PERSPECTIVES ON PUBLIC EMPLOYMENT
A BUSINESS APPROACH

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TABLE OF CONTENTS

INTRODUCTION..1

EMPLOYMENT LAW'S ALPHABET SOUP 1

THE STRANGE WORLD OF LOCAL GOVERNMENT LAW 2

SYNTHESIZING EMPLOYMENT LAW AND LOCAL GOVERNMENT LAW 3

FEDERAL LAW..3

AGE DISCRIMINATION IN EMPLOYMENT ACT...3

Coverage 3

Release Agreements 4

AMERICANS WITH DISABILITIES ACT..5

Coverage 5

Procedure 6

***McDonnell Douglas* Burden Shifting Analysis** 6

Disability 7

Ultimate Burdens 8

FAIR LABOR STANDARDS ACT 9

Coverage 9

Statute of Limitations 9

Liquidated Damages..10

On-Call Time 10

Compensatory Time 10

FAMILY AND MEDICAL LEAVE ACT 11

Coverage 11

Permissible Reasons for Requesting Leave 11

Serious Health Condition 12

Employee's Duty to Notify 12

Second Opinion 14

Employer Duties upon Employee's Return to Work 14

Non-Retaliation 15

Penalties 15

Statute of Limitations 16

REHABILITATION ACT OF 1973 16

TITLE VII 16

Coverage 16

Procedural Requirements 17

McDonnell Douglas Burden Shifting Analysis 17

Sexual Harassment 18

Vicarious Liability 19

Damages 19

SECTION 1983 20

POTENTIAL DEFENDANTS 20

IMMUNITY 21

Absolute Immunity 21

Qualified Immunity 21

Entity Immunity (Or, the Lack Thereof) 23

ENTITY RESPONSIBILITY 24

RELIEF 25

Legal and Equitable Relief 25

Punitive Damages 25

Attorney's Fees 26

STATUTE OF LIMITATIONS 27

PUBLIC EMPLOYMENT AND THE CONSTITUTION 27

FIRST AMENDMENT 27

THE DUE PROCESS CLAUSE 29

Liberty 29

Property 29

Due Process 30

EQUAL PROTECTION 30

UNREASONABLE SEARCHES AND SEIZURES 31

STATE LAW 31

THE GOVERNMENTAL TORT CLAIMS ACT 31

Notice of Claim 31

Entity Liability 32

Limitation of Liability 32

FORM OF GOVERNMENT 33

Statutory Cities 33

Home Rule Charters 34

Charter as City's Fundamental Law 35

THOSE WHO DEAL WITH THE GOVERNMENT ARE DEEMED TO KNOW THE LAW **35**

OPEN MEETINGS/OPEN RECORDS **36**

COLLECTIVE BARGAINING **37**

CONCLUSION **38**

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INTRODUCTION

"You can't fight city hall!" "An employer can fire an employee at any time for any reason!" Or so went the conventional wisdom. With ever-increasing frequency, however, citizens are finding that they can assert their rights against the government. Often, it is the erstwhile employees of city hall who are battling their former employers.

At least two legal specialties are involved in claims involving government employment – government law and employment law. Each of these two areas of practice requires the devotion of a practitioner's full time and attention.

EMPLOYMENT LAW'S ALPHABET SOUP

Employment law involves a virtual alphabet soup of statutes, rules and regulations. ADA,[1] ADEA,[2] COBRA,[3] ERISA,[4] FMLA,[5] FLSA,[6] NLRA,[7] OSHA,[8] Title VII,[9] the Rehab Act,[10] Section 1981,[11] NLRB, EEOC, DoJ, DoL,

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[1] 42 U.S.C. §§ 12101 *et seq.*
[2] 29 U.S.C. §§ 621 *et seq.*
[3] 29 U.S.C. §§ 1161 *et seq.*
[4] 29 U.S.C. §§ 1001 *et seq.*
[5] 29 U.S.C. §§ 2601 *et seq.*
[6] 29 U.S.C. §§ 201 *et seq.*
[7] 29 U.S.C. §§ 151 *et seq.*
[8] 29 U.S.C. §§ 651 *et seq.*

not to mention the various state counterpart statutes[12] and agencies. On top of all of that, there are also the various state common law rules. Starting with the employment at will doctrine, there are the various and often changing rules regarding who is an employee,[13] what role an employee manual plays,[14] whether there is a covenant of good faith and fair dealing implicated in the situation,[15] what public policy is at issue,[16] the applicability of the tort of intentional infliction of emotional distress,[17] whistleblower rules,[18] privacy rights,[19] duties of loyalty,[20] trade secrets,[21] covenants not to compete,[22] defamation law,[23] and so forth.

THE STRANGE WORLD OF LOCAL GOVERNMENT LAW

Local government law, by contrast, focuses on an entirely different set of standards. The Civil Rights Act of 1871,[24] the Open Meeting Act,[25] the Open Records Act,[26] the Public Competitive Bidding Act,[27] Title 11, Title 19, Title 74,

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[9] 42 U.S.C. §§ 2000e *et seq.*
[10] 29 U.S.C. §§ 706, 791 *et seq.*
[11] 42 U.S.C. § 1981.
[12] See, e.g., 25 O.S. §§ 1101 *et seq.*; 40 O.S. §§ 165.1 *et seq.*
[13] *Shackelford v. American Airlines, Inc.*, 2000 OK CIV APP 18, 998 P.2d 646; 85 O.S. § 3(6).
[14] *Hinson v. Cameron*, 1987 OK 49, 742 P.2d 549.
[15] *Hall v. Farmers Insurance Exchange*, 1985 OK 40, 713 P.2d 1027.
[16] *Tate v. Browning-Ferris, Inc.*, 1992 OK 72, 833 P.2d 1218.
[17] *Eddy v. Brown*, 1986 OK 3, 715 P.2d 74.
[18] *Hayes v. Eateries, Inc.*, 1995 OK 108, 905 P.2d 778.
[19] *Gilmore v. Enogex, Inc.*, 1994 OK 76, 878 P.2d 360.
[20] See, e.g., *Groce v. Foster*, 1994 OK 88, 880 P.2d 902.
[21] See, e.g., 78 O.S. §§ 85 *et seq.*
[22] *Oklahoma Personnel Service v. Alternate Staffing, Inc.*, 1991 OK 92, 817 P.2d 1265.
[23] 12 O.S. §§ 1441 *et seq.*
[24] 42 U.S.C. § 1983.
[25] 25 O.S. §§ 301 *et seq.*
[26] 51 O.S. §§ 24A.1 *et seq.*
[27] 61 O.S. §§ 101 *et seq.*

the Governmental Tort Claims Act,[28] not to mention the long-standing common law discussions of Dillon's Rule, the role of sovereign or governmental immunity, home rule, federalism, and the like.

SYNTHESIZING EMPLOYMENT LAW AND LOCAL GOVERNMENT LAW

Suffice it to say that we cannot put these two specialties together in 1½ hours. While by no means exhaustive of either, this paper attempts to synthesize employment law with local government law, thereby providing a framework for analyzing public employment issues.

Thus, public employment law is a combination of the two separate fields, with some additions thrown in for good measure. In addition to the alphabet soup federal claims, the United States Constitution comes into play. In the employment setting, this primarily involves familiarity with the requirements of the First, Fourth and Fourteenth Amendments, as well as the procedural rules of claims filed under 42 U.S.C. § 1983. Under state law, the focus should be on the applicable substantive law, the applicable claims procedures, and the applicable law governing the powers of the particular governmental entity.

FEDERAL LAW

AGE DISCRIMINATION IN EMPLOYMENT ACT

Coverage

The Age Discrimination in Employment Act of 1972 ("ADEA")[29] generally prohibits discrimination against an individual because of the person's older age. 29 U.S.C. § 623. Covered employers must have at least 20 employees.

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[28] 51 O.S. §§ 151 *et seq.*

Employees receive protection upon attaining the age of 40.

The ADEA differs from other federal civil rights statutes in many respects. First, the ADEA eventually covers all workers (assuming, of course, that they attain the age of 40). Secondly, to prove a prima facie case under the ADEA, it is neither sufficient to show that the plaintiff was replaced by a person outside of the protected class, nor required to show that he was replaced by a person outside of the protected class. Thirdly, as a part of the “Labor” code (Title 29), as opposed to the “Public Health and Welfare” code (Title 42), it is closely linked to and generally follows the Fair Labor Standards Act, not Title VII.

Generally speaking, an employee proves a claim of age discrimination by showing that the employer discriminated against the person in the terms or conditions of employment because of age. The plaintiff must be “substantially older” to show the claim. While the question whether a particular age disparity is sufficiently substantial to prove a claim is somewhat open, it is clear that a 16-year differential will suffice.[30]

Release Agreements

Employers may negotiate a release of potential claims with an employee. However, particularly where age discrimination might be an issue, the employer must use caution. The Supreme Court has found that a former employee’s release of claims was unenforceable as to claims of age discrimination, because it was not

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[29] 29 U.S.C. §§ 621 *et seq.*
[30] *O’Connor v. Consolidated Coin Corp.*, 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed.2d 433 (1996).

properly executed.[31] The federal Older Workers Benefit Protection Act[32] gives clear guidance regarding permissible releases. In *Oubre*, the release (1) did not give the employee sufficient time to consider her options, (2) did not give her 7 days to change her mind, and (3) made no specific reference to her potential claims under the ADEA. The Court stated that there was no requirement that the employee first tender back any benefits she had received under the ineffective release agreement.

AMERICANS WITH DISABILITIES ACT

Coverage

The Americans with Disabilities Act ("ADA")[33] prohibits discrimination in the terms and conditions of employment against an otherwise qualified individual who either has a disability or is perceived as having a disability.[34] This statute covers employers who have at least 15 employees.

The ADA also prohibits the exclusion of qualified individuals with disabilities from "participation in or [the denial of] ... the benefits of the services, programs, or activities of a public entity."[35] A person is a "qualified individual with a disability" under this section if he or she "meets the essential eligibility requirements" of the services or programs provided by the public entity, with or without "reasonable accommodation."[36]

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[31] *Oubre v. Entergy Operations, Inc.,* 522 U.S. 422, 118 S. Ct. 838, 139 L. Ed.2d 849 (1998).
[32] 29 U.S.C. § 626(f).
[33] 42 U.S.C. §§ 12101 *et seq.*
[34] 42 U.S.C. § 12112(a).
[35] 42 U.S.C. § 12132.
[36] 42 U.S.C. § 12131(2).

Employers and public entities need not make a reasonable accommodation to a qualified individual with a disability if the proposed accommodation would cause an "undue hardship."[37] "Undue hardship" means an action requiring significant difficulty or expense" when considered in light of various factors.[38] The factors to be considered when determining whether an accommodation would impose an undue hardship on a covered entity include: (1) the nature and cost of the accommodation; (2) the overall financial resources of the covered entity; and (3) the type of operation of the covered entity.[39]

Procedure

Drawing upon the experience of Title VII, the ADA has a strict procedure for employees to follow before they can file a lawsuit. A claimant must file a complaint with the Equal Employment Opportunity Commission or with an appropriate state counterpart. Because Oklahoma has such a state counterpart, the Oklahoma Human Rights Commission, ADA claims in Oklahoma must be filed within 300 days of the incidents giving rise to the claim.

Either commission has the power to investigate. Until the appropriate commission issues a "right to sue" letter, no claim may be filed. A claimant must quickly suit within 90 days of receipt of the right to sue letter.

***McDonnell Douglas* Burden Shifting Analysis**

In the absence of direct evidence of discrimination, ADA cases are

[37] 42 U.S.C. § 12112(b)(5)(A).
[38] 42 U.S.C. § 12111(10)(A).
[39] 42 U.S.C. § 12111(10)(B).

evaluated under the *McDonnell Douglas*[40] burden-shifting test. Under this test, the plaintiff must first establish his prima facie case by a preponderance of the evidence. If he does so, he establishes a rebuttable presumption of unlawful conduct. The employer then must produce evidence of a legitimate, nondiscriminatory reason for the adverse employment action. If the employer does so, the presumption drops out of the case. The employee then must prove that the stated reason was in fact a pretext for illegal discrimination.[41]

To show a prima facie case, a plaintiff must prove that he has: 1) a disability within the meaning of the ADA; 2) that he is "qualified" for the job; and 3) that the employer terminated him because of the disability.[42]

Disability

A disability under the ADA is a physical or mental impairment that substantially limits one or more of the major life activities. A disability may also be proven by the existence of a record of such impairment or by being regarded as having such an impairment.[43] The disability must substantially limit a major life activity. A disability substantially limits a major life activity when a person is: 1) unable to perform a major life activity that the average person in the general population can perform, or 2) significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity

[40] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed.2d 668 (1973).
[41] *Butler v. City of Prairie Village*, 172 F.3d 736 (10th Cir. 1999).
[42] *Sutton v. United Airlines*, 130 F.3d 893 (10th Cir. 1997).
[43] *MacDonald v. Delta Airlines*, 94 F.3d 1437 (10th Cir. 1996).

compared to the general population.[44]

The determination of whether a person's disability substantially limits a major life activity should take into consideration mitigating or corrective factors.[45] For example, a near-sighted person who sees normally with corrective lenses is not disabled.[46]

To be a "qualified individual," the employee must be able to perform the essential functions of the job with or without a reasonable accommodation.[47] Moreover, it is necessary to show that a reasonable accommodation could enable the plaintiff to perform the essential job functions.[48]

Finally, plaintiff must prove that the termination occurred because of his disability. The plaintiff must present affirmative evidence that his disability was a determining factor in the employer's decision.[49] In most instances, this is a question of fact.

Ultimate Burdens

If plaintiff proves the prima facie case, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the termination.[50] The defendant need not prove that the reason for the termination was legitimate and

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[44] *Penny v. United Parcel Service*, 128 F.3d 408 (6th Cir. 1997).
[45] *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 119 S. Ct. 2133, 144 L. Ed.2d 484 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed.2d 450 (1999).
[46] *Sutton v. United Airlines*, 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed.2d 450 (1999).
[47] *Smith v. Blue Cross Blue Shield of Kansas*, 102 F.3d 1075 (10th Cir. 1996)
[48] *Anderson v. Coors Brewing Company*, 181 F.3d 1171 (10th Cir. 1999).
[49] *Morgan v. Hilti, Inc.*, 108 F.3d 1319 (10th Cir. 1997).
[50] *Butler v. City of Prairie Village*, 172 F.3d 736 (10th Cir. 1999).

nondiscriminatory, but must merely produce a valid reason for the termination.[51] If the defendant meets this burden, the plaintiff must ultimately prove that the proffered reason for the termination was merely a pretext and that the true reason for the termination was the disability. Importantly, the plaintiff always bears the ultimate burden of proving discrimination.[52]

FAIR LABOR STANDARDS ACT

Coverage

The Fair Labor Standards Act of 1938[53] is the grandfather of all employment legislation. Better known as the minimum wage law, it also sets the standard workweek at 40 hours. Except insofar as certain government employees, such as police officers and firefighters, are concerned, "non-exempt" employees must be paid overtime for any hours worked in a week above 40.[54] The statute requires overtime pay to be calculated as 1½ times the employee's regular hourly wage.

Statute of Limitations

The FLSA has an odd statute of limitations, in that it generally does not bar entire claims but only portions of claims. If an employer has improperly failed to pay overtime for several years, the statute of limitations bars claims only for those wages that fall outside of the applicable time period. The limitations period generally is two years. But, it can be extended to three years where the

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[51] *Reeves v. Sanderson Plumbing Production, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed.2d 105 (2000).
[52] *Butler v. City of Prairie Village*, *supra*.
[53] 29 U.S.C. §§ 201 *et seq.*
[54] 29 U.S.C. §§ 206, 207, 213.

employer knows or shows reckless disregard for whether its conduct is prohibited by the FLSA.[55]

Liquidated Damages

In a proper case, a court should also award liquidated damages by doubling the award of actual damages. Indeed, the court *must* award liquidated damages, unless the defendant proves that its failure to pay overtime was in good faith and that it had reasonable grounds for not paying the overtime due.[56]

On-Call Time

One interesting issue often affecting government emergency personnel is whether on-call time is compensable. In an on-call case, the court considers several factors, including the agreement between the parties, the nature and extent of the restrictions on the employee during the on-call period, the relationship between the services rendered and the on-call time, and the degree to which the burden on the employee interferes with his or her personal pursuits. In this latter determination, the court reviews facts such as the number of calls, the required response time, and the employee's ability to engage in personal pursuits while on call.[57]

Compensatory Time

In a proper setting, governmental agencies may compel their employees to use compensatory time instead of receiving overtime wages. The Supreme Court

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[55] *Pabst v. O.G.&E.*, 228 F.3d 1128 (10th Cir. 2000).
[56] *Sanders v. Elephant Butte Irr. Dist. Of New Mexico*, 112 F. 3d 468, 471 (10th Cir. 1997).
[57] *Pabst v. O.G.&E.*, 228 F.3d 1128 (10th Cir. 2000); *Renfro v. City of Emporia*, 948 F.2d 1529 (10th Cir. 1991).

has recently upheld a plan that requires the employee to take such compensatory time during a specified time period, thereby avoiding the need to pay overtime wages.[58]

FAMILY AND MEDICAL LEAVE ACT

Coverage

The Family and Medical Leave Act ("FMLA")[59] annually requires a covered employer to allow an eligible employee up to twelve weeks unpaid leave (or paid leave, if the leave has accrued) to care for family members during illness, or upon the birth or adoption of a child or the placement of a child for foster care, or in the event of the employee's own serious health condition. The term "employer" means any person who employs 50 or more employees within a 75-mile area around the work site for each working day during each of twenty or more calendar work weeks in the current or preceding calendar year. It also includes any public agency, including political subdivisions of a state, and agencies of the state or its political subdivisions. Eligible employees must have been employed for at least 12 months and have worked at least 1,250 hours with that employer for the previous 12 months.

Permissible Reasons of Requesting Leave

An employee may request leave:

1. because of the birth of a child and to care for that child;
2. because of the adoption of a child;
3. because of the placement of a child for foster care;
4. to care for a spouse, child or parent if that person has a

[58] *Christensen v. Harris County*, 529 U.S. 576, 120 S. Ct. 1655, 146 L. Ed.2d 621 (2000).
[59] 29 U.S.C. §§ 2601 *et seq.*

serious health condition; or
5. because the employee himself has a serious health condition that makes him unable to perform the functions of his employment.

The term “child” includes a biological, adopted, or foster child, a step-child, a legal ward, or a child of a person standing *in loco parentis* who is under 18, or if over 18, is physically or mentally incapable of self-care. “Parent” means the biological parent of the employee or someone who stood in loco parentis to that employee when that employee was a child.

Serious Health Condition

A serious health condition includes a physical or mental condition that involves inpatient care, hospice or residential medical care or “continuing treatment” by a health care provider. “Continuing treatment” means that the employee or the family member is required to be treated by a health care provider two or more times for the injury or illness. Voluntary or cosmetic treatments not requiring in-patient care do not constitute serious health conditions.

Prenatal care is included as a serious health condition. Routine preventative physical exams are not serious health conditions.

Generally, an employee has no right to leave on an intermittent or reduced schedule unless the employer and the employee so agree. However, the employer must provide such leave if the employee provides certification that there is a medical need for it. Intermittent leave may be taken an hour at a time if proven to be medically necessary.

Employee’s Duty to Notify

The employee must provide the employer with no less than thirty days notice

before the date leave is to begin. If possible, employees must make plans for medical treatment in a way that will not unduly disrupt the operation of the employer.

Obviously, thirty days notice is not always possible. In that situation, the employee must give as much notice as is reasonably possible.

An employer may require that an employee provide it with certification issued by a health care provider concerning the need for the leave. Certification is sufficient if it states the date on which the serious health condition began, the probable duration of the condition and appropriate medical information concerning the condition.

If the employee is taking leave to care for an eligible relative, the certification should include a statement by the health care provider that he is needed to care for the relative. The employee should also provide an estimated amount of time the employee believes is needed to care for the relative.

Where an employee is taking leave for his or her own serious medical condition, the employer may require the employee's health care provider to provide a statement that the employee is unable to perform the essential functions of his job.[60] If the employer requests such information, the employer should provide the health care provider with a description dealing and listing the essential functions of the job position. Certification may also be required when an employee requests intermittent leave.

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[60] An employee is unable to perform the functions of the employer's position when a health care provider finds that the employee is unable to perform the work at all or if he is unable to perform *any* of the essential functions of the position within the meaning of the Americans with Disabilities Act. 42 U.S.C. §§ 12101 *et seq.*

Second Opinion

Where an employer has reasonable grounds to doubt the validity of the certification, the employer may require the employee to obtain a second opinion. The second opinion may not be obtained from a health care provider employed on a regular basis by the employer. Where the first certification and the second opinion conflict, the employer may require the employee to obtain a third opinion. However, if the employer makes such request the employer must pay for the third health care provider's opinion. An employer may also require an employee to provide certification of his ability to return to work.

Employer Duties upon Employee's Return to Work

When an employee takes FMLA leave, the employer must ensure that upon return, the employee will be given the same or an equivalent position with equivalent benefits and terms and conditions of employment. The employer must continue coverage under any group health plan for the duration of the leave at such level and under such conditions as would have been provided to the employee had the employment continued throughout the duration of the leave. The employee may also be required to continue making any co-payments for health insurance.

The FMLA permits an employer to withdraw the employee from health care benefits after a thirty-day grace period, if the employee fails to continue to make his co-payments. This may not be advisable, for upon return to employment, the employee must be placed in the same position, including the same or equivalent employee benefits that he would have had absent the leave.

If the employee fails to return to work from leave, the employer may recover the premiums it paid on behalf of the employee out of the employee's final pay. The employer may not do so however, if the employee's failure to return to work is a result of a continuation, recurrence or onset of a serious health condition or other circumstances beyond the control of the employee.

Non-Retaliation

It is unlawful for an employer to interfere with, to restrain, or to deny the exercise of or attempt to exercise, any right provided by the FMLA. It is unlawful for an employer in any manner to discriminate against or to discharge any individual who opposes a practice made illegal or unlawful by the FMLA.

It is unlawful for an employer to discriminate against or to discharge an employee who has filed a charge or instituted any proceeding relating to the FMLA or who has given or will give information in connection with any proceeding related to the FMLA or any person who has testified in any proceeding regarding any right under the title.

Penalties

Any employer who violates the FMLA will be liable to the affected employee for the following damages:

1. Any lost wages, salary, employment benefits or other compensation that was denied to the employee;
2. If actual benefits have not been lost, the actual monetary losses sustained by the employee as a direct result of the violation, up to the sum equal to 12 weeks of wages or salary of the employee.
3. Interest;
4. Liquidated damages equal to the sums in paragraphs 1 and 2;
5. Any equitable relief which the court deems appropriate, including employment reinstatement and promotion.

An employer may try to prove that it acted in good faith and had reasonable grounds for believing that its act or omission was not a violation of the Act. If that occurs, then the court can reduce the amount of liability and interest under paragraphs 1 and 2.

Statute of Limitations

The statute of limitations for causes of action under the FMLA is two years. However, if an employer is deemed to have willfully violated the Act, then a three-year statute of limitations is applicable beginning from the date of the last event constituting a violation of the Act.

REHABILITATION ACT OF 1973

The so-called "Rehab Act"[61] is a precursor to the Americans with Disabilities Act. It prohibits discrimination against disabled individuals under any program or activity receiving Federal financial assistance. Significantly, the statute only prohibits discrimination that occurs *solely* by reason of the disability.[62]

TITLE VII

Coverage

Title VII of the Civil Rights Act of 1964[63] prohibits discrimination with respect to the terms, conditions, or privileges of employment because of the individual's race, color, religion, sex, or national origin.[64] The term "employer" means a person engaged in industry who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding

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[61] 29 U.S.C. § 794.
[62] 29 U.S.C. § 794(a).
[63] 42 U.S.C. §§2000e *et seq.*

calendar year, and any agent of such person.[65]

Procedural Requirements

Title VII's filing requirement was essentially adopted by the ADA, as well. Thus, a Title VII claimant must file a complaint with the EEOC or, in Oklahoma, with the Oklahoma Human Rights Commission. All Title VII claims in Oklahoma must be filed within 300 days of the incidents giving rise to the claim.

The Commission has the power to investigate. A claimant may not file a lawsuit until the Commission issues a "right to sue" letter. Upon receipt of the right to sue letter, the claimant must file suit within 90 days.

McDonnell Douglas Burden Shifting Analysis

The *McDonnell Douglas*[66] burden-shifting test described in the section regarding the ADA also applies to Title VII cases. To prove a prima facie case, the plaintiff must show that he is a member of a protected class, that he is qualified for the job, that he suffered an adverse employment action, and that he was replaced by someone not a member of the protected class or that the job remained open. The burden then shifts to the employer to proffer a legitimate non-discriminatory reason for the adverse employment action. If the employer does so, the burden shifts to the plaintiff to show that the proffered reason was a pretext, and that the employer discriminated against him for a reason that is unlawful under Title VII.

A factfinder's rejection of the employer's legitimate non-discriminatory

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[64] 42 U.S.C. § 2000e-2(a)(1).
[65] 42 U.S.C. § 2000(2).

reason for its action does not compel judgment for the plaintiff. It does, however, permit the factfinder to conclude, without more, that the employer unlawfully discriminated.[67]

Sexual Harassment

As a subset of discrimination, Title VII also outlaws harassment based on the individual's race, color, religion, sex, or national origin. The most common of these claims is sexual harassment. Sexual harassment under Title VII is defined as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[68]

Title VII does not prohibit all verbal or physical harassment in the workplace. It targets only discrimination because of one's sex, or other protected status. Thus, the critical determination is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.

The Supreme Court has held that same sex sexual harassment is actionable under Title VII.[69] "Common sense," the Court ruled, will enable courts to distinguish between simple teasing and roughhousing and conduct that a reasonable person would find severely hostile or abusive.

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[66] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed.2d 668 (1973).
[67] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed.2d 105 (2000).
[68] 29 C.F.R. § 1604.11(a) (1993).
[69] *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75, 118 S. Ct. 998, 140 L. Ed.2d 201 (1998).

Vicarious Liability

An employer has vicarious liability for a supervisor's hostile work environment sexual harassment of an employee. However, an employer may raise an affirmative defense when no tangible employment action was taken against the employee.[70]

Under the affirmative defense, the employer can attempt to prove that it exercised reasonable care to prevent and promptly to correct sexually harassing behavior and that the plaintiff employee failed to take advantage of any preventive or corrective opportunities. If the employee has suffered tangible job detriment as a result of a supervisor's harassment, the harassment is of the *quid pro quo* variety. In all other circumstances, sexual harassment is of the hostile work environment kind, and an employee need not prove that she suffered tangible job loss in order to recover for sexual harassment perpetrated by her supervisor; however, the harassment must be severe or pervasive.

Damages

An award of punitive damages under Title VII is permissible where the employer's conduct is egregious. Plaintiff must do more than simply show that certain individuals exhibit the requisite malice or reckless indifference. Instead, plaintiff must impute employer liability for punitive damages under principles of agency law. Where, however, the discriminatory actions of managerial agents were contrary to employer's good faith efforts to comply with the law, vicarious

[70] *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed.2d 633 (1998); *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed.2d 662 (1998).

liability for punitive damages is inappropriate.[71]

SECTION 1983

The Civil Rights Act of 1871, more famous as section 1983,[72] states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, 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.

Over the years, a significant percentage of cases in the federal and, increasingly, the state judicial systems has involved litigation of section 1983 issues.

POTENTIAL DEFENDANTS

Both governmental entities and individual government officials are potential parties defendant under section 1983.[73] When a plaintiff brings an action against an individual in his official capacity, however, it is essentially the same as bringing the action against that person's agency. The same rights and responsibilities of the agency itself inure to the benefit or detriment of the officer. If the agency has notice of the pendency of the action against the individual in his official capacity, the agency itself will be liable for damages and attorney's fees.[74] On the other hand, an action against a governmental official in his personal

[71] *Kolstad v. American Dental Association*, 527 U.S. 526, 119 S. Ct. 2118, 144 L. Ed.2d 494 (1999).
[72] 42 U.S.C. § 1983.
[73] *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed.2d 611 (1978).
[74] *Brandon v. Holt*, 469 U.S. 464, 105 S. Ct. 873, 83 L. Ed.2d 878 (1985).

capacity will not lead to agency liability.[75]

IMMUNITY

Government officials who are sued individually in civil rights lawsuits generally are entitled to claim some form of immunity. The two basic choices are absolute or qualified immunity.

Absolute Immunity

Absolute immunity is available for officials whose specialized functions or constitutional status requires complete protection from suit. This immunity is essentially limited to legislative and judicial officials for their legislative or judicial functions. Thus, a judge who acts judicially has immunity, although one who acts administratively, for example, in terminating a bailiff, does not. Absolute immunity mean precisely what it says – the absolutely immune official cannot be sued regardless of his good faith or his competence.

Qualified Immunity

In the employment setting, more often the applicable immunity, if any, will be qualified immunity. This defense protects individual defendants whose conduct may have violated the law, but was objectively reasonable at the time the actions were taken.[76] The defense is available to government officials if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[77] Generally, good faith is

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[75] Cf. *Kentucky v. Graham*, 473 U.S. 159, 105 S. Ct. 3099, 87 L. Ed.2d 114 (1985).
[76] *Davis v. Scherer*, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed.2d 139 (1984).
[77] *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed.2d 396, 410 (1982).

irrelevant.[78]

Qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law."[79] The test is this: Would a reasonably competent, similarly situated official in similar circumstances realize that the actions violate some federal constitutional or statutory right? If so, than qualified immunity does not adhere. If not, the defendant should be entitled to an early favorable ruling.

Qualified immunity does not merely protect against money damages. Instead, it is an affirmative defense that entitles the government official to avoid standing trial or even facing the various other burdens associated with a trial. Those burdens include such matters as discovery.

The defendant has the initial burden of raising qualified immunity. However, qualified immunity differs significantly from other affirmative defenses. Once qualified immunity is raised, the burden shifts to the plaintiff to show that defendant's conduct violated the law and that the relevant law was clearly established.

Generally, qualified immunity is determined by an objective standard. When the applicable substantive law makes state of mind an essential element, courts will review subjective factors. On the other hand, when state of mind is not an essential element of the claim, the Supreme Court has ruled out subjective inquiry.

The question is whether the defendants acted reasonably according to

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[78] *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed.2d 271 (1986).

settled law, not whether another reasonable, or even a more reasonable, interpretation of the events can be constructed years after the fact. Individual defendants are entitled to qualified immunity because their decision was objectively reasonable, even if mistaken. The accommodation for reasonable error exists so those officials do not always err on the side of caution from fear of being sued.[80]

Generally, an order denying qualified immunity is immediately appealable.[81] This is true regardless of whether the order arose from the denial of a motion to dismiss, a motion for summary judgment, or even a requirement that an individual defendant to undergo discovery.[82] Summary judgment orders which determine only a question of evidence sufficiency, however, are not appealable.[83]

Entity Immunity (Or, the Lack Thereof)

Most government agencies have no immunity.[84] However, under the Eleventh Amendment, states may not be sued in federal courts.[85] Although a state may waive its Eleventh Amendment protection,[86] the consent to suit must be

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[79] *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S. Ct. 3034, 3038, 97 L. Ed.2d 523, 530 (1987), *quoting Malley v. Briggs*, 475 U.S. at 341, 106 S. Ct. at 1096, 89 L. Ed.2d at 278.

[80] *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed.2d 589 (1991).

[81] *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed.2d 411 (1985).

[82] See, e.g., *Siegert v. Gilley*, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed.2d 277 (1991).

[83] *Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed.2d 238 (1995).

[84] *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed.2d 673 (1980).

[85] *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed.2d 67 (1984).

[86] *Alabama v. Pugh*, 438 U.S. 781, 98 S. Ct. 3057, 57 L. Ed.2d 1114 (1978).

clearly expressed.[87] A general waiver of sovereign immunity will not suffice. The waiver "must specify the State's intention to subject itself to suit in *federal court*."[88] Although an act of Congress may override the Eleventh Amendment immunity, section 1983 itself does not do so.[89]

The denial of Eleventh Amendment immunity is immediately appealable.[90] Although the immunity protects the state, it does not necessarily protect state officials.[91] State officials sued in their individual capacities are persons subject to suit. Neither states nor state officials sued in their official capacities are persons subject to suit under section 1983.

ENTITY RESPONSIBILITY

A local government is not liable in section 1983 lawsuits under the doctrine of *respondeat superior*. To impose entity liability, there must be a direct causal link between a municipal policy or custom and the constitutional deprivation.[92] Where the offending policy is a failure to train, such claims can yield entity liability only where the alleged policy reflects deliberate indifference to the constitutional rights of the entity's inhabitants.

The determination of who sets government policy is a question of state

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[87] *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed.2d 662 (1974).
[88] *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241, 105 S. Ct. 3142, 3146-3147, 87 L. Ed.2d 171, 179 (1985) (emphasis in the original).
[89] *Quern v. Jordan*, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed.2d 358 (1979).
[90] *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 113 S. Ct. 684, 121 L. Ed.2d 605 (1993).
[91] *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358, 116 L. Ed.2d 301 (1991).
[92] *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed.2d 412 (1989).

law.[93] Generally, proof of a single incident of unconstitutional activity will not suffice to demonstrate a policy. On the other hand, a single act by the final policy making authority can suffice to impose entity liability.[94]

RELIEF

Legal and Equitable Relief

A prevailing plaintiff may be entitled to compensatory damages, punitive damages, non-monetary relief, and attorney's fees. Compensatory damages include out-of-pocket loss, other monetary harms, impairment of reputation, humiliation, mental anguish and suffering, and other matters of actual loss resulting from the constitutional deprivation.[95] However, "the abstract value of a constitutional right may not form the basis for § 1983 damages."[96] Moreover, without proof of actual injury, a plaintiff may receive only nominal damages, not to exceed one dollar.[97]

Punitive Damages

Cities are immune from liability for punitive damages under section 1983.[98] Plaintiffs may, however, pursue such damages against individual defendants in a proper action.[99] "The purpose of punitive damages is to punish the defendant for his willful or malicious conduct and to deter others from similar

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[93] *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed.2d 107 (1988).
[94] *Pembaur v. Cincinnati,* 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed.2d 452 (1986).
[95] *Memphis Community School Dist. v. Stachura,* 477 U.S. 299, 106 S. Ct. 2537, 91 L. Ed.2d 249 (1986).
[96] *Id.*, 477 U.S. at 308, 106 S. Ct. at 2543, 91 L. Ed.2d at 259-260.
[97] *Carey v. Piphus,* 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed.2d 252 (1978).
[98] *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed.2d 616 (1981).

behavior."[100]

Attorney's Fees

The Civil Rights Attorney's Fees Awards Act of 1976[101] provides:

> In any action or proceeding to enforce a provision of [section 1983,] the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

The purpose of section 1988 is to encourage private attorneys general to correct civil rights abuses. Therefore, a plaintiff can be a prevailing party even though he does not prevail on all issues.[102] Furthermore, a plaintiff can be awarded fees even after the case is settled or has been rendered moot.[103] On the other hand, defendants recover fees rarely. Plaintiff's claim must be "frivolous, unreasonable, or groundless, or [] the plaintiff [must have] continued to litigate after it clearly became so."[104]

A declaratory judgment constitutes relief under section 1988 only if it affects the behavior of the defendant towards the plaintiff.[105] A plaintiff who wins an award of nominal damages, on the other hand, is a prevailing party under section 1988. Because of the technical nature of an award of $1.00 as compared to a much larger request, however, the prevailing party may be entitled to no fee

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[99] *Smith v. Wade,* 461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed.2d 632 (1983).
[100] *Memphis Community School Dist. v. Stachura,* 477 U. S. at 307, 106 S. Ct. at 2543, 91 L. Ed.2d at 258, n. 9.
[101] 42 U.S.C. § 1988.
[102] *Hensley v. Eckerhart,* 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed.2d 40 (1983).
[103] See *Maher v. Gagne,* 448 U. S. 122, 100 S. Ct. 2570, 65 L. Ed.2d 653 (1980).
[104] *Christiansberg Garment Co. v. EEOC,* 434 U.S. 412, 422, 98 S. Ct. 694, 700, 54 L. Ed.2d 648, 657 (1978).
[105] *Rhodes v. Stewart*, 488 U.S. 1, 109 S. Ct. 202, 102 L. Ed.2d 1 (1988).

whatsoever.[106]

Fees for paralegals are shiftable to the losing party.[107] Expert witness fees are not.[108] A prevailing party enforces his right to attorney's fees in the civil rights action itself. A separate lawsuit under section 1988 is not actionable.[109]

STATUTE OF LIMITATIONS

For limitation purposes "§ 1983 claims are best characterized as personal injury actions."[110] The general or residual state statute of limitations for personal injury actions applies.[111] In Oklahoma, the two year statute of limitations of 12 O.S. § 95(Third) applies to section 1983 actions.[112]

PUBLIC EMPLOYMENT AND THE CONSTITUTION

In the employment setting, most cases will fall under either the First or the Fourteenth Amendment. Less often, an employment matter will involve Fourth Amendment rights.

FIRST AMENDMENT

The First Amendment prohibits the government from taking an adverse employment action based upon the employee's political party affiliation or

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[106] *Farrar v. Hobby*, 506 U.S. 103, 113 S. Ct. 566, 121 L. Ed.2d 494 (1992).
[107] *Missouri v. Jenkins*, 491 U.S. 274, 109 S. Ct. 2463, 105 L. Ed.2d 229 (1989).
[108] *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 111 S. Ct. 1138, 113 L. Ed.2d 68 (1991).
[109] *North Carolina Dep't. of Transportation v. Crest Street Community Council, Inc.*, 479 U.S. 6, 107 S. Ct. 336, 93 L. Ed.2d 188 (1986).
[110] *Wilson v. Garcia,* 471 U.S. 261, 280, 105 S. Ct. 1938, 1949, 85 L. Ed.2d 254, 269 (1985).
[111] *Owens v. Okure*, 488 U.S. 235, 109 S. Ct. 573, 102 L. Ed.2d 594 (1989).
[112] *Meade v. Grubbs*, 841 F.2d 1512 (10th Cir. 1988).

support.[113] Furthermore, the government may not discriminate against its employee based upon the employee's speech on a matter of public concern.[114]

Employee speech rights are not absolute.[115] Defining free speech rights of public employees involves balancing needs of the government as an employer to maintain an efficient workplace and the typical concerns arising from any attempt by government to limit speech.[116] The fact that employee speech is inappropriate or controversial, however, does not mean that it is unprotected. Indeed, in one case, the Supreme Court held that a police constable's statement after learning of the assassination attempt on President Reagan, "If they go for him again, I hope they get him," constituted protected speech on a matter of public concern.[117]

Speech is on matter of public concern if it can fairly be considered as relating to any matter of political, social or other concern to the community. Courts conduct a case by case inquiry, looking to content, form and context of speech, and scrutinizing whether the speaker's purpose was to bring an issue to the attention of the public, or merely to air personal grievances. Where the government can show that it would have reached the challenged decision even without considering the employee's speech, however, judgment for the defendant

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[113] *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S. Ct. 2729, 111 L. Ed.2d 52 (1990); *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed.2d 547 (1976); *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed.2d 574 (1980).

[114] *Waters v. Churchill*, 511 U.S. 661, 114 S. Ct. 1878, 128 L. Ed.2d 686 (1994); *Board Of County Commissioners, Wabaunsee County, Kansas, v. Umbehr*, 518 U.S. 668, 116 S. Ct. 2342, 135 L. Ed.2d 843 (1996).

[115] *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed.2d 708 (1983).

[116] *Pickering v. Board of Ed.*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed.2d 811 (1968).

[117] *Rankin v. McPherson*, 483 U.S. 378, 107 S. Ct. 2891, 97 L. Ed.2d 315 (1987).

is appropriate.[118]

THE DUE PROCESS CLAUSE

The Due Process Clause protects two distinct interests of a public employee. It prohibits the deprivation of property or liberty without due process.[119] Due process claims look not so much at the reasons for the termination. Instead, they focus on the method of the termination.

Liberty

Liberty interests in the public employment context exist without regard to the existence of a property interest. To state a deprivation of liberty claim, an employee must show that the dismissal resulted in the publication of information which was false and stigmatizing, and the publication had the general effect of curtailing plaintiff's future freedom of choice or action.[120] It is akin to, though by no means identical with, a common law defamation claim. Intra-government dissemination, however, falls short of publication. There must be a sufficient nexus between the stigmatizing charges and the termination for a claim of deprivation of liberty.

Property

In the employment context, a property interest is defined as having a legitimate expectation in continued employment. At-will status ordinarily forecloses property interest claim. The question of whether a property interest

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[118] *Mt. Healthy City School District Board Of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed.2d 471 (1977).
[119] *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed.2d 548 (1972).

exists generally requires reference to state law.[121]

Due Process

Before the government can deprive a person of liberty or property, it must provide notice and an opportunity to be heard before the deprivation of any significant property interest. Something less than a full evidentiary hearing is sufficient. Generally, the entitlement to due process includes (1) the right to present witnesses and evidence, (2) the right to confront adverse witnesses and evidence, (3) the right to an impartial decision-maker, and (4) the right to be confronted with specific allegations.[122] Generally, there should be a pre-termination hearing. However, that hearing need not be elaborate, where it is followed by a more comprehensive post-termination hearing.[123]

It is important to remember that the Due Process Clause simply encompasses a guarantee of fair procedure.[124] What is unconstitutional is not the deprivation of liberty or property, but instead the deprivation of life, liberty or property without due process.

EQUAL PROTECTION

The Equal Protection Clause may be at issue in a public employment case. Allegations of sexual harassment, for example, are actionable as violations of

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[120] *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed.2d 725 (1975); *Paul v. Davis*, 424 U.S. 693, 95 S. Ct. 1155, 47 L. Ed.2d 405 (1976).
[121] *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed.2d 548 (1972).
[122] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed.2d 494 (1985).
[123] *Gilbert v. Homar*, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed.2d 120 (1997).
[124] *Zinermon v. Burch*, 494 U.S. 113, 110 S. Ct. 975, 108 L. Ed.2d 100 (1990).

equal protection.[125] So, too, are racial harassment claims cognizable under section 1983.[126] This does not mean, however, that a plaintiff may invoke section 1983 to enforce Title VII of the Civil Rights Act of 1964. To the contrary, a plaintiff must instead prove the more difficult requirements of an equal protection claim.[127]

UNREASONABLE SEARCHES AND SEIZURES

The Fourth Amendment protections against unreasonable searches and seizures may apply in public employment cases. This has most often occurred in drug testing cases,[128] and in claims involving searches of the workplace.[129]

STATE LAW

THE GOVERNMENTAL TORT CLAIMS ACT

Under state law, there are also several matters which distinguish public employment cases from their private counterparts. The first and most obvious one is the existence of the Governmental Tort Claims Act ("GTCA").[130]

Notice of Claim

Under the GTCA, before a lawsuit sounding in tort may be filed against the government, the plaintiff must file a notice of tort claim.[131] This must be done within one year of the tort. Once the claim has been filed, the government has 90 days within which to consider the claim. During that time, it can either approve

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[125] *Noland v. McAdoo*, 39 F.3d 269 (10th Cir. 1994); *Sauers v. Salt Lake County*, 1 F.3d 1122 (10th Cir. 1993).
[126] *Ryan v. City of Shawnee*, 13 F.3d 345 (10th Cir. 1993).
[127] *Lankford v. City of Hobart*, 73 F.3d 283 (10th Cir. 1986).
[128] *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed.2d 685 (1989).
[129] *O'Connor v. Ortega*, 480 U.S. 709, 107 S. Ct. 1492, 94 L. Ed.2d 714 (1987).
[130] 51 O.S. §§ 151 *et seq.*
[131] 51 O.S. § 156.

or deny the claim. If the government takes no action on the claim within 90 days, the claim is deemed denied.[132]

Upon denial of the claim, the plaintiff has 180 days to file the lawsuit. If suit is not filed within the statutory time period, it is forever barred.[133]

Entity Liability

Whereas there is no *respondeat superior* liability under section 1983, such liability does exist under the GTCA.[134] However, the employee must have been acting within the scope of his employment.[135] Where the employee acted outside the scope of his employment, the government has no liability.[136] On the other hand, where the employee acted within the scope of his authority, the government may have liability but the employee cannot. It is an either/or proposition.[137]

Limitation of Liability

The GTCA limits the liability of the government to $25,000 for any claim for property damage,[138] $125,000 for any claim for any other type of damage,[139] and $1,000,000 for all claims arising out of a single incident.[140] As is true under section 1983, punitive damages are not available under the GTCA.[141] Of course, if the offending employee was acting outside the scope of his employment, the damages caps do not apply.

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[132] 51 O.S. § 157.
[133] *Id.*
[134] 51 O.S. § 153.
[135] 51 O.S. § 152(9).
[136] 51 O.S. § 153(A).
[137] 51 O.S. § 153(B).
[138] 51 O.S. § 154(A)(1).
[139] 51 O.S. § 154(A)(2).
[140] 51 O.S. § 154(A)(3).

FORM OF GOVERNMENT

It is important also to know the powers of a local government. In Oklahoma, there are cities,[142] towns,[143] counties,[144] school boards,[145] public trusts,[146] rural water districts,[147] housing authorities,[148] as well as other forms of local governments.[149] Each has its own defined set of powers. Indeed, among municipalities alone, there are at least five different types of entity. The employee's rights often depend upon this very determination.

Statutory Cities

Article 9 of the Oklahoma Municipal Code discusses the "statutory aldermanic form of government."[150] Most employees of such cities are terminable "solely for the good of the service," which means that they are employees at will.[151] Yet, "officers" are removable "for cause," *id.*, which means that they have tenure rights. The term "officer" is defined in a previous article of the Municipal Code,[152] although there appears to be some discrepancy between that section and Article 9, which describes other officers.[153]

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[141] 51 O.S. § 154(B).
[142] 11 O.S. §§ 9-101 *et seq.*; 11 O.S. §§ 10-101 *et seq.*; 11 O.S. §§ 11-101 *et seq.*; 11 O.S. §§ 13-101 *et seq.*
[143] 11 O.S. §§ 12-101 *et seq.*
[144] 19 O.S.
[145] 70 O.S.
[146] 60 O.S. §§ 176 *et seq.*
[147] 82 O.S. §§ 1324.1 *et seq.*
[148] 63 O.S. §§ 1051 *et seq.*
[149] See also 51 O.S. § 152(8) (defining the term "political subdivision" under the Governmental Tort Claims Act).
[150] 11 O.S. § 9-101.
[151] 11 O.S. § 9-117.
[152] 11 O.S. § 1-102(6)
[153] 11 O.S. § 9-114

Article 10 describes the statutory council-manager form of government."[154] While most city employees here are also terminable "solely for the good of the service,"[155] section 10-121 describes how terminations may take place.

The pattern develops somewhat similarly through Article 11, which describes the "statutory strong-mayor-council form of government,"[156] and Article 12, which describes the "statutory town board of trustees form of government."[157] If the employer is one of these four types of cities, any analysis must begin with the applicable statutes.[158]

Home Rule Charters

The pattern shatters altogether, however, at Article 13, which codifies the constitutionally created ability of certain municipalities to adopt their own charter.[159] Upon adoption, the charter becomes "the organic law of such city and supersede[s] any existing charter and all amendments thereof and all ordinances inconsistent with it."[160] In other words, a charter is essentially the constitution of the city, and acts as the city's supreme law.[161]

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[154] 11 O.S. § 10-101.
[155] 11 O.S. § 10-120.
[156] 11 O.S. § 11-101.
[157] 11 O.S. § 12-101.
[158] See, e.g., *Lane v. Town of Dover*, 761 F.Supp. 768 (W.D.Okla. 1991), *aff'd*, 951 F.2d 291 (10th Cir. 1991) (defining duties of town with reference to 11 O.S. §§ 12-101 *et seq.*); *Lankford v. City of Hobart*, 73 F.3d 283, 286-7 (10th Cir. 1996) (defining duties of city with reference to 11 O.S. §§ 9-101 *et seq.*).
[159] 11 O.S. §§ 13-101 *et seq.*
[160] Okla. Const. Art. 18, § 3(a).
[161] *Development Industries, Inc. v. City of Norman*, 1966 OK 59, 412 P.2d 953.

Charter as City's Fundamental Law

Indeed, the law is clear that a charter provision that is not inconsistent with the Constitution supersedes state statutes pertaining to purely municipal affairs.[162] Hence, unlike other local governments, home rule cities can have virtually any form of governance, and can create their own rules with respect to their relationship with their employees, within the confines of the state and federal constitutions, applicable federal law, and applicable state law of general concern.

This can lead to some surprising results. For example, where the city has a personnel manual, adopted by the city manager, that mandates "for cause" terminations, but the city charter requires that terminations be "for the good of the service" unless amended by the city council, does an employee have a property right in continued employment? The Tenth Circuit has said no.[163]

THOSE WHO DEAL WITH THE GOVERNMENT ARE DEEMED TO KNOW THE LAW

This result makes sense when one understands the common law with regard to political subdivisions. The law is clear that

> [W]hoever deals with a municipality does so with notice of the limitations on it or its agent's powers. All are presumed to know the law, and those who contract with it, or furnish it supplies, do so with reference to the law; and if they go beyond the limitations imposed, they do so at their peril.[164]

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[162] *U. S. Elevator Corp. v. City of Tulsa*, 1980 OK 69, 610 P.2d 791; *Town of Luther v. State ex rel. Harrod*, 1967 OK 59, 425 P.2d 986; *Oklahoma Journal Pub. Co. v. City of Oklahoma City*, 1979 OK CIV APP 42, 620 P.2d 452.

[163] *Graham v. City of Oklahoma City*, 859 F.2d 142 (10th Cir. 1988); see also *Umholtz v. City of Tulsa*, 1977 OK 98, 565 P.2d 15; *Mindemann v. Ind. Sch. Dist. No. 6 of Caddo Cty.*, 1989 OK 49, 771 P.2d 996.

[164] *Blumenauer v. Kaw City*, 1938 OK 213, 182 Okl. 409, 77 P.2d 1143, 1144-1145 (citations omitted); *Cobb v. City of Norman*, 1937 OK 66, 179 Okl. 126, 64 P.2d 901, 902.

This is so for good public policy reasons. "A municipal corporation possesses and can exercise only those powers granted in express words, those necessarily or fairly implied or incidental to the powers expressly granted, and those essential to the declared objects and purposes of the corporation."[165]

We do not want our government officials exceeding the powers granted them by the people. Where the people have granted only limited powers to contract, the government does not have inherent authority to contract more broadly. Thus, although in a private setting the result might be different, in the public arena the employee is normally out of luck.

OPEN MEETINGS/OPEN RECORDS

One advantage a plaintiff has in connection with claims against the government is the existence of various open government laws. In particular, the Oklahoma Open Meeting Act,[166] and the Oklahoma Open Records Act,[167] can allow the collection of important documents without the need of engaging in formal discovery or even in litigation at all. Under the Open Records Act, most municipal documents are open to the public for inspection and copying at reasonable times under reasonable circumstances. Under the Open Meeting Act, all formal decisions by the governing body of the government agency must be made in public session.[168] Although in a limited number of circumstances a

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[165] *Development Industries, Inc. v. City of Norman*, 1966 OK 59, 412 P.2d 953.
[166] 25 O.S. §§ 301 *et seq.*
[167] 51 O.S. §§ 24A.1 *et seq.*
[168] 25 O.S. § 305.

government can meet behind closed doors,[169] the governing body cannot take action without doing so in public.

Where the governing body willfully violates the Open Meeting Act, the action is invalid.[170] However, the courts have not recognized an independent claim for damages because of a violation of the Act. Moreover, a public body may subsequently ratify an action that was taken in violation of the Act.[171]

COLLECTIVE BARGAINING

Municipal police officers[172] and fire fighters[173] may engage in collective bargaining with their employing entity. Not all public safety employees, even uniformed employees, are necessarily among the class covered by the act. For example, airport safety officers are not considered police officers covered by the Fire and Police Arbitration Act ("FPAA").[174]

The FPAA creates a procedure for the recognition of a labor organization as an exclusive employee bargaining representative.[175] It creates a right to submit a failure to agree on a contract to arbitration.[176] It allows for municipal elections over certain contract disputes.[177] The FPAA also creates a Public Employees

[169] See 25 O.S. § 307.
[170] 25 O.S. § 313. See also *Haworth Bd. of Ed. of Independent School Dist. No. I-6, McCurtain County v. Havens*, 1981 OK CIV APP 56, 637 P.2d 902.
[171] *State ex rel. Trimble v. City of Moore*, 1991 OK 97, 818 P.2d 889, 897. See also *City of Bixby v. State ex rel. Dept. of Labor*, 1996 OK CIV APP 118, 934 P.2d 364.
[172] Compare 11 O.S. § 51-102(1) with 11 O.S. 50-101(6).
[173] 11 O.S. §§ 51-101 *et seq.*
[174] *City of Tulsa v. State ex rel. Public Employees Relations Board*, 1998 OK 92, 967 P.2d 1214.
[175] 11 O.S. § 51-103.
[176] 11 O.S. § 51-106.
[177] 11 O.S. § 51-108.

Relations Board ("PERB")[178] which has the duty of processing and hearing claims that a person has engaged in an unfair labor practice.[179] The act defines the term "unfair labor practices" as to either the city[180] or the bargaining agent.[181] In both instances, it includes a failure to bargain collectively or discuss grievances in good faith.

Similarly, public school employees have the right to engage in collective bargaining.[182] Both the board of education and the bargaining agent have a duty to negotiate in good faith.[183] The means for breaking an impasse is delineated.[184] Strikes are illegal.[185]

Both school administrators[186] and teachers[187] have certain due process rights to continued employment. The relevant acts spell out how a school board may terminate such rights.

CONCLUSION

Congress, the Legislature and the courts are continually expanding and refining the various rights and responsibilities of public employers and employees. Perhaps no other area of law has seen the exponential growth of regulation and litigation over the past decade as employment law. Public

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[178] 11 O.S. § 51-104.
[179] 11 O.S. § 51-104b.
[180] 11 O.S. § 51-102(6)(a).
[181] 11 O.S. § 51-102(6)(b).
[182] 70 O.S. §§ 509.1 *et seq.*
[183] 70 O.S. § 509.6.
[184] 70 O.S. § 509.7
[185] 70 O.S. § 509.8.
[186] 70 O.S. § 6-101.13.
[187] 70 O.S. §§ 6-101.20 *et seq.*

employment law is a legal specialty where it is vital to read the advance sheets and to keep track of all of the latest developments.