PUBLIC EMPLOYMENT PERSPECTIVES:
A "PEP" TALK

Andrew W. Lester
Lester, Loving & Davies, P.C.
1505 South Renaissance Boulevard
Edmond, Oklahoma 73013-3018
Tel. (405) 844-9900
Fax (405) 844-9958
Email: alester@lldlaw.com

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INTRODUCTION

"You can't fight city hall!" "An employer can fire an employee at any time for any reason!" When was the last time you heard those old bromides? With ever-increasing frequency, citizens are asserting 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 municipal employment – employment law and local government law. Each of these two areas of practice requires the devotion of a practitioner's full time and attention.

EMPLOYMENT LAW BY THE ALPHABET

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, not to mention the

[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.*
[9] 42 U.S.C. §§ 2000e *et seq.*
[10] 29 U.S.C. §§ 706, 791 *et seq.*

various state counterpart statutes[12] and agencies. Then, add into the mix 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 a covenant of good faith and fair dealing is 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] libel, slander,[23] and so forth.

LOCAL GOVERNMENT LAW BY NUMBER

Local government law, by contrast, focuses on an entirely different set of standards. The Civil Rights Act of 1871, otherwise known as section 1983,[24] the Open Meeting Act of Title 25,[25] the Open Records Act,[26] the Public Competitive Bidding Act,[27] Title 11, Title 19, Title 74, 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

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[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.*
[28] 51 O.S. §§ 151 *et seq.*

immunity, home rule, federalism, and the like – these are the rules familiar to the municipal law practitioner.

SYNTHESIZING EMPLOYMENT LAW AND LOCAL GOVERNMENT LAW

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.

This paper attempts to synthesize employment law with local government law, thereby providing a framework for analyzing public employment issues. It then provides several fact patterns, with the aim of putting the synthesis into practice.

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. Employees receive protection upon attaining the age of 40.

The ADEA differs from other federal civil rights statutes in many respects. One

[29] 29 U.S.C. §§ 621 *et seq.*

difference is that under the ADEA virtually everyone will eventually be a member for the protected class (assuming, of course, that they attain the age of 40). In another departure from the norm, 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. Yet a third difference is that, as a part of the "Labor" code (Title 29), as opposed to the "Public Health and Welfare" code (Title 42), the ADEA is closely linked to and generally follows judicial interpretations of the Fair Labor Standards Act, not Title VII.[30]

McDonnell Douglas

Courts have generally used a modified version of the so-called *McDonnell Douglas*[31] test in guiding[32] them through the shoals of an age discrimination case. Although the Supreme Court has, on occasion, assumed that *McDonnell Douglas* applies, it has never specifically approved that using approach under the ADEA.

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.[33] The plaintiff must be "substantially older" to show the

[30] *Greene v. Safeway Stores, Inc.*, 210 F.3d 1237 (10th Cir. 2000).
[31] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973).
[32] Indeed, the *McDonnell Douglas* framework is simply a road map, now primarily used for the summary judgment stage of a case. Once it is decided that there will be a trial, the plaintiff has the burden of showing that an adverse employment action occurred because of the employee's protected status. *Dodoo v. Seagate Technology, Inc.*, 235 F.3d 522 (10th Cir. 2000); *Kendrick v. Penske Transportation Services, Inc.*, 220 F.3d 1220 (10th Cir. 2000).
[33] *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132 (10th Cir. 2000).

claim.[34] 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.

A fact finder's rejection of the employer's legitimate non-discriminatory reason for its action challenged under the framework of does not compel judgment for the plaintiff.[35] It does, however, permit the fact finder to conclude, without more, that the employer unlawfully discriminated.[36]

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 properly executed.[37]

The Older Workers Benefit Protection Act[38] 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.

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[34] *O'Connor v. Consolidated Coin Corp.*, 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed.2d 433 (1996).
[35] *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed.2d 407 (1993).
[36] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L.Ed.2d 105 (2000)
[37] *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 118 S. Ct. 838, 139 L. Ed.2d 849 (1998).
[38] 29 U.S.C. § 626(f).

AMERICANS WITH DISABILITIES ACT

Coverage

The Americans with Disabilities Act ("ADA")[39] prohibits discrimination in the terms and conditions of employment against an otherwise qualified[40] individual who either has a disability or is perceived[41] as having a disability.[42] 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."[43] 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."[44]

Employers and public entities need not make a reasonable accommodation[45] to a qualified individual with a disability if the proposed accommodation would cause an "undue hardship."[46] "Undue hardship" means an action requiring significant difficulty or expense" when considered in light of various factors.[47] 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

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[39] 42 U.S.C. §§ 12101 *et seq.*
[40] *Borgialli v. Thunder Basin Coal Co.*, 235 F.3d 1284 (10th Cir. 2000).
[41] *McKenzie v. Dovala*, ___ F.3d ___, 2001 WL 246202 (10th Cir. 2001).
[42] 42 U.S.C. § 12112(a).
[43] 42 U.S.C. § 12132.
[44] 42 U.S.C. § 12131(2).
[45] Although an allowance of time for medical treatment may be a reasonable accommodation, an indefinite period of unpaid leave is not a reasonable accommodation where the employee does not present evidence of the expected duration of the disability. *Taylor v. Pepsi-Cola Co.*, 196 F.3d 1106, 1110 (10th Cir. 1999).
[46] 42 U.S.C. § 12112(b)(5)(A).

financial resources of the covered entity; and (3) the type of operation of the covered entity.[48]

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, however, no lawsuit may be filed.[49] A claimant must file suit quickly, 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 evaluated under the *McDonnell Douglas*[50] 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

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[47] 42 U.S.C. § 12111(10)(A).
[48] 42 U.S.C. § 12111(10)(B).
[49] See, e.g., *Walker v. United Parcel Service, Inc.*, 240 F.3d 1268, 1273 (10th Cir. 2001) (an individual cannot take away the enforcement authority of the EEOC or to force it to issue an early right to sue letter).
[50] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed.2d 668 (1973).

then must prove that the stated reason was in fact a pretext for illegal discrimination.[51]

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.[52]

It is improper within the meaning of the ADA to find an agreement for mandatory arbitration in a union setting, absent a clear and unmistakable waiver of employee rights to a federal judicial forum for employment discrimination claims.[53] However, disputes arising under employment contracts are not generally exempt from arbitration.[54]

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.[55] 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 compared to the general population.[56]

The determination of whether a person's disability substantially limits a major life

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[51] *Butler v. City of Prairie Village*, 172 F.3d 736 (10th Cir. 1999).
[52] *Sutton v. United Airlines*, 130 F.3d 893 (10th Cir. 1997).
[53] *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 119 S. Ct. 391, 142 L.Ed.2d 361 (1998)
[54] *Circuit City Stores, Inc. v. Adams*, ___ U.S. ___, 2001 WL 273205 (2001).
[55] *MacDonald v. Delta Airlines*, 94 F.3d 1437 (10th Cir. 1996).
[56] *Penny v. United Parcel Service*, 128 F.3d 408 (6th Cir. 1997).

activity should take into consideration mitigating or corrective factors.[57] For example, a near-sighted person who sees normally with corrective lenses is not disabled.[58] Moreover, an employer may enforce a federal visual acuity standard for its truck drivers, even though federal law allows waiver of the standard in an individual case.[59] Likewise, because with medication an employee's hypertension did not significantly restrict his activities and he could function normally, he did not have an impairment that substantially limited him in any major life activity and therefore does not qualify as disabled for purposes of the ADA.[60]

To be a "qualified individual," the employee must be able to perform the essential functions of the job with or without a reasonable accommodation.[61] Moreover, it is necessary to show that a reasonable accommodation could enable the plaintiff to perform the essential job functions.[62]

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.[63] In most instances, this is a question of fact.

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[57] *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).
[58] *Sutton v. United Airlines*, 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed.2d 450 (1999).
[59] *Albertson's, Inc. v. Kirkingburg* 527 U.S. 555, 119 S. Ct. 2162, 144 L.Ed.2d 518 (1999).
[60] *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 119 S. Ct. 2133, 144 L.Ed.2d 484 (1999)
[61] *Smith v. Blue Cross Blue Shield of Kansas*, 102 F.3d 1075 (10th Cir. 1996)
[62] *Anderson v. Coors Brewing Company*, 181 F.3d 1171 (10th Cir. 1999).
[63] *Morgan v. Hilti, Inc.*, 108 F.3d 1319 (10th Cir. 1997).

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.[64] The defendant need not prove that the reason for the termination was legitimate and nondiscriminatory, but must merely produce a valid reason for the termination.[65] 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.[66]

An employee who pursues and recovers Social Security Disability Insurance benefits because of a claimed inability to work is not automatically precluded from obtaining relief through an employment discrimination claim under the ADA, even though the employee claims an inability to perform the essential functions of the job. However, the plaintiff must proffer a sufficient explanation of the apparent discrepancy such that a reasonable juror could conclude that the plaintiff could nonetheless perform the essential functions of her job, with or without reasonable accommodation.[67]

FAIR LABOR STANDARDS ACT

Coverage

The Fair Labor Standards Act of 1938[68] is the grandfather of all employment legislation. Better known as the minimum wage law, it also sets the standard workweek at

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[64] *Butler v. City of Prairie Village*, 172 F.3d 736 (10th Cir. 1999).
[65] *Reeves v. Sanderson Plumbing Production, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed.2d 105 (2000).
[66] *Butler v. City of Prairie Village, supra*.
[67] *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 119 S. Ct. 1597, 143 L.Ed.2d 966 (1999)
[68] 29 U.S.C. §§ 201 *et seq.*

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.[69] The statute requires overtime pay to be calculated as 1½ times the employee's regular hourly wage.

Federalism

May Congress regulate the minimum wages and maximum hours of state employees? The Supreme Court has said variously, though perhaps not so helpfully, no,[70] yes,[71] and maybe.[72] To clarify matters, it appears from recent pronouncements involving the ADEA[73] and the ADA[74] that the Supreme Court is ready once again to say no.

Statute of Limitations

The FLSA statute of limitations is odd, 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 employer knows or shows reckless disregard

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[69] 29 U.S.C. §§ 206, 207, 213.
[70] *National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed.2d 245 (1976).
[71] *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed.2d 1016 (1985).
[72] *Seminole Tribe of Florida v. Florida*, 517 U.S. 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed.2d 252 (1996).
[73] *Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S. Ct. 631, 145 L.Ed.2d 522 (2000); see also *Migneault v. Peck*, 204 F.3d 1003 (10th Cir. 2000).
[74] *Board of Regents of the University of Alabama v. Garrett*, ___ U.S. ___, 121 S. Ct. 955 (2001).

for whether its conduct is prohibited by the FLSA.[75]

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.[76]

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.[77]

Compensatory Time

In a proper setting, governmental agencies may compel their employees to use compensatory time instead of receiving overtime wages.[78] The Supreme Court has recently upheld a plan that requires the employee to take such compensatory time during

[75] *Pabst v. O.G.&E.*, 228 F.3d 1128 (10th Cir. 2000).
[76] *Sanders v. Elephant Butte Irr. Dist. Of New Mexico*, 112 F. 3d 468, 471 (10th Cir. 1997).
[77] *Pabst v. O.G.&E.*, 228 F.3d 1128 (10th Cir. 2000); *Renfro v. City of Emporia*, 948 F.2d 1529 (10th Cir. 1991).
[78] 29 U.S.C. § 207(o).

a specified time period, thereby avoiding the need to pay overtime wages.[79]

FAMILY AND MEDICAL LEAVE ACT

Coverage

The Family and Medical Leave Act ("FMLA")[80] annually requires a covered employer to allow an eligible employee up to twelve weeks unpaid leave (or paid leave, if such 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 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

[79] *Christensen v. Harris County*, 529 U.S. 576, 120 S. Ct. 1655, 146 L. Ed.2d 621 (2000).
[80] 29 U.S.C. §§ 2601 *et seq*.

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. An employee is considered unable to perform the functions of the position when a health care provider finds that the employee is unable to perform the work at all or is unable to perform *any* of the essential functions of the position. If the employer requests such information, the employer should provide the health care provider with a description listing the essential functions of the job position. Certification may also be required when an employee requests intermittent leave.

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 also 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. An employer may not discriminate against or

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"[81] 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.[82]

TITLE VII

Coverage

Title VII of the Civil Rights Act of 1964[83] prohibits discrimination[84] with respect to the terms, conditions, or privileges of employment because of the individual's race,[85] color, religion,[86] sex, or national origin.[87] Title VII also prohibits retaliation against an employee who claims discrimination.[88] Pregnancy discrimination claims are analyzed the same as other Title VII actions.[89] 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 calendar year, and any agent of such person.[90]

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

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[81] 29 U.S.C. § 794.
[82] 29 U.S.C. § 794(a).
[83] 42 U.S.C. §§2000e *et seq.*
[84] 42 U.S.C. § 2000e-2(a)(1).
[85] *Kendrick v. Penske Transportation Services, Inc.*, 220 F.3d 1220, 1225, n. 4 (10th Cir. 2000).
[86] Interestingly, the Tenth Circuit recently stated that a religious discrimination claim under Title VII is analyzed similarly to an ADA claim, in that "in both situations, the employer has an affirmative obligation to make a reasonable accommodation." *Thomas v. National Ass'n. of Letter Carriers*, 225 F.3d 1149, 1155 n. 5 (10th Cir. 2000).
[87] *Amro v. Boeing Co.*, 232 F.3d 790 (10th Cir. 2000).
[88] *Pastran v. K-Mart Corp.*, 210 F.3d 1201 (10th Cir. 2001).
[89] *Atchley v. Nordam Group, Inc.*, 180 F.3d 1143, 1148 (10th Cir. 1999).
[90] 42 U.S.C. § 2000(2).

within 300 days of the incidents giving rise to the claim.[91]

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*[92] 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.[93] If the employer does so, the burden shifts to the plaintiff to show that the proffered reason was a pretext,[94] and that the employer discriminated against him for a reason that is unlawful under Title VII.[95] Indeed, an employee always retains the burden of persuading the trier of fact that the employer illegally discriminated.[96]

A fact finder's rejection of the employer's legitimate non-discriminatory reason for its action does not compel judgment for the plaintiff. It does, however, permit the fact

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[91] *Martinez v. Wyoming Dep't. of Family Services*, 218 F.3d 1133 (10th Cir. 2000).
[92] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed.2d 668 (1973).
[93] *Jones v. Denver Post Corp.*, 203 F.3d 748 (10th Cir. 2000).
[94] *O'Neal v. Ferguson Construction Co.*, 237 F.3d 1248, 1255-1256 (10th Cir. 2001); *Kelley v. Goodyear Tire & Rubber Co.*, 220 F.3d 1174 (10th Cir. 2000).
[95] *Munoz v. St. Mary-Corwin Hospital*, 221 F.3d 1160, 1167 (10th Cir. 2000) (to rebut employer's offer of legitimate non-discriminatory reason, plaintiff must offer evidence of nexus between adverse employment action and discriminatory intent).
[96] *Stewart v. Adolph Coors Co.*, 217 F.3d 1285 (10th Cir. 2000).

finder to conclude, without more, that the employer unlawfully discriminated.[97]

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.[98] 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."[99]

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.[100] "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.

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

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[97] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed.2d 105 (2000).

[98] But see, e.g., *Hollins v. Delta Airlines*, 238 F.3d 1255 (10th Cir. 2001) (racial harassment); *Ford v. West*, 222 F.3d 767 (10th Cir. 2000) (racial harassment).

[99] 29 C.F.R. § 1604.11(a) (1993).

[100] *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S. Ct. 998, 140 L. Ed.2d 201 (1998).

defense when no tangible employment action was taken against the employee.[101] However, a plaintiff has a relatively simple task in showing that the employer took a tangible employment action.[102] A tangible employment action occurs whenever there is a "materially adverse change in the terms and conditions of employment."[103]

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.[104] 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.[105] 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

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[101] *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).

[102] *Heno v. Sprint/United Management Co.*, 208 F.3d 847, 858 (10th Cir. 2000) (Tenth Circuit liberally defines an adverse employment action).

[103] *Mallinson-Montague v. Pocrnick*, 224 F.3d 1224, 1231-1232 (10th Cir. 2000).

[104] *Cadena v. The Pacesetter Corp.*, 224 F.3d 1203, 1208 (10th Cir. 2000).

good faith efforts to comply with the law, vicarious liability for punitive damages is inappropriate.[106]

SECTION 1983

The Civil Rights Act of 1871, more famous as section 1983,[107] 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.[108] 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.[109] On the other hand, an action against a

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[105] *Deters v. Equifax Credit Information Services, Inc.*, 202 F.3d 1262 (10th Cir. 2000).
[106] *Kolstad v. American Dental Association*, 527 U.S. 526, 119 S. Ct. 2118, 144 L. Ed.2d 494 (1999).
[107] 42 U.S.C. § 1983.
[108] *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed.2d 611 (1978).
[109] *Brandon v. Holt*, 469 U.S. 464, 105 S. Ct. 873, 83 L. Ed.2d 878 (1985).

governmental official in his personal capacity will not lead to agency liability.[110]

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.[111] 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."[112] Generally, good faith is irrelevant.[113]

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[110] Cf. *Kentucky v. Graham*, 473 U.S. 159, 105 S. Ct. 3099, 87 L. Ed.2d 114 (1985).
[111] *Davis v. Scherer*, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed.2d 139 (1984).
[112] *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed.2d 396, 410 (1982).
[113] *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed.2d 271 (1986).

Qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law."[114] 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 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

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[114] *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.

accommodation for reasonable error exists so those officials do not always err on the side of caution from fear of being sued.[115]

Generally, an order denying qualified immunity is immediately appealable.[116] 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.[117] Summary judgment orders which determine only a question of evidence sufficiency, however, are not appealable.[118]

Entity Immunity (Or, the Lack Thereof)

Most government agencies have no immunity.[119] However, under the Eleventh Amendment, states may not be sued in federal courts.[120]

Although a state may waive its Eleventh Amendment protection,[121] the consent to suit must be clearly expressed.[122] 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*."[123] Although an act of Congress may override the Eleventh Amendment immunity, section 1983 itself does not do so.[124] However, a state agency waives its Eleventh

[115] *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed.2d 589 (1991).
[116] *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed.2d 411 (1985).
[117] See, e.g., *Siegert v. Gilley*, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed.2d 277 (1991).
[118] *Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed.2d 238 (1995).
[119] *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed.2d 673 (1980).
[120] *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed.2d 67 (1984).
[121] *Alabama v. Pugh*, 438 U.S. 781, 98 S. Ct. 3057, 57 L. Ed.2d 1114 (1978).
[122] *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed.2d 662 (1974).
[123] *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).
[124] *Quern v. Jordan*, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed.2d 358 (1979).

Amendment immunity by removing a case to federal court.[125]

The denial of Eleventh Amendment immunity is immediately appealable.[126] Although the immunity protects the state, it does not necessarily protect state officials.[127] 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.[128]

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.[129] 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 law.[130] 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

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[125] *McLaughlin v. Bd. of Trustees of State Colleges of Colorado*, 215 F.3d 1168 (10th Cir. 2000).
[126] *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 113 S. Ct. 684, 121 L. Ed.2d 605 (1993); *Sturdevant v. Paulsen*, 218 F.3d 1160 (10th Cir. 2000).
[127] *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358, 116 L. Ed.2d 301 (1991).
[128] *Will v. Michigan Dep't. of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed.2d 45 (1989).
[129] *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed.2d 412 (1989).
[130] *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed.2d 107 (1988).

can suffice to impose entity liability.[131]

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.[132] However, "the abstract value of a constitutional right may not form the basis for § 1983 damages."[133] Moreover, without proof of actual injury, a plaintiff may receive only nominal damages, not to exceed one dollar.[134]

Punitive Damages

Cities are immune from liability for punitive damages under section 1983.[135] Plaintiffs may, however, pursue such damages against individual defendants in a proper action.[136] "The purpose of punitive damages is to punish the defendant for his willful or malicious conduct and to deter others from similar behavior."[137]

Attorney's Fees

The Civil Rights Attorney's Fees Awards Act of 1976[138] provides:

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[131] *Pembaur v. Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed.2d 452 (1986).
[132] *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 106 S. Ct. 2537, 91 L. Ed.2d 249 (1986).
[133] *Id.*, 477 U.S. at 308, 106 S. Ct. at 2543, 91 L. Ed.2d at 259-260.
[134] *Carey v. Piphus*, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed.2d 252 (1978).
[135] *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed.2d 616 (1981).
[136] *Smith v. Wade*, 461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed.2d 632 (1983).
[137] *Memphis Community School Dist. v. Stachura*, 477 U. S. at 307, 106 S. Ct. at 2543, 91 L. Ed.2d at 258, n. 9.
[138] 42 U.S.C. § 1988.

> 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.[139] Furthermore, a plaintiff can be awarded fees even after the case is settled or has been rendered moot.[140] 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."[141]

A declaratory judgment constitutes relief under section 1988 only if it affects the behavior of the defendant towards the plaintiff.[142] 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 whatsoever.[143]

Fees for paralegals are shiftable to the losing party.[144] Expert witness fees are not.[145] 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.[146]

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[139] *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed.2d 40 (1983).
[140] See *Maher v. Gagne*, 448 U. S. 122, 100 S. Ct. 2570, 65 L. Ed.2d 653 (1980).
[141] *Christiansberg Garment Co. v. EEOC,* 434 U.S. 412, 422, 98 S. Ct. 694, 700, 54 L. Ed.2d 648, 657 (1978).
[142] *Rhodes v. Stewart*, 488 U.S. 1, 109 S. Ct. 202, 102 L. Ed.2d 1 (1988).
[143] *Farrar v. Hobby*, 506 U.S. 103, 113 S. Ct. 566, 121 L. Ed.2d 494 (1992).
[144] *Missouri v. Jenkins*, 491 U.S. 274, 109 S. Ct. 2463, 105 L. Ed.2d 229 (1989).
[145] *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 111 S. Ct. 1138, 113 L. Ed.2d 68 (1991).
[146] *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).

STATUTE OF LIMITATIONS

For limitation purposes "§ 1983 claims are best characterized as personal injury actions."[147] The general or residual state statute of limitations for personal injury actions applies.[148] In Oklahoma, the two year statute of limitations of 12 O.S. § 95(Third) applies to section 1983 actions.[149]

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[150] political party affiliation or support.[151] Furthermore, the government may not discriminate against its employee[152] based upon the employee's speech on a matter of public concern.[153]

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[147] *Wilson v. Garcia,* 471 U.S. 261, 280, 105 S. Ct. 1938, 1949, 85 L. Ed.2d 254, 269 (1985).
[148] *Owens v. Okure*, 488 U.S. 235, 109 S. Ct. 573, 102 L. Ed.2d 594 (1989).
[149] *Meade v. Grubbs*, 841 F.2d 1512 (10th Cir. 1988).
[150] Analyzing first amendment retaliation claims against a non-employer governmental official involves different concerns and therefore uses different methods. *Worrell v. Henry*, 219 F.3d 1197, 12079-1214 (10th Cir. 2000).
[151] *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).
[152] While this analysis applies to government employees, it does not apply to elected officials. *Phelan v. Laramie Cty. Community College Board of Trustees*, 235 F.3d 1243 (10th Cir. 2000).
[153] *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).

Employee speech rights are not absolute.[154] 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.[155] This balancing is done of a case specific nature.[156] The fact that employee speech is inappropriate or controversial, however, does not mean that it is unprotected.[157] 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.[158]

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.[159] Courts also look at the time, place and manner of speech in weighing the competing interests at stake.[160] 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 is appropriate.[161]

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[154] *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed.2d 708 (1983).
[155] *Pickering v. Board of Ed.*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed.2d 811 (1968).
[156] *Worrell v. Henry*, 219 F.3d 1197, 1207 (10th Cir. 2000).
[157] *Vanderhurst v. Colorado Mountain College Dist.*, 208 F.3d 908 (10th Cir. 2000).
[158] *Rankin v. McPherson*, 483 U.S. 378, 107 S. Ct. 2891, 97 L. Ed.2d 315 (1987).
[159] *Clinger v. New Mexico Highlands University Bd. of Regents*, 215 F.3d 1162 (10th Cir. 2000).
[160] *Anderson v. McCotter*, 205 F.3d 1214 (10th Cir. 2000).
[161] *Mt. Healthy City School District Board Of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed.2d 471 (1977).

THE DUE PROCESS CLAUSE

The De Process Clause protects two distinct interests of a public employee. It prohibits the deprivation of property or liberty without due process.[162] 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.[163] 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.[164]

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 exists generally requires reference to state law.[165]

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[162] *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed.2d 548 (1972).
[163] *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).
[164] *Renaud v. Wyoming Dep't. of Family Services*, 203 F.3d 723 (10th Cir. 2000).
[165] *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed.2d 548 (1972).

The Tenth Circuit has recently held that a tenured[166] employee is entitled to substantive due process protection.[167] That means that governmental action in connection therewith cannot be arbitrary. Plaintiff must, however, show that the purportedly wrongful governmental conduct "represent[s] more than an ordinary tort."[168]

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,[169] (3) the right to an impartial decision-maker, and (4) the right to be confronted with specific allegations.[170] 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.[171]

It is important to remember that the Due Process Clause simply encompasses a guarantee of fair procedure.[172] 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.

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[166] A non-tenured, tenure-track professor does not have a property interest in continued employment. *Lighton v. University of Utah*, 209 F.3d 1213, 1222 (10th Cir. 2000).
[167] *Garcia v. City of Albuquerque*, 232 F.3d 760 (10th Cir. 2000).
[168] *Clark v. City of Draper*, 168 F.3d 1185, 1190 (10th Cir. 1999).
[169] *McClure v. Ind. Sch. Dist. No. 16*, 228 F.3d 1205 (10th Cir. 2000).
[170] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed.2d 494 (1985).
[171] *Gilbert v. Homar*, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed.2d 120 (1997).
[172] *Zinermon v. Burch*, 494 U.S. 113, 110 S. Ct. 975, 108 L. Ed.2d 100 (1990).

Allegations of sexual harassment, for example, are actionable as violations of equal protection.[173] So, too, are racial harassment claims cognizable under section 1983.[174] 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.[175]

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,[176] and in claims involving searches of the workplace.[177]

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").[178]

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.[179] This must be done within one year of the tort. Once the claim has been filed, the government has 90 days within which

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[173] *Noland v. McAdoo*, 39 F.3d 269 (10th Cir. 1994); *Sauers v. Salt Lake County*, 1 F.3d 1122 (10th Cir. 1993).
[174] *Ryan v. City of Shawnee*, 13 F.3d 345 (10th Cir. 1993).
[175] *Lankford v. City of Hobart*, 73 F.3d 283 (10th Cir. 1986).
[176] *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed.2d 685 (1989).
[177] *O'Connor v. Ortega*, 480 U.S. 709, 107 S. Ct. 1492, 94 L. Ed.2d 714 (1987).
[178] 51 O.S. §§ 151 *et seq.*
[179] 51 O.S. § 156.

to consider the claim. During that time, it can either approve or deny the claim. If the government takes no action on the claim within 90 days, the claim is deemed denied.[180]

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.[181]

Entity Liability

Whereas there is no *respondeat superior* liability under section 1983, such liability does exist under the GTCA.[182] However, the employee must have been acting within the scope of his employment.[183] Where the employee acted outside the scope of his employment, the government has no liability.[184] 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.[185]

Limitation of Liability

The GTCA limits the liability of the government to $25,000 for any claim for property damage,[186] $125,000 for any claim for any other type of damage,[187] and $1,000,000 for all claims arising out of a single incident.[188] As is true under section 1983, punitive damages are not available under the GTCA.[189] Of course, if the offending employee was acting outside the scope of his employment, the damages caps do not apply.

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[180] 51 O.S. § 157.
[181] *Id.*
[182] 51 O.S. § 153.
[183] 51 O.S. § 152(9).
[184] 51 O.S. § 153(A).
[185] 51 O.S. § 153(B).
[186] 51 O.S. § 154(A)(1).
[187] 51 O.S. § 154(A)(2).
[188] 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,[190] towns,[191] counties,[192] school boards,[193] public trusts,[194] rural water districts,[195] housing authorities,[196] as well as other forms of local governments.[197] 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."[198] Most employees of such cities are terminable "solely for the good of the service," which means that they are employees at will.[199] 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,[200] although there appears to be some discrepancy between that section and Article 9, which describes other officers.[201]

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[189] 51 O.S. § 154(B).
[190] 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.*
[191] 11 O.S. §§ 12-101 *et seq*.
[192] 19 O.S.
[193] 70 O.S.
[194] 60 O.S. §§ 176 *et seq.*
[195] 82 O.S. §§ 1324.1 *et seq*.
[196] 63 O.S. §§ 1051 *et seq.*
[197] See also 51 O.S. § 152(8) (defining the term "political subdivision" under the Governmental Tort Claims Act).
[198] 11 O.S. § 9-101.
[199] 11 O.S. § 9-117.
[200] 11 O.S. § 1-102(6)
[201] 11 O.S. § 9-114

Article 10 describes the statutory council-manager form of government."[202] While most city employees here are also terminable "solely for the good of the service,"[203] 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,"[204] and Article 12, which describes the "statutory town board of trustees form of government."[205] If the employer is one of these four types of cities, any analysis must begin with the applicable statutes.[206]

Charter Cities

The pattern shatters altogether, however, at Article 13, which codifies the constitutionally created ability of certain municipalities to adopt their own charter.[207] 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."[208] In other words, a charter is essentially the constitution of the city, and acts as the city's supreme law.[209]

Charter as City's Fundamental Law

Indeed, the law is clear that a charter provision that is not inconsistent with the

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[202] 11 O.S. § 10-101.
[203] 11 O.S. § 10-120.
[204] 11 O.S. § 11-101.
[205] 11 O.S. § 12-101.
[206] 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.*).
[207] 11 O.S. §§ 13-101 *et seq.*
[208] Okla. Const. Art. 18, § 3(a).
[209] *Development Industries, Inc. v. City of Norman*, 1966 OK 59, 412 P.2d 953.

Constitution supersedes state statutes pertaining to purely municipal affairs.[210] 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.[211]

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.[212]

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

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[210] *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.

[211] *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.

[212] *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.

or incidental to the powers expressly granted, and those essential to the declared objects and purposes of the corporation."[213]

As a matter of public policy, the people do not want their government officials exceeding the powers they have granted to them. Where the people have granted only limited powers to contract, the government does not have some 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,[214] and the Oklahoma Open Records Act,[215] 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.[216] Although in a limited number of circumstances a government can meet behind closed doors,[217] the governing body cannot take action without doing so in public.

Where the governing body willfully violates the Open Meeting Act, the action is

[213] *Development Industries, Inc. v. City of Norman,* 1966 OK 59, 412 P.2d 953.
[214] 25 O.S. §§ 301 *et seq.*
[215] 51 O.S. §§ 24A.1 *et seq.*
[216] 25 O.S. § 305.
[217] See 25 O.S. § 307.

invalid.[218] 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.[219]

ATTORNEY-CLIENT PRIVILEGE

Another distinction between government practice and employment law in the private sector revolves around the attorney-client privilege. In the public context, the privilege that normally exists between attorney and client is limited.

According to the Oklahoma Evidence Code:

> There is no [attorney-client] privilege under this rule ... as to a communication between a public officer or agency and its attorney unless the communication concerns a pending investigation, claim or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation or proceeding in the public interest.[220]

Thus, the presumption is that no privilege exists.[221] To establish an attorney-client privilege, the public body must show:

1. that there is an ongoing investigation; and
2. that disclosure will seriously impair the ability of the public entity making the claim to conduct the investigation.

Courts are reluctant to declare that the privilege does not protect such communications. And certainly communications between the government lawyer and the client regarding the on-going case itself are privileged. Nevertheless, there are some

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[218] 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.
[219] *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.
[220] Okla. Stat. tit. 12, § 2502(D)(6).
[221] *Stolberg v. Buley*, 50 F.R.D. 281 (D. Conn. 1970).

communications that a party can discover, or even use at trial, that in the private sector would normally be considered privileged.

COLLECTIVE BARGAINING

Municipal police officers[222] and fire fighters[223] 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").[224]

The FPAA creates a procedure for the recognition of a labor organization as an exclusive employee bargaining representative.[225] It creates a right to submit a failure to agree on a contract to arbitration.[226] It allows for municipal elections over certain contract disputes.[227] The FPAA also creates a Public Employees Relations Board ("PERB")[228] which has the duty of processing and hearing claims that a person has engaged in an unfair labor practice.[229] The act defines the term "unfair labor practices" as to either the city[230] or the bargaining agent.[231] 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

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[222] Compare 11 O.S. § 51-102(1) with 11 O.S. 50-101(6).
[223] 11 O.S. §§ 51-101 *et seq.*
[224] *City of Tulsa v. State ex rel. Public Employees Relations Board*, 1998 OK 92, 967 P.2d 1214.
[225] 11 O.S. § 51-103.
[226] 11 O.S. § 51-106.
[227] 11 O.S. § 51-108.
[228] 11 O.S. § 51-104.
[229] 11 O.S. § 51-104b.
[230] 11 O.S. § 51-102(6)(a).

bargaining.[232] Both the board of education and the bargaining agent have a duty to negotiate in good faith.[233] The means for breaking an impasse is delineated.[234] Strikes are illegal.[235]

Both school administrators[236] and teachers[237] 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 employees and their employers. Perhaps no other area of law has seen the exponential growth of regulation and litigation over the past decade as employment law. Public 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.

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[231] 11 O.S. § 51-102(6)(b).
[232] 70 O.S. §§ 509.1 *et seq.*
[233] 70 O.S. § 509.6.
[234] 70 O.S. § 509.7.
[235] 70 O.S. § 509.8.
[236] 70 O.S. § 6-101.13.
[237] 70 O.S. §§ 6-101.20 *et seq.*

PROBLEM I:

Louie Larkin was demoted from his position as Deputy Chief of the Winston Police Department in significant part because of statements he made at a Winston City Council meeting in June. The statements related to events that had taken place two weeks earlier in Winston when two police officers responded to a shooting incident in a predominantly black neighborhood. A potentially riot-like situation developed when the officers arrived, with individuals throwing rocks at the police and another vehicle speeding at the officers when they exited their patrol car. The officers had to call for back-up. As a result of the incident, members of the black community requested and received a meeting with Winston officials to address the events and the police officers' actions.

The incident again arose in the public comment section of the next regularly scheduled city council meeting. Larkin attended the meeting and addressed the incident, purporting to speak for the police department. When he went to the meeting, Larkin was in the middle of his scheduled patrol shift. He had not been excused from his duties to attend the meeting and had not been authorized to speak on behalf of the department. Larkin did not inform his supervisors or dispatcher that he was leaving his patrol for over three hours to attend the meeting. He was the only officer scheduled for patrol during that shift.

At the meeting Larkin stated that the officers had followed department procedures during the relevant incident. However, Larkin also stated that the incident was the culmination of prior problems created by a particular officer. Specifically, Larkin explained that

> I don't think we've got a police department problem. A police department-community problem. I think we have a police officer and community problem.... This thing that happened the other night ... was the culmination of an attitude and a theme that's been going on for quite awhile.

He also stated

> We do have a police officer image problem. Now I don't like to stand here and slam a fellow officer but that's the way it is.

Larkin did not name the particular officer but it was obvious to whom he was referring.

Larkin's statements angered other officers and disrupted the small police department. The Winston Police Department had only six officers at the time, including Larkin and Chief Barry Blocker. Larkin denied that his comments were disruptive. Nonetheless, a week later Chief Blocker demoted Larkin from deputy chief to patrol officer, purportedly because Larkin left his scheduled patrol, criticized a fellow officer in public without authorization, and significantly disrupted the functioning of the department. The City upheld the demotion, stating that "there are serious disagreements with Chief Blocker and Assistant Chief Larkin, which make it impossible for them to work together in this capacity."

Moore v. City of Wynnewood, 57 F.3d 924 (10th Cir. 1995)

PROBLEM II:

Prior to the 1996 election for the Board of County Commissioners of Columbus County, Marvin Merkel and Kevin Kerwin had been close personal friends. In the 1996 election, Kerwin lost his reelection bid for District 3 County Commissioner. Merkel supported his opponent. Kerwin subsequently regained his post in 2000.

In 2000, Merkel ran against Tom Tanner for District 2 County Commissioner. After defeating Merkel in the Democratic primary, Tanner sought Merkel's support in the general election. Merkel agreed to support Tanner. He built and hauled signs, provided transportation, and introduced Tanner to people around the county. After winning the general election, Tanner offered Merkel employment as the District 2 road foreman. Merkel accepted and began work in January 2001.

Several months later, Kerwin initiated an investigation of Merkel. Kerwin told Tanner that two citizens had complained that the driveway of a county employee had been paved using county equipment and materials. At the time, District 2 employees had just finished an oil and chip paving job for the Big Foot School District. Kerwin and Tanner drove past the school and discovered that the driveway of county employee Frank Fuller had recently been oiled and chipped. In a subsequent meeting with Tanner, Merkel admitted that he was aware that county employees had worked on Fuller's driveway and that he had been present during at least part of the project.

Tanner dismissed Merkel in September for using county equipment and materials to pave Fuller's driveway. The Columbus County District Attorney filed criminal charges against Merkel for embezzlement of county property, a charge of which Merkel

was later acquitted. Over the course of these events, Tanner issued various press releases concerning the investigation, criminal charges, and acquittal.

Shinault v. Cleveland County Board of County Commissioners,
82 F.3d 367 (10th Cir. 1996)

PROBLEM III:

Sheriff Burns, a Republican, beat Democratic incumbent Sheriff Dill. He subsequently hired Lisa Lane as dispatcher/matron. Lane spent approximately 90% of her time on the teletype and dispatching, and 10% of her time on assisting the jailers. Basically, Lane performed clerical and ministerial duties for the jail.

Last year, Sheriff Burns lost his bid for re-election in the Republican primary. Bill Bates, the Democratic nominee, won the election and took office at the first of the year. Bates retained Lane as dispatcher/matron.

In March, the Republican District Attorney began an investigation of Bates. During the investigation, the District Attorney requested statements from Lane concerning her knowledge of the jail's operation. Lane cooperated, giving statements concerning early release of prisoners and Bates' command for her to falsify such prisoners' records. Several other employees also provided statements against the sheriff's interest.

On May 1, the Chester County Commissioners voted to take no action against Sheriff Bates. On May 2, Bates told Lane that he would remember who had tried to get him thrown out of office and that there would be changes made in his office that she would not like.

A week later, Bates began taking retaliatory actions. He demoted several department employees who had participated in the investigation. He instituted several policy changes, such as eliminating independent criminal investigations. On several occasions, he stated that he would "have his day," implying retaliation against those who had participated in the investigation. He even made clear that he knew the identity of each person who had given statements against him and that he would fire all of them. He also

started transferring deputies who had given negative statements to undesirable shifts. He made just such a transfer for Ms. Lane.

Three weeks later, Bates fired Lane, supposedly because of budget cuts. Yet, a few days later, Bates hired a new employee, and gave her Lane's job duties Lane's salary and a better shift. A review of the County budget records shows that there was absolutely no decrease in the personal services fund, out of which Lane was paid.

PROBLEM IV:

From 1997 to 2000, Marcia Minor was employed by the City of Erehwon as the Director of Recreational Services. According to the Erehwon City Charter, appointments and removals to municipal employment "shall be made upon the basis of merit and fitness alone." The Erehwon City Code states that the City Manager has "the power to appoint and to remove at pleasure all administrative department heads." Minor clearly qualifies as a "department head."

On February 7, 2000, amid publicly disclosed allegations of potentially criminal conduct, Trotter suspended Minor with pay and requested the Police Department to commence a criminal investigation.. During the suspension, a series of articles was published about Minor in local newspapers, many of which quoted sources at the City, including the City Manager, the Police Chief and the City Attorney.

On May 19, 2000, City notified Minor that a hearing would be held on May 24, 2000, to determine whether Minor would be fired from her employment with the City. The letter charged Minor of (1) mismanagement, (2) failure to follow city policies, (3) using public property for private gain. There were no additional details regarding the charges. The evening before the scheduled hearing, the *Erehwon Evening Star* published the contents of the letter under the front-page headline, "City plans to oust Minor."

The hearing was held on May 24. The City refused to allow Minor to call witnesses on her behalf. She was not allowed to inspect city documents which would have exonerated her. She was not allowed to know the names of, or to cross-examine, her accusers.

By letter dated May 27, 2000, Trotter terminated Minor, stating: "As you are

aware, pursuant to the Erehwon City Charter and Municipal Code you are an at will employee. Effective May 27, 2000, your employment with City of Erehwon is hereby terminated."

On May 28, pursuant to City procedure, Minor appealed her termination and asked the City to schedule an appeal hearing. However, City policy only allowed her on appeal to present "new matters in writing to the City Manager." No other post-termination procedure was allowed.

PROBLEM V:

Plaintiffs are on call to monitor building alarms weekdays from 4:30 p.m. to 7:30 a.m. and twenty-four hours a day on weekends. During these hours, alarms go to computers at plaintiffs' homes as well as to pagers they carry. The pagers, however, are only 70% reliable. Plaintiffs must respond to the alarms within 10-15 minutes. Failure to respond within the time limit is grounds for discipline. The short response time, coupled with unreliable pagers, forced plaintiffs to remain at or near their homes while on call.

On average, plaintiffs receive an average of three to five alarms per night, not including pages for security issues. Not all alarms require plaintiffs to report to the office. Many can be fixed by remote computer. It takes an average of forty-five minutes to respond to each alarm. These alarms severely disrupt plaintiffs' sleep. They rarely experience more than five hours of uninterrupted sleep per night. During waking hours, plaintiffs are unable to pursue many personal activities while on call because of the need to come into their homes to check their computers every fifteen minutes.

Pabst v. O.G.&E., 228 F.3d 1128 (10th Cir. 2000)

PROBLEM VI:

Over the years, City of Columbia, a charter city which has the council-manager form of government, has experienced turbulent political seas. At the last election, one of the main issues was the continued employment of the city manager, George Granger. The "outs" won the election, and immediately took over 4 of the 5 seats on the city council. The fifth council member, Jim Johnson, immediately experienced strained relations with the newcomers. Shortly after the election, the new council received the resignation of the city manager.

Lana Rooker served as the Assistant City Manager for the last three years. The assistant city manager is the manager's "right hand" and "alter ego." According to the job description, she acts on the city manager's behalf at city council meetings and city, civic, and social functions; she works on confidential and sensitive matters; she troubleshoots community problems; and she must maintain good relationships with the council, other employees and the public. The assistant serves at the pleasure of the city manager. Even during the several months after Granger left the employ of the City, Rooker was regularly seen throughout the community in close contact with Granger.

One day in August, shortly after the election, Rooker and the new council members attended a meeting of the Municipal League. The following evening, at a regularly scheduled City Council meeting, Johnson accused the other four council members of violating the Oklahoma Open Meeting Act by deciding, while attending the league conference, to hire a new city attorney.

A reporter for the local newspaper contacted Rooker and asked to speak to her about the conference. Rooker asked the acting city manager and the city attorney whether

she should meet with the reporter. They told her she could do so as long as she told the truth. A subsequent newspaper article discussed Johnson's allegations, and included statements from Rooker that supported Johnson's claims.

Meanwhile, recall petitions were circulating, seeking to recall the mayor and the other three newly elected council members. At the election held the following March, all four were retained in office. One month later, on April 25, C. V. Gross, who had become the new city manager after the first of the year, terminated Rooker's employment. Gross said that Rooker was unfit for the job, and that her job performance had been substandard.

Barker v. City of Del City, 215 F.3d 1134 (10th Cir. 2000).

PROBLEM VII:

Beverly Berger, a 70-year old woman, had been the resident-manager of Greenway Park Apartments for over nine years. There had never been any complaint about her services. On November 6, Berger was summarily discharged by Lucy Loring in front of two employees and given 30 minutes to clear out her office and turn in her keys. When Berger asked why she was being fired, Loring responded that she didn't need to have reasons. During this time, a locksmith changed the locks on the door to Berger's office. A few days later, she was replaced by a 27-year old man.

There was no prior notice of any dissatisfaction with Berger's performance, and no explanation at the time of the discharge as any reason. Further, the following morning Berger was given a formal eviction notice in which she was given five days to vacate the apartment in which she had resided for the past nine years. When it was pointed out that state law gave her 30 days to vacate, Greenway agreed thereto.

At the time of the discharge, Loring demanded an immediate accounting by Berger of the petty cash fund. Berger responded that she would need time to make such accounting. The following day Berger left a message at the office that she would turn in the reconciliation on November 8, whereupon Loring called the local police department and informed them that the petty cash fund had not been turned in.

In immediate response to Loring's complaint, a policeman arrived at Berger's door, knocked on her door for about five minutes and tested the doorknob. Berger was inside her apartment at the time, but did not open the door. She says that she thought somebody was going to break down her door, and that the experience was "horrible."

Later that same morning, Berger was informed by Loring that she had called the police regarding the petty cash fund.

When Berger timely vacated her premises, she moved in, temporarily, with her granddaughter who lived in another apartment in the Greenway Park Apartments. Greenway then served a 30-day notice on the granddaughter.

PROBLEM VIII:

For 11 years, Juliette Jimenez worked for the City of Richfield. In May 1999, Jimenez was ordered to investigate another employee for possible wrongdoing. During the four days of the investigation, Jimenez was placed under extraordinary emotional strain which caused her to suffer a mental breakdown on May 19, 1999.

Before her breakdown, Jimenez had no mental disability. Instead, she was a fully competent employee who was performing the duties of her position. After her breakdown, Jimenez was unable to work. She sought treatment from a psychiatrist, who diagnosed her as suffering from severe depression and acute anxiety.

On June 21, Jimenez filed a request for leave. City granted that request and provided Jimenez leave from June 26 until September 15.

In early August, Jimenez requested forms so that she could participate in City's voluntary annual leave transfer program. That program would have allowed Jimenez to remain on paid leave by obtaining donated leave from other employees. City refused to provide the forms directly to Jimenez because she had obtained counsel. Instead, City told her to have her attorney contact it.

Around September 12, Jimenez wrote to City requesting that it extend her leave until January 15, 2000. On September 29, however, City wrote back, informing Jimenez that City policy allowed extended leave without pay, but only under two circumstances: (1) if City could assure her a position of like status and pay at the same geographic location upon return, or (2) if City could not make such assurances, but the employee waived his or her right to return to such a position. City told Jimenez that it could not assure her return to an equivalent position and, thus, it could grant her request for leave

only if she waived her right to return to such a position. City placed Jimenez on leave without pay until she submitted a completed request for extended leave.

That same day, Jimenez filed a charge with the EEOC alleging age and disability discrimination. Thereafter, on October 16, she submitted a request for extended leave without pay, as well as a request to participate in City's voluntary annual leave transfer program. With the requests, Jimenez included letters from her doctors, stating that she was unable to work. In the requests, however, Jimenez stated that she would not "waive my rights to my position, pay and location upon return to work."

On November 6, City informed Jimenez that it could not grant her request for extended leave without pay because she had not waived her right to return to an equivalent position. City therefore placed her on AWOL status. However, City gave Jimenez five working days to reconsider her decision not to waive that right. Because she was AWOL, City refused to consider her request to participate in the voluntary annual leave transfer program.

On November 7, Jimenez filed another charge with the EEOC, alleging that City had retaliated against her for filing the first charge. Two days later, she again informed City that she would not waive her right to return to an equivalent position.

In response, City told Jimenez that it was considering dismissing her from her position for being AWOL. After repeated exchanges of correspondence, City dismissed Jimenez on December 23. That same day, she filed yet another charge with the EEOC alleging that she had been terminated in retaliation for filing her previous charges with the EEOC.

Cisneros v. Wilson, 226 F.3d 1113 (10th Cir. 2000)

PROBLEM IX:

The City of Rutherford has the statutory aldermanic form of government. Gary Gross was elected as the town marshal. By operation of ordinance, Gross also became the City police chief.

The 15-person Rutherford police department, includes three dispatchers. Gross named Lisa Lindstrom as chief dispatcher. Other than the title, there is no difference in the duties or pay of the chief dispatcher from other dispatchers.

Starting in May, Gross engaged in a course of conduct towards Lindstrom that included fondling, requesting sexual favors, and making obscene gestures and unwelcome advances. When it became clear to Chief Gross that his sexual advances would not be accepted, he threw temper tantrums, began spying on Lindstrom while she was off duty, threatened to fire her and started spreading rumors that Lindstrom was a lesbian. He also used his authority as police chief to obtain Lindstrom's private medical records without her consent from a local hospital in an attempt to discredit her and to prove that she really was a lesbian. In July, he also removed her title as chief dispatcher.

In August, Gross got the City Council to terminate Lindstrom's employment. When she challenged her termination, however, the City Council provided her with a post-termination hearing. During the hearing, however, Lindstrom never mentioned any allegations of sexual harassment. Upon conclusion of the hearing, the Council voted to reinstate Lindstrom to her position with compensation for missed pay, subject to a ninety-day probationary period.

Several months later, Lindstrom finally told the Mayor about the on-going sexual harassment. The Mayor immediately suspended Lindstrom with pay so that he could

conduct an investigation. The investigation proved inconclusive. The mayor reinstated Lindstrom, moved the dispatcher's office and changed her schedule so she would not come into contact with Chief Gross. After these steps, the harassment stopped. A week later, Gross was defeated at the polls, ending his tenure as both marshal and police chief.

Lankford v. City of Hobart, 27 F.3d 477 (10th Cir. 1994)
Lankford v. City of Hobart, 73 F.3d 283 (10th Cir. 1996)

PROBLEM X:

The Town of Rehoboth is a statutory town. Laney Lewis is the Rehoboth police chief, and has served in that capacity for 3 years. On February 12, the Board of Trustees met in executive session. Upon reconvening into regular session, the board voted to terminate Lewis "for the good of the service." Lewis turned in her badge, her gun and other Town property in her possession the following morning. At that time, she pointed out to the Town clerk that the agenda for the board meeting the previous evening made no mention of any potential action on her continued employment. The clerk immediately called the mayor, who said that he didn't care, as far as he was concerned Lewis was no longer the police chief.

The board met again the following month. This time, the Town had a proper agenda with all items spelled out in full compliance with the Open Meetings Act. When the item regarding the police chief arose, Lewis got up to speak. Lewis demanded the right to have a hearing, saying that no one had ever told her a reason that she was being terminated. The Town board then voted to ratify Lewis' termination, and also voted to pay her back wages through that date.

Lane v. Town of Dover, 761 F.Supp. 768 (W. D. Okla. 1991),
aff'd, 951 F.2d 291 (10th Cir. 1991)