordering desegregation of core city schools as to which no finding of de jure segregation had been made. 445 F.2d 990 (10th Cir. 1971).

[8] 413 U.S. 189 (1973). *See also* Comment, Keyes v. School Dist. No. 1: *Unlocking the Northern Schoolhouse Doors*, 9 HARV. CIV. LIB.-CIV. RIGHTS L. REV. 124 (1974).

[9] 413 U.S. at 208. The Court refused to hold, as many civil rights advocates had hoped

On remand the burden would be on the School Board to show that its segregative acts in Park Hill "did not cause or contribute to the current segregated condition of the core city schools."[10] An "allegedly logical, racially neutral explanation"[11] would not be sufficient to rebut the presumption of system-wide segregative design raised by proof of intentionally segregative action in one part of the district.[12]

The district court was ordered, on remand, first, to allow the School Board to prove that Park Hill was isolated from the rest of the district, so that actions by the School Board there would not affect the rest of the district; second, if the School Board failed to prove such isolation, the district court was ordered to determine whether the Board's acts as to Park Hill made the entire district a dual school system; and third, even if the district court did not find such acts caused Denver to have a dual school system, the School Board would still have the difficult task of rebutting the presumption that the Board's intentional segregative acts in Park Hill did not create or contribute to the segregation in core city schools.[13]

On remand the district court held the School Board had failed to show Park Hill was an isolated area. Further, the district court found the defendant School Board's acts made the entire district a dual, de jure segregated school system.[14]

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it would, that de facto segregation amounts to a constitutional violation. To have held de facto segregation was a constitutional violation would probably have resulted in a deluge of school segregation suits from areas outside the southern states where, at the time of *Brown I*, 347 U.S. 483 (1954), school segregation had been mandated by state statute or constitution. In *Keyes*, Justice Powell, with whom Justice Douglas agreed, criticized the Court for adhering to the de facto-de jure distinction. He urged the Court to take a uniform approach to school segregation unburdened by outmoded distinctions. *Id.* at 217-53 (Powell, J., concurring in part and dissenting in part). *See also* Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965); Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275 (1972).

[10] 413 U.S. at 211.

[11] *Id.* at 210.

[12] This is merely an application of the well-settled evidentiary principle that "the prior doing of other similar acts, whether clearly a part of the scheme or not, is useful as reducing the possiblity that the act in question was done with innocent intent." 2 J. WIGMORE, EVIDENCE 200 (3d ed. 1940). . . . Similarly, a finding of illicit intent as to a meaningful portion of the item under consideration has substantial probative value on the question of illicit intent as to the remainder.

*Id.* at 207-08.

[13] *Id.* at 213-15.

[14] 368 F. Supp. 207 (D. Colo. 1973). Because the district court found Denver had a

## I. TENTH CIRCUIT—THE SECOND TIME AROUND

Three issues were reviewed by the Tenth Circuit: First, whether the trial court had properly determined the entire district was a dual school system; second, whether the student reassignment and transportation plan was proper; and third, whether the order requiring bilingual-bicultural education, faculty, and staff desegregation, and the combination of two high schools was justified.[15]

The School Board conceded that Park Hill was not isolated geographically or otherwise from the rest of the district. Instead, the Board offered evidence to show the absence of causal effect between its proven segregative acts and current levels of segregation. The Tenth Circuit remonstrated the trial court's handling of this evidence:

> Although the trial court admitted and considered the Board's evidence, it was of the view that proof of extraterritorial effect was somewhat beside the point; the court viewed the principal issue on remand as whether the Board's segregative intent with respect to the entire district could be inferred from its Park Hill actions.[16]

The Board had offered the testimony of a statistician to show the absence of extraterritorial effect from the Board's Park Hill acts upon core city schools.[17] The trial court found this evidence was "merely conclusory and lacking in substance."[18] Reluctantly, the Tenth Circuit affirmed, commenting that the trial court had misunderstood the issues to be considered on remand. Nevertheless, since a correct reading of the Supreme Court's decision would have supported the trial court's ruling, that ruling could not be reversed as it was not "clearly erroneous."[19]

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dual school system, it was not necessary for the trial court to consider the third issue set out by the Supreme Court—rebuttal of the presumption of system-wide effect from proof of past intentionally segregative acts in a meaningful part of the system. *Id.* at 209.

[15] 521 F.2d 465 (10th Cir. 1975).

[16] *Id.* at 471.

[17] The statistician had studied percentage variations in the racial composition of the student bodies in Denver schools between 1962 and 1968. He had also studied the racial composition of schoolage children in Denver on a neighborhood basis between 1960 and 1970. From these studies he concluded that the Board's acts in Park Hill had no impact on the racial composition of core city schools. Plaintiffs contested his testimony with three experts of their own. *Id.* at 472.

[18] 521 F.2d at 472, *quoting* 368 F. Supp. at 210.

[19] *Id.* at 472. The court of appeals added, "An appellate court will affirm the rulings of the lower court on any ground that finds support in the record, even where the lower

Appeal was also taken by the School Board from the district court's decision to exclude the testimony of the superintendent of Denver schools.[20] The trial court rejected this testimony because it bore on conditions in Denver schools as of the time of remand rather than as of the time of the original hearing in 1969.

Testimony by the superintendent sought to disprove the existence of a dual school system in Denver by the absence of the usual, classic indicators attending statutorily enforced segregation.[21] The superintendent's testimony was based on a misapprehension of the Supreme Court's prior decision in this same litigation. There, the Court held de jure segregation could as well result from the intentional acts of the School Board as it could from a statutory scheme.[22] The superintendent's suggestion that the trial court search for the classic indicators of statutorily enforced segregation would obviously be fruitless where there was no such statutory scheme. The superintendent's testimony had the aura of a "straw man" argument. In upholding the trial court's ruling, the court of appeals said:

> [C]ourts must presume the existence of a dual school system from school authorities' segregative acts, the burden then shifting to those authorities to prove the absence of any causal relation between those acts and current levels of racial segregation.[23]

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court reached its conclusions from a different or even erroneous course of reasoning." *Id.* at 472-73.

The Tenth Circuit also affirmed the trial court's exclusion of evidence offered to show that certain segregative acts occurring in 1964 had had no effect on school segregation either inside or outside of Park Hill. The trial court had rejected this evidence on the ground of remoteness. *Id.* at 473.

[20] The school superintendent offered to testify that, as of the time of remand, Denver did not have a dual school system in the classic sense. Among the classic indicators are: State enforced separation of the races; exclusion of students from certain schools on the basis of race; designation of schools along racial lines by reference to faculty composition; and differences in transportation services and extracurricular activities. These indicators, however, arose in the context of segregation authorized or mandated by state statute or constitution. Denver's segregation, and for that matter most northern school segregation, is the result of more subtle, behind-the-scene manipulations of the School Board, an agency of the state. *Id.* at 474.

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

[22] We hold that the differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred in *Swann* is *purpose* or *intent* to segregate.

413 U.S. at 208 (footnote omitted).

[23] 521 F.2d at 474 (footnote omitted). Although the superintendent's testimony was not offered for such purpose, the Tenth Circuit suggested it would have been admissible as probative of the proper remedy in this case. *Id.* at 475.

The critical finding by the district court that Denver had a dual school system was affirmed. Given the existence of a dual, de jure segregated school system, did the trial court afford the proper remedy? After considering and rejecting remedial plans submitted by both the School Board and plaintiffs,[24] the trial court proceeded under its equitable powers to fashion a remedy of its own.[25]

Under the district court's order, elementary schools were to be desegregated in three ways: 24 schools would be rezoned; 23 schools would be rezoned and would receive students from satellite attendance areas; and 37 schools were paired for the purpose of reassigning students on a part-time basis only. Students in schools of the last category would spend one-half of their time at a segregated neighborhood school and the other half of their time at an integrated receiving school.[26] This plan was unacceptable to the court of appeals as "part-time desegregation."[27] The rule that the scope of the remedy is determined by the nature and extent of the constitutional violation[28] requires, and the Tenth Circuit so held, that full-time segregation be remedied by full-time desegregation.[29] This part of the district court's remedy was, therefore, reversed by the Tenth Circuit.

District-wide Anglo-minority enrollment ratios were utilized by the trial court as guidelines in shaping the remedy. The School Board appealed the use of this device, arguing that since its

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[24] Summaries of these two plans follow the opinion of Judge Lewis as Appendices A and B. 521 F.2d at 485-87.

[25] *E.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1970); Green v. County School Bd., 391 U.S. 430 (1968); Brown v. Board of Educ., 349 U.S. 294 (1955).

[26] 521 F.2d at 475.

> The [trial] court's principal justification for part-time pairing was the desirability of anchoring students and parents to a neighborhood school, which would continue to serve as the focus for student extracurricular activities and community functions.

*Id.*

[27] The court of appeals described the district court's order as "part-time desegregation." Relying, principally, upon two Fifth Circuit decisions, Arvizu v. Waco Indep. School Dist., 495 F.2d 499 (5th Cir. 1974), and United States v. Texas, 467 F.2d 848 (5th Cir. 1972), holding part-time desegregation an unacceptable substitute for dismantling a dual school system, the Tenth Circuit was unwilling to accept a partial remedy.

[28] Milliken v. Bradley, 418 U.S. 717 (1974); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1970).

[29] 521 F.2d at 478-79. The district court's remedy would have left 13 of the 18 predominantly minority elementary schools desegregated only on a part-time basis. *Id.*

proven intentionally segregative acts had occurred in only one part of the school district, the remedy should be similarly restricted. This suggestion would have forced plaintiffs to prove segregation in every school in the district before a district-wide remedy could be imposed. Such a suggestion flies directly in the face of the Supreme Court's direction to the district court on remand:

> If the District Court determines that the Denver school system is a dual school system, respondent School Board has the affirmative duty to desegregate the entire system "root and branch."[30]

In upholding the district court's use of district-wide enrollment data, the court of appeals declined the School Board's invitation to adopt different remedial standards for de jure segregation caused by School Board acts rather than statutory scheme.[31] A finding that the School Board's acts constituted the entire system a dual system, as the trial court found was the case in Denver, required the district court to order a plan to desegregate the *entire* system "root and branch."[32]

The court of appeals balked at approving that part of the order leaving five schools with minority enrollment between 78 percent and 88 percent. This was justified by the trial court on the ground of inaccessability of the schools and to facilitate bilingual-bicultural education.[33] In reversing, the court of appeals held the bilingual-bicultural education component of the remedy was unwarranted. No finding had been made that the curricula or teaching methods offered in Denver schools discriminated against minority students.[34] Since the scope of the remedy is determined by the nature and extent of the violation,[35] the district

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[30] 413 U.S. at 213, *quoted in* 521 F.2d at 476.

[31] 521 F.2d at 476-77. Plaintiffs, on the other hand, appealed the transportation aspect of the court's remedy because it imposed greater burdens on minority than non-minority students. The court of appeals felt the district court's remedy was not an abuse of discretion since the plan offered by plaintiffs, while allocating transportation burdens more evenly among minority and non-minority students, would have required more overall transportation. Minority students comprised 42 percent of the system's enrollment but comprised 60 percent of all students bused under the court's order. No error was found in the "balance" thus struck by the trial court. *Id.* at 479 n.13.

[32] *See* note 30 *supra*. Judge Seth, concurring specially, felt it was error for the trial court to adopt the use of district-wide enrollment ratios as guidelines. 521 F.2d at 488-89.

[33] *Id.* at 479-80.

[34] *Id.* at 481-82.

[35] *See* note 28 *supra*.

court's failure to find curricula discrimination precluded it from ordering curricular remedies.[36]

Remand was ordered to the district court for a determination of what, if any, other reasons would justify leaving these five schools with predominantly minority compositions. Unless it is shown on remand that desegregation of these schools would be impractical or unwise, or segregation in these schools was not the result of past School Board discrimination, then the district court's duty to eliminate segregation "root and branch" requires the court to order these schools be desegregated.[37]

## CONCLUSION

The *Keyes* case was before the Tenth Circuit for the second, but maybe not the last time.[38] While the larger, more abstract questions of the case have been settled,[39] the practical and often harder problems associated with actual desegregation remain ahead. Over these issues the litigation continues.[40]

*Nancy A. Hopf*

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[36] In so holding, the Tenth Circuit distinguished the case before it from the situation in Lau v. Nichols, 414 U.S. 563 (1974), and a previous Tenth Circuit decision based on *Lau*, Serna v. Portales Municipal Schools, 499 F.2d 1147 (10th Cir. 1974). In both of those cases, curricula remedies were warranted because plaintiffs specifically proved curriculum discrimination against non-English speaking students. Both of those cases, moreover, were decided on statutory rather than constitutional bases. 521 F.2d at 483. *Lau* and *Serna* were decided under section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970). *See Tenth Circuit Survey*, 52 DENVER L.J. 90 (1975).

In a belabored effort to discredit the bilingual-bicultural education component of the district court's remedial order, the court of appeals went on to hold that the Constitution does not require states to adopt educational plans "tailored to [minorities'] unique cultural and developmental needs." 521 F.2d at 482. And by way of dictum, the court of appeals said that such programs, even when justified, are "not a substitute for desegregation." *Id.* at 480. This statement appears to be overkill in the court of appeals' effort to discredit the trial court's use of a bilingual-bicultural component in the remedy. School pairing, rezoning of school boundary lines, student transportation, minority faculty recruitment and reassignment, and bilingual-bicultural education are all desegregation tools. Which of these tools a district court must use depends in each case upon the nature and extent of the violation proved. *See* note 28 *supra*.

[37] 521 F.2d at 480. Ironically, the court of appeals vacated that part of the trial court's order consolidating two high school campuses to achieve an overall Anglo enrollment of 55 percent. The Tenth Circuit found no support for this order in the record. *Id.* at 483-84. That part of the court's order on faculty and staff desegregation was affirmed. *Id.* at 484-85.

[38] "All parties appeal with typical inflexibility of position . . . ." *Id.* at 468.

[39] *See* notes and text accompanying notes 8-13 *supra*.

[40] 521 F.2d 465 (remanding issues to the trial court), *cert. denied*, 44 U.S.L.W. 3399 (Jan. 13, 1976) (No. 75-701).

# TEACHERS' SPEECH AND FIRST AMENDMENT RIGHTS *Bertot v. School District No. 1*, 522 F.2d 1171 (10th Cir. 1975)

## INTRODUCTION

Mrs. Donna Bertot and Mrs. Martha Sweeny, teachers at Laramie High School, brought suit under 42 U.S.C. § 1983[1] in the United States District Court for the District of Wyoming after the Albany School District Board of Trustees (the District) voted not to renew their contracts.[2] The plaintiffs claimed that the District's action was in retaliation for their exercise of first amendment rights and that the procedures used by the board members in making the decision denied them the right to procedural due process. Plaintiffs sued the District and its board members, the superintendent of schools, and the school principal, in their individual and official capacities, asking for declaratory and injunctive relief and damages.

The case was submitted to the jury on a charge covering the first amendment claims and the defendants' assertions of immunity. The trial court refused to submit any factual claim on the due process question, because, under Wyoming law, plaintiffs' contracts could be terminated without a hearing.[3] The jury answered two special interrogatories against the plaintiffs and returned a general verdict for the defendants.[4]

[1] 42 U.S.C. § 1983 (1970) [hereinafter cited as section 1983] provides:

> Every person who, under color of any statute . . . subjects, or causes to be subjected any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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

[3] Wyoming law classifies teachers as either initial contract teachers or continuing contract teachers. An initial contract teacher is one who has not achieved continuing contract status. WYO. STAT. ANN. § 21.1-152(d) (Supp. 1975). Continuing contract teachers are those who have been employed by the same school district for 3 consecutive years and have had their contracts renewed for a fourth, or those teachers who have achieved continuing contract status in one district, have taught for 2 consecutive years without lapse of time, and have had their contract renewed for a third in another school district. *Id.* § 21.1-152(b). Continuing contract teachers are employed on a continuing basis and are entitled to a hearing before the board within 30 days after receiving a notice of termination. *Id.* §§ 21.1-154, 21.1-158. The Wyoming statutes do not provide for a hearing when an initial contract teacher is not rehired.

[4] The special interrogatories were: (1) Whether the defendants acted in good faith in

The Court of Appeals for the Tenth Circuit upheld the decision of the trial court regarding the due process issue and Sweeny's first amendment claim. The court found, however, that Bertot was entitled to a judgment notwithstanding the verdict on her first amendment claim. The court directed that Bertot be granted declaratory and injunctive relief, but found that the defendants were immune from damages in their individual capacities.[5] On remand, the district court was directed to determine the liabilities of the District and the individual defendants in their official capacities.[6]

## I. ISSUES AND FACTS

In *Bertot* the Tenth Circuit was faced with three separate issues. The first was whether initial-contract (or nontenured) teachers are entitled to the protections of procedural due process when they are not rehired.[7] The second concerned the type of

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failing to renew the plaintiffs' teaching contracts, and (2) whether the defendants acted maliciously and for the purpose of retaliation in failing to renew the contracts. 522 F.2d at 1175. (Lower court action not reported.)

[5] *Id.* at 1177, 1184, 1185.

[6] *Id.* at 1185.

[7] In *Bertot* neither plaintiff received a hearing prior to the nonrenewal of her contract. It is settled law that one has no interest in reemployment protected by procedural due process, unless one can demonstrate that nonrenewal would deprive him of liberty or that he has a property interest in continued employment. Board of Regents v. Roth, 408 U.S. 564 (1972). Property interests are created and their dimensions defined by existing rules or understandings that stem from sources independent of the Constitution, such as state law or particular agreements. *Id.* at 577. One can acquire "de facto tenure" if there are implied agreements to the effect that once a teacher has met certain criteria he can count on continued employment. Perry v. Sindermann, 408 U.S. 593 (1972). In *Sindermann* the Court upheld plaintiff's claim to "de facto tenure" on the ground of an understanding fostered by the college administration. Citing *Roth* the Court stated that "a person's interest is a property interest for due process purposes if there are such rules or mutually explicit understandings to support his claim of entitlement to the benefit." *Id.* at 601. For a discussion of *Roth* and *Sindermann*, see Shulman, *Employment of Nontenured Faculty: Some Implications of* Roth *and* Sindermann, 51 DENVER L.J. 215 (1974).

The Tenth Circuit found that neither Sweeny nor Bertot had statutory or contractual tenure. 522 F.2d at 1176. Appellants were initial contract teachers. *See* note 2 *supra*. With respect to initial contract teachers, the Wyoming Supreme Court has stated it is aware of no statutory or contractual right to reemployment. O'Melia v. Sweetwater County School Dist., 497 P.2d 540, 542 (Wyo. 1972). Nor did either Sweeny or Bertot present sufficient evidence to put in issue the question of whether they had an implied property right to continued employment. 522 F.2d at 1177. The court applied the rule that

> when the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court

evidence necessary to show that a teacher's contract was not renewed because her employers objected to certain of her activities protected by the first amendment.[8] The third and most complex issue involved the question of who could be held liable for damages when the nonrenewal of a teacher's contract was found unconstitutional. This comment will discuss the court's treatment of the issues decided and analyze the questions remanded.

Sweeny had appeared on a local radio program where she took a position contrary to that of the board members concerning the school dress code. Sweeny argued that this was a reason for her not being rehired.[9] The court, however, pointed to the fact that every member of the board testified that Sweeny's appearance on the show had no bearing on their decision,[10] and that the criticism of her work included things unrelated to the radio program.[11] The court concluded that, with respect to Sweeny, the jury's findings were supported by the record.

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> should determine the proceeding by non-suit, a directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict.

*Id.* at 1176, *citing* Brady v. Southern Ry., 320 U.S. 476, 479-80 (1943). The court found that evidence to support appellants' claim of "de facto tenure" was "wholly lacking." *Id.* at 1177.

[8] It is fundamental that teachers, even though nontenured, cannot be fired or fail to have their contracts renewed for exercising constitutional rights. Perry v. Sindermann, 408 U.S. 593, 596-98 (1972); Pickering v. Board of Educ., 391 U.S. 563 (1968); Adams v. Campbell County School Dist., 511 F.2d 1242, 1246 (10th Cir. 1975); Rampey v. Allen, 501 F.2d 1090 (10th Cir. 1974). *See Tenth Circuit Survey,* 52 DENVER L.J. 85 (1975).

[9] The incident apparently upset the principal, and he brought the matter up with the District when they were discussing her contract. In the written criticism of her work that he later prepared, the principal referred to this incident as an example of "lack of judgment."

[10] Every board member flatly stated that Mrs. Sweeny's radio appearance did not influence their decision. 522 F.2d at 1179. It has been said:

> When a violation of First Amendment Rights is alleged, the reasons for dismissal or nonrenewal of an employment contract must be examined to see if the reasons given are only a cloak for activity or attitudes protected by the Constitution.

Board of Regents v. Roth, 408 U.S. 564, 582 (1972) (Douglas, J., dissenting). The Tenth Circuit, aware of the possibility of concealed motives on the part of the school board members, stated that it was "important to consider the manner in which the board reached its decision and the matters relied upon in the process, considering both the recommendations to the [District] and any additional reasons for their action." 522 F.2d at 1178.

[11] From the record, the "things" included lack of discipline in her classrooms, antagonism of students, utilization of class time for discussing material not related to the subject of the class, and poor judgment. It would seem that the actions described are not constitu-

As in the case of Sweeny, the principal prepared a written criticism of Bertot's work after the District decided not to renew her contract.[12] The principal criticized Bertot for: (1) Encouraging the development of an "underground" student newspaper; (2) not seeking his advice with respect to that newspaper; and (3) after learning of his opposition to the newspaper, soliciting a non-staff person to aid the students. The principal regarded Bertot's actions and attitudes concerning the student paper as "insubordination." He also included under "lack of judgment" an incident in which Bertot showed some students a film deemed not appropriate for sophomore classes.[13] He also cited her greeting of students with a peace sign as an example of "immaturity."

When the concept of a student newspaper had come up in Bertot's English class, she had told the students that, although classtime could not be spent on it, she was willing to help them after school hours. Dr. Ludwick learned of the proposed project and voiced his disapproval. Bertot then withdrew from the project, but the students continued alone and published one issue. Shortly thereafter, the principal told Bertot that he thought she should stop the students from publishing more issues.

The court found that, although some reference was made to the film incident and peace signs, "it is an inescapable conclusion from examining [the] record that Mrs. Bertot's actions connected with the student newspaper were the paramount and recurring reason for non-renewal of her contract."[14] The court also concluded that first amendment protections extend to activities in connection with the publication of a newspaper[15] and, there-

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tionally protected on the theory of balancing the interest of the teacher in commenting on matters of public concern with the interest of the state in promoting the efficiency of its public services. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968). Nor are they protected under the material and substantial disruption test of Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 513 (1969).

[12] The criticism is reproduced at 522 F.2d at 1180 n.3.

[13] Later a disturbance was caused by a student who was given the film by Bertot for his private viewing. The principal objected to the film about black militancy because it made the police look foolish. Record at 157, *id.* at 1171.

[14] *Id.* at 1182. In the case of Bertot, the testimony of the superintendent of schools, who was also a member of the personnel committee, and the testimony of the board members showed that they relied on the reasons presented by the principal in determining not to renew her contract. *Id.*

[15] *Id.* at 1183, *citing* Papish v. University of Mo. Curators, 410 U.S. 667 (1973); Pickering v. Board of Educ., 391 U.S. 563 (1968). *See also* Joyner v. Whiting, 477 F.2d

fore, the district court was in error when it refused to grant Bertot's motion for a judgment notwithstanding the verdict.

From the Tenth Circuit's treatment of Bertot and Sweeny, some observations can be made. The method relied upon by the court in reaching its decision was to examine carefully the District's proceedings as reflected in the trial record. If, as a result of such scrutiny, it appears that the discharge was based upon constitutionally protected behavior, the discharge cannot stand. It must be clear to the court that the invalid reasons, although discussed, played *no part* in the decision not to rehire. If the invalid reasons played no part and the valid reasons are documented on the record, the decision will stand.[16] In Sweeny's case the court clearly relied on the board members' testimony pertaining to her radio appearance as showing that it was not a factor in their decision. As the court saw it, the District's decision was based entirely upon the "other (valid) reasons" that appeared on the record. In Bertot's case the court apparently disregarded the film incident, which might have provided a valid reason for nonrenewal. It is, therefore, reasonable to postulate that when an invalid reason is given *any* weight, the decision will be overturned.[17]

## II. REMEDIES

Once a determination was made that the nonrenewal of Ber-

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456 (4th Cir. 1973); Shanley v. Northeast Indep. School Dist., 462 F.2d 960 (5th Cir. 1972); Fujishima v. Board of Educ., 460 F.2d 1355 (7th Cir. 1972); Eisner v. Stamford Bd. of Educ., 440 F.2d 863 (8th Cir. 1971); Scoville v. Board of Educ., 425 F.2d 10 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970).

[16] It is important to note that in neither Sweeny's nor Bertot's case did the court feel it was presented with a situation where valid and invalid reasons were more or less equally weighted in making the decision not to rehire. While finding in Sweeny's case that her radio appearance played no part in the District's decision to terminate her employment, the court concluded that, as to Bertot, the newspaper activities were the "paramount and recurring" reasons for her nonrenewal. 522 F.2d at 1179, 1182.

[17] Appellants argued this position in their brief and cited cases standing for the proposition that a dismissal is unconstitutional if motivated even partly by first amendment activities. Brief for the Plaintiffs-Appellants at 15-16, *id.* at 1171. *See* Simard v. Board of Educ., 473 F. 2d 988, 995 (2d Cir. 1973); Gieringer v. Center School Dist. 477 F.2d 1164, 1166 n.2 (8th Cir.), *cert. denied*, 414 U.S. 832 (1973); Langford v. City of Texarkana, 478 F.2d 262, 268 (8th Cir. 1973); Cook County College Teachers Union v. Byrd, 456 F.2d 882, 888 (7th Cir.), *cert. denied*, 409 U.S. 848 (1972); Fluker v. Alabama State Bd. of Educ., 441 F.2d 201, 210 (5th Cir. 1971). The typical language refers to actions based in part upon protected activities. Presumably "in part" includes "small part" but the issue has not been discussed directly.

tot's contract was the result of constitutionally protected activity, the Tenth Circuit faced the issue of remedies. Although Bertot was clearly injured by the action of the District, the question who should bear the burden of that injury remained. The fact that public officials, discharging their duties, were responsible for that injury raised some competing policy considerations: While on the one hand it is unjust to deny compensation to an injured party, it is seldom contested that the public interest is better served when officials can perform their duties without fear of personal liability.

The defendants in *Bertot* were sued in both their individual and official capacities. The court declared that Bertot was entitled to declaratory and injunctive relief. With respect to her claim for money damages and backpay, the court found the defendants in their individual capacities immune.[18] The case was remanded to determine whether the Board and the defendants, as officials, could also claim immunity. The district court was also directed to determine whether the District was a "person" subject to suit under section 1983 and whether the eleventh amendment barred a damage claim against the District and its officials. For a more complete understanding of *Bertot,* it is necessary to discuss the court's basis for finding the defendants individually immune and, also, the main issues to be considered on remand.

### A. *Good Faith Immunity of Individual Defendants*

The rationale for extending personal immunity to public servants for harm they may cause in performing their functions is, primarily, that the public benefits when its servants are able to act without concern over possible liability. If officials are not personally immune they will be deterred from acting when speed is necessary or the law unsettled. They will be hindered in making difficult decisions required in a complex society.

In the Tenth Circuit the doctrine of good faith immunity was first applied to school officials in *Smith v. Losee.*[19] The court there declared that the defense of immunity was established by a showing that the decision not to renew an employment contract:

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[18] 522 F.2d at 1185.

[19] 485 F.2d 334 (10th Cir. 1973). Smith sued the Utah State Board of Education and various college officials, alleging deprivation of tenure and nonrenewal of his contract because of activities protected by the first amendment.

(1) Was a board action representing an exercise of the discretion vested in it by state law, (2) was made in good faith, and (3) was based on a valid reason evidenced in the record.[20] The Tenth Circuit, in *Bertot,* also relied on a recent Supreme Court case which considered the status of a school board member's immunity from damages in the context of a section 1983 action concerning school discipline.

*Wood v. Strickland*[21] involved three girls who were expelled for violating a school regulation against the use or possession of intoxicating beverages at school activities. Two of the girls, claiming a violation of section 1983 and their due process rights, brought suit against the school board members, two administrators, and the school district. They asked for compensatory and punitive damages, and declaratory and injunctive relief. The Court declared the test of immunity to be as follows:

> [A] school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within the sphere of his official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. . . . A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.[22]

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[20] *Id.* at 344.

[21] 420 U.S. 308 (1975).

[22] *Id.* at 322 (citations omitted). The Supreme Court derived this test from three prior cases dealing with the scope of official immunity. In Tenney v. Brandhove, 341 U.S. 367 (1951), the Court found that since section 1983 was silent with respect to immunities, there was no cause for thinking that Congress intended to eliminate a legislator's traditional immunity from civil liability for acts done within the scope of his duties.

Pierson v. Ray, 386 U.S. 547 (1967), involved the immunities of a judge and arresting officers in a section 1983 suit. The Court found that a judge's immunity from damages for acts committed within his judicial discretion was firmly entrenched in the common law. Since the legislative record gave no clear indication that section 1983 was intended to abolish common law immunities, the judge was found to be immune and the officers were afforded the common law defense of good faith and probable cause in section 1983 actions. In Scheuer v. Rhodes, 416 U.S. 232 (1974), the Court stated that the eleventh amendment barred suit where one was seeking money damages from the public treasury, but that it was clear from the doctrine of *Ex parte* Young, 209 U.S. 123 (1908), that the amendment did not bar section 1983 suits against public officials who deprive others of federal rights under the color of state law. Damages against individual defendants are

The Court reasoned that if the school's decisionmakers were held liable for damages every time an action is found to violate a student's constitutional rights, it would unfairly impose upon them liability for good faith mistakes made while exercising their official discretion.[23]

The Tenth Circuit was the first circuit to apply the immunity test stated in *Wood*. The court found that the discretionary authority the board members exercised over the employment contracts in *Bertot* was analogous to the discretionary authority exercised in *Wood*. Applying the *Wood* test, the court concluded that the defendants, having acted in their official capacities, were immune from damages individually.[24] The record did not support a finding of malice; furthermore, the jury had expressly found that the defendants had acted in good faith in deciding not to rehire the plaintiffs. In addition, the court found[25] that at the time of the District's decision, the defendants could not have known their action would violate Bertot's constitutional rights, because the Tenth Circuit had earlier dismissed, for failure to state a claim, a section 1983 suit that was brought on a very similar set of facts.[26]

## III. REMAND ISSUES

*Bertot* was remanded to the trial court for a determination

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permissible in some circumstances notwithstanding the fact that they hold public office. The Court described executive officers' immunity for official acts as being varied in scope, depending upon the extent of their discretion, the responsibilities of the office, and all the circumstances as they reasonably appeared at the time of the action.

> It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974).

[23] Wood v. Strickland, 420 U.S. 308, 319-20 (1975). The Court reasoned that some degree of immunity is necessary in order that the school officials will realize that actions taken and decisions made in good faith in the performance of their duties will not be punished. Even though the Court had stated that the *Wood* test was to be applied "in the specific context of school discipline," *id.* at 322, 4 months after that decision the Supreme Court remanded, for consideration in light of *Wood*, a case involving the liability for damages of the superintendent of a state mental hospital. In O'Connor v. Donaldson, 422 U.S. 563 (1975), the plaintiff was wrongfully kept against his will in a state hospital without receiving treatment.

[24] 522 F.2d at 1185.

[25] *Id.*

[26] Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969).

of the issues concerning plaintiff's damage claim against the District and the individual defendants as officials. The district court was also directed to consider what effect potential immunities would have on the claim.[27] A brief discussion of the issues involved may help to clarify the ultimate outcome of the case.

A. *Eleventh Amendment*

A basic question in an action such as this is whether it constitutes a suit against the state. The eleventh amendment prohibits federal courts from taking jurisdiction over suits brought against a state by a citizen of the state.[28] However, that amendment does not bar a suit when the plaintiff is seeking prospective equitable relief, such as enjoining a public official to act in accordance with federal law.[29] Recently, the Supreme Court, in *Edelman v. Jordan,*[30] reaffirmed the basic eleventh amendment test: If state funds must ultimately be used to pay an award, the suit is regarded as being a suit against the state, whether or not the state is a named party, and the suit is therefore barred by the amendment.

The eleventh amendment, however, does not bar suits against counties or municipal corporations. In *Edelman* the Court stated:

> A county does not occupy the same position as a state for purposes of the Eleventh Amendment. [There is a] long established rule that while a county action is generally a state action for purposes of the

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[27] The district court was directed to determine whether the good faith immunity could apply to the District as a corporate entity and to the other defendants in their official capacities, whether the eleventh amendment would bar a damage action against the district and its officials, and whether the school district was a "person" suable under section 1983. 522 F.2d at 1185.

[28] The eleventh amendment states:

> 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.

The Supreme Court has often held that the amendment also bars suits against an unconsenting state by its own citizens. *See* Employees v. Department of Pub. Health & Welfare, 411 U.S. 279 (1973); Parden v. Terminal Ry., 377 U.S. 184 (1964); Great N. Life Ins. Co. v. Read, 322 U.S. 47 (1944); Duhne v. New Jersey, 251 U.S. 311 (1920); Hans v. Louisiana, 134 U.S. 1 (1890).

[29] *Ex parte* Young, 209 U.S. 123 (1908).

[30] 415 U.S. 651 (1974).

Fourteenth Amendment, a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment.[31]

In determining whether a suit is against the state or some nonprotected corporation or political subdivision, the concept of "alter ego" is often used.[32] The term is used to denote two or more entities, not separate and distinct, one of which is an instrumentality of the other. In *Harris v. Tooele County School District*,[33] the Tenth Circuit ruled that the eleventh amendment barred a tort claim against a Utah school district. The court stated that whether a suit against a government subdivision is a suit against the state depends on the pertinent state law. The Utah Supreme Court had declared school districts to be agents of the state. The court also applied the basic eleventh amendment test of *Edelman*. The court concluded that the district was not a separate and distinct entity from the state but was rather its alter ego; therefore, the district was entitled to the state's immunity from suit in a federal court.[34] Court decisions are virtually unanimous in ruling that, where a school board or school district is sued and monetary damages rather than injunctive or declaratory relief is requested, the suit will be barred by the eleventh amendment.[35]

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[31] *Id.* at 667 n.12. The leading case for the proposition that the eleventh amendment does not bar suits against counties and municipal corporations is Lincoln County v. Luning, 133 U.S. 529 (1890). That case was an action on county bonds and coupons. *Accord*, Griffin v. School Bd., 377 U.S. 218 (1964). "It has long been established that actions against a county can be maintained in United States courts in order to vindicate federally guaranteed rights." *Id.* at 233.

[32] *E.g.*, George R. Whitten Jr., Inc. v. State Univ. Constr. Fund, 493 F.2d 177 (1st Cir. 1974); Harris v. Tooele County School Dist., 471 F.2d 218 (10th Cir. 1973); Kansas Turnpike Authority v. Abramson, 275 F.2d 711 (10th Cir. 1960).

[33] 471 F.2d 218 (10th Cir. 1973).

[34] *Accord*, George R. Whitten Jr., Inc. v. State Univ. Constr. Fund, 493 F.2d 177 (1st Cir. 1974), where state funds used to finance state university buildings (the construction of which was seen as a state function) were dependent on state appropriations for support; therefore, the fund was an alter ego of the state and protected from suit by the eleventh amendment. *See* Kansas Turnpike Authority v. Abramson, 275 F.2d 711 (10th Cir. 1960). There, the turnpike authority was found not to be an alter ego of the state because it was a public corporation, not under state or agency supervision. "In sum, it is a public corporation—a creature of the legislature empowered to perform designated proprietary functions without any obligation on the part of the State." *Id.* at 713.

[35] *See* Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962); De Levay v. Richmond County School Bd., 284 F.2d 340 (4th Cir. 1960); O'Neill v. Early, 208 F.2d 286 (4th Cir. 1953); Gainer v. School Bd., 135 F. Supp. 559 (N.D. Ala. 1955). *Contra*, Fabrizio & Martin, Inc. v. Board of Educ., 290 F. Supp. 945 (S.D.N.Y. 1968). The "where would the money come

On remand, the threshold question regarding Bertot's damage claim is whether it will be considered a suit against the State of Wyoming. Accordingly, the court must look to the source of the funds that would be used to satisfy an award. If the funds would ultimately come from the state, *i.e.*, if the district is found to be an alter ego of the state, then Bertot's claim will be barred.[36] Wyoming law will govern whether Bertot can bring a damage claim against the District and board members in their official capacities. Unlike the Utah court in *Harris*, the Wyoming Supreme Court has not yet determined the relationship of school boards to the state, and thus Wyoming statutes must be analyzed.[37]

B. *Section 1983 Immunity*

The language of section 1983 refers to "persons" who act under the color of state law to deprive others of federal rights. The leading Supreme Court decision on section 1983 immunity is *Monroe v. Pape,*[38] which concerned a suit brought against certain police officers and the City of Chicago. The Supreme Court analyzed in depth the history of section 1983 and concluded that there was a cause of action against the individual police officers but none against the city.

> The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by

from" test was used to find that the school district was not an alter ego of the state but a separate corporation. The state would not suffer from a judgment against the district.

[36] A suit against the individual board members in their official capacities would have to be considered a suit against the district that employs them.

[37] The Wyoming Education Code of 1969, WYO. STAT. ANN. §§ 21.1-1 to -289 (Supp. 1970) states that school districts are corporate entities which can sue or be sued through the board. *Id.* §§ -17, -27(a). Financial support for the school districts may be derived from diverse sources: Funds may be obtained locally, from the county, from the state and federal governments, and from various building funds, reserve funds, and bond issues. *Id.* §§ -213 to -289. All school district funds are raised directly or indirectly through taxes. In theory a damage award could be paid out of funds derived solely at the local or county level, but, arguably, even this may ultimately reduce state funds. School districts operate on fairly strict budgets; thus, if an award was to deplete the amount of money raised locally, then that amount would have to be made up from another source. One likely source is the state treasury.

[38] 365 U.S. 167 (1961). This is the famous case involving 13 Chicago police officers who broke into Monroe's home without a warrant and forced him and his wife to stand naked in the living room while they ransacked the house. They took Monroe downtown and held him for 10 hours without allowing him to call a lawyer and then released him without charges.

> the Act of April 20, 1871, was so antagonistic that we cannot believe that the word "person" was used in this particular Act to include them.[39]

The word "municipalities" has been held to include the state and all its subdivisions of government including municipal corporations.[40] Furthermore, where a school district, school board, or state university has been sued for damages under section 1983, the courts have consistently held that the suit could not be maintained.[41]

It seems, then, that in order to bring a successful damage suit under section 1983 against the District, Bertot will have to show that Wyoming school districts are not part of the municipal government. However, the courts generally view the activities included in the term "municipal government" very broadly; almost any damage action which would result in an award paid out of public funds is considered outside the scope of section 1983.

C. *Immunities*

The eleventh amendment and section 1983 aside, there is one further barrier standing between Bertot and recovery. The final question is whether the defendant school officials and the corporate District are protected by some sort of common law executive

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[39] *Id.* at 191. Although the holding of *Monroe* had been confined to actions where only damages were being sought and equitable or declaratory relief against municipalities had been considered permissible in section 1983 actions, a recent Supreme Court decision has declared that a city is protected from suit under section 1983 even when only equitable relief is sought. City of Kenosha v. Bruno, 412 U.S. 507, 512-13 (1973). There, the only named defendants were cities; no individual officials were named either in their official or individual capacities. *Id.* at 508.

[40] For cases holding a state is not a person within section 1983, see Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), Fear v. Pennsylvania, 413 F.2d 88 (3d Cir. 1969), Williford v. California, 352 F.2d 474 (9th Cir. 1965). *See also* Sykes v. California, 497 F.2d 197 (9th Cir. 1974) (Department of Motor Vehicles not subject to suit under section 1983); Hathaway v. Worcester City Hosp., 475 F.2d 701 (1st Cir. 1973) (hospital not within section 1983); Barden v. University of Pittsburg, 497 F.2d 1 (3d Cir. 1973) (university not within section 1983); Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973) (city council not suable under section 1983); Ries v. Lynskey, 452 F.2d 172 (7th Cir. 1971) (city not within section 1983).

[41] *E.g.*, Sterzing v. Fort Bend Indep. School Dist., 496 F.2d 92 (5th Cir. 1974); Huntley v. North Carolina Bd. of Educ., 493 F.2d 1016 (4th Cir. 1974); Williams v. Eaton, 443 F.2d 422 (10th Cir. 1971); Buhr v. Buffalo School Dist., 364 F. Supp. 1225 (D.N.D. 1973); Jones v. Jefferson County Bd. of Educ., 359 F. Supp. 1081 (E.D. Tenn. 1972); Webb v. Lake Mills Community School Dist., 344 F. Supp. 791 (N.D. Iowa 1972); Miller v. Parsons, 313 F. Supp. 1150 (M.D. Pa. 1970).

immunity.[42] The issue involved here is fairly narrow. Where administrative officials, while performing their duties and exercising discretion, are found to have acted in good faith and without malice, they are generally personally immune from damage suits;[43] the question remains as to whether this immunity also applies to them in their official capacity and thus to the agency that employs them. Practically, a suit against officials is a suit against the employing agency that would have to pay the award.

Professor Davis argues against holding the public entity immune wherever the employee is immune.[44] He states that when a person is harmed by official action it is unjust to make the injured party bear the loss. The reason most often advanced for an official's immunity is the public's interest in the fearless administration of his task; possible personal liability would inhibit the official's actions. When only the agency's pocketbook is involved, the official would not be deterred from fully exercising his discretion. Since the public is the beneficiary of the agency's actions, the public should bear the loss when the agency causes injury. By making the agency liable, the loss is spread over the general population rather than falling directly on one person.[45]

In a suit for damages by a school superintendent against a school district, the California Supreme Court in *Lipman v. Brisbane Elementary School District*,[46] said:

> The immunity of the agency from liability for discretionary conduct of its officials, however, is not coextensive with the immunity of the officials in all instances . . . . It is unlikely that officials would be as adversely affected in the performance of their duties by the fear of liability on the part of their employing agency as by the fear of personal liability.[47]

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[42] The concept of executive immunity is based, in general, upon the idea that to allow an unconsented suit against the government is inconsistent with its supreme executive power. This immunity is extended to municipal corporations that perform a governmental, as opposed to a proprietary, function. The rationale for extending immunity to municipal corporations is that the particular function, which is a public benefit, could not be carried out if money raised through taxes went instead to satisfy damage judgments. W. PROSSER, THE LAW OF TORTS § 131 (4th ed. 1971).

[43] Wood v. Strickland, 420 U.S. 308 (1975).

[44] K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.17, at 864-65 (Supp. 1970).

[45] *Id.*

[46] 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961).

[47] *Id.* at 229-30, 359 P.2d at 467, 11 Cal. Rptr. at 99. In *Lipman*, however, the court found that the acts complained of were discretionary and that:

In finding the district immune, the California court considered the importance to the public of the function involved, the extent to which governmental liability might impair free exercise of the function, and the availability to individuals of remedies other than tort suits for damages.[48]

A test of this type may be crucial in the *Bertot* remand. Public policy considerations may foreclose any remedy available to Bertot for the damages she sustained. Public education is one of the most important functions performed by government, and the possibility of damage awards against the District could certainly deter officials from freely exercising discretion in the performance of their function.

## CONCLUSION

On remand the principal issues concerning Bertot's damage claim against the school district and the individual defendants in their official capacities will be whether the eleventh amendment bars the suit, whether the District can be sued under section 1983, and whether the District and its officials can claim immunity from damages. If the school district is considered to be an instrumentality of the state, or if a damage judgment against it would ultimately reduce state funds, then the damage claim will probably be barred by the eleventh amendment. If the District is found to be a part of the municipal government, then it will not be a "person" suable under section 1983 for damages. Finally, if the court determines that the threat of damage judgments against school districts would deter school district officers from exercising discretion in the performance of their duties, it is likely that common law executive immunity would bar the damage suit.

*Ward L. Van Scoyk*

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> There is a vital public interest in securing free and independent judgment of school trustees in dealing with personnel problems, and trustees, being responsible for the fiscal well-being of their districts, would be especially sensitive to the financial consequences of suits for damages against the districts.

*Id.*

[48] *Id.*