Resolving Gender Conflict in the Workplace
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RESOLVING GENDER CONFLICT IN THE WORKPLACE: CONSENSUAL AND NONCONSENSUAL CONDUCT

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INTRODUCTION

Most employers are by now well aware that Title VII of the 1964 Civil Rights Act prohibits sexual harassment in the workplace. Traditionally, sexual harassment is defined in one of two ways: (1) "quid pro quo" sexual harassment in which job advancement is conditioned on the grant of sexual favors; and (2) "hostile work environment" sexual harassment in which the workplace is pervaded with sexual intimidation, ridicule and insult. Recently, however, employees have sought to invoke Title VII's prohibition against sex discrimination in other contexts. Moreover, employees are also relying on common law concepts of contractual assurances and privacy rights in actions against their employers based on consensual and nonconsensual conduct in and out of the workplace.

This paper explores several common situations arising in the workplace, and discusses how they may give rise to liability for employers under some of these theories. The situations discussed in this paper are obviously not exhaustive. Furthermore, this paper does not purport to advise employers about how to handle particular situations arising in the workplace, which can only be done by careful analysis of each particular workplace situation.

I. Dating and On the Job Relationships

Typically, there are two major problems with romantic relationships in the workplace. One problem occurs when the relationship involves a supervisor with a supervisee. It is easy to imagine that if the supervisee desires to end the relationship, and the supervisor retaliates, this may give rise to a cause of action for "quid pro quo" sexual harassment.[(1)] What is less obvious, however, is that when the relationship is continuing without difficulty, other employees (not parties to the relationship) may complain of favoritism or preferential treatment by the supervisor.

The regulations implementing Title VII recognize that a cause of action for discrimination against third parties may arise from romantic relationships in the workplace: "Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit." 29 C.F.R. § 1604.11(g) (1993). This federal regulation has been used as the basis for claims of sexual favoritism in the workplace under Title VII.

Initially, the few cases based on sexual favoritism were successful. For example, in one case, the plaintiff applied for a promotion at a Veterans' Administration Hospital

in Delaware.[2] She was one of five applicants who were determined to be qualified for the position, but the person who was selected for the position had had a sexual encounter with the person making the employment decision. The plaintiff sued, alleging that in order to be selected for the position, a woman had to grant sexual favors, which was a condition not imposed on men. The trial court held that the plaintiff had a cause of action under Title VII, based on Section 1604.11(g) discussed above.

Another early decision involved a failure to promote claim by a nurse, who lost the promotion to another nurse who was having a sexual relationship with the doctor who was in charge of the promotion.[3] The trial court relied on the Toscano case discussed above, and found, like the court in Toscano, that the plaintiff had stated a claim under Title VII because she had established that sex was a substantial factor in the discrimination, for no legitimate reason. The court of appeals affirmed, finding that "unlawful sex discrimination occurs whenever sex is `for no legitimate reason a substantial factor in the discrimination.'"

More recently, however, several cases have rejected sexual favoritism claims brought under Title VII. In DeCintio v. Westchester County Medical Center, a group of male respiratory therapists sued their medical center employer, claiming that promotion requirements were created to disqualify them from the position of Assistant Chief Respiratory Therapist.[4] The employees alleged that their supervisor considered only applicants who possessed certification from a specific professional organization, in order to ensure that the woman he was dating would be given the promotion, who was the only applicant with that certification. Although the trial court found that the employees had stated claims under Title VII and the Equal Pay Act, the court of appeals reversed, finding that Title VII precluded only discrimination based on sex, not on a person's sexual affiliations.[5] The court also noted that the guidelines issued by the EEOC indicated that "sexual relationships between co-workers should not be subject to Title VII scrutiny, so long as they are personal, social relationships."[6]

A later case relied on DeCintio in rejecting a claim of favoritism under Title VII. In that case, the plaintiff was selected for termination when the company decided to eliminate one of its two product technician positions.[7] She sued under Title VII, claiming that the other product technician was not terminated because of her romantic relationship with the plant manager. Relying on DeCintio, the trial court granted summary judgment to the employer, reasoning that the plaintiff had not proved either that job benefits were conditioned on submission to the manager's sexual advances, or that the relationship between the plant manager and the co-worker was nonconsensual. The court reasoned that preferential treatment based on a consensual romantic relationship between a supervisor and an employee was not gender-based discrimination under Title VII: "Male employees shared with the plaintiff the same disadvantage relative to the favored woman: none could claim the special place in the supervisor's heart that the favored woman occupied. Favoritism and unfair treatment, unless based on a prohibited classification, do not violate Title VII."[8]

These cases reveal some ambiguity in Title VII interpretation. In 1990, the EEOC clarified its position in its Policy Guidance on employer liability for sexual favoritism. The EEOC adopted the reasoning of DeCintio and Miller, and stated that isolated instances of preferential treatment based upon consensual and romantic

relationships were not prohibited under Title VII: "Title VII does not prohibit preferential treatment based upon consensual relationships[.] [F]avoritism toward a `paramour'... may be unfair, but it does not discriminate ... in violation of Title VII, since both [men and women] are disadvantaged for reasons other than their genders."[(9)]

Since the EEOC's issuance of its Policy Guidance on employer liability, at least one court has rejected a claim of sexual favoritism based on a consensual relationship between a supervisor and a co-worker.[(10)] The plaintiff claimed that she was transferred from one of the company's "prime" stores in order to replace her with the supervisor's younger girlfriend. The court found that the alleged "discrimination" was not based on sex, but was more like nepotism. "If someone favors a `close friend,' other men and women do not thereby have Title VII or ADEA claims."[(11)]

In the same Policy Guidance directive, the EEOC also stated that both male and female employees could sue for sexual harassment under a "hostile work environment" theory where widespread instances of favoritism, even when the conduct was not directed towards the complaining employees and even when the complaining employees had not been coerced into participating in such relationships. This directive, then, creates new ambiguity in Title VII interpretation. Future cases will have to determine whether favoritism in the workplace is "widespread," thereby subjecting employers to liability to third parties (of either sex) for sexual harassment based on sexual favoritism.

Arguably, this ambiguity may be resolved by the same analysis that has always pertained to "hostile work environment" sexual harassment claims. That is, when the sexual favoritism is widespread, it may be said to pervade the workplace with sexual intimidation. Therefore, even employees who are not involved in romantic relationships with a particular offending supervisor, may have valid claims that such relationships were proposed, and rejected, by them. Alternatively, such widespread conduct may give rise to a traditional "quid pro quo" sexual harassment claim. In one recent case, for example, the plaintiff alleged sexual harassment when she was not permitted to return to her secretarial position after a leave of absence because the position had been filled by a woman having an affair with the plaintiff's supervisor.[(12)] The court refused to dismiss the complaint, finding that the plaintiff had alleged that it was "generally necessary" for women to grant sexual favors to the supervisor in order to achieve professional advancement. The court suggested, therefore, that a claim for "quid pro quo" sexual harassment had been stated.

In an attempt to insulate themselves from liability for sexual favoritism, some companies have instituted anti-fraternization policies which prohibit employees from dating fellow employees. J.C. Penney's anti-fraternization policy was challenged after it terminated an employee for dating a fellow employee, and the Oregon Supreme Court upheld a judgment for J.C. Penney, finding that the policy did not violate public policy, and did not constitute outrageous conduct.[(13)] Similarly, in another case, the court held that "Sears is entitled to enforce a no-dating policy ... against supervisors, who by virtue of their managerial positions are expected to know better[.]"[(14)]

In another case, however, an employer's inconsistency was the basis for imposing liability when a female employee was terminated for dating her supervisor. The area director who decided to terminate the employee had himself dated and eventually married an employee. Therefore, the court held that the plaintiff had been

discriminated against on the basis of sex when the company terminated her employment.[15]

Another problem may occur when the relationship terminates, or is otherwise unhappily concluded. At least one court rejected a recent Title VII claim based on the end of a relationship between a professor and a student.[16] The student alleged that after the intimate relationship ended, the professor failed to attend appointments, gave her lower grades, and demeaned her. The court found that the conduct did not constitute discrimination on the basis of sex: "The professor's conduct did not stem from his discriminatory action against women, but, rather, is the way he ended their love affair."

Claims based upon state, rather than federal, law have been more successful. In one case, a male supervisor was found liable for slandering a female employee because after she rejected his sexual advances, he told other employees that she was a lesbian.[17]

In another case, a female employee claimed that during her three-month employment, the president of the company continually harassed her and suggested that she have a personal and sexual relationship with him.[18] She contended that she was fired for refusing his sexual advances. The company contended that the president and the employee had a consensual dating and sexual relationship, and that the employee was terminated for cause. The jury awarded the employee $2,200 for medical expenses, $75,000 for emotional distress and $23,000 in punitive damages.

The courts generally side with employers against state law claims alleging that employees were terminated for "immoral" conduct on company time. For example, the court dismissed a claim of wrongful discharge brought by a life insurance agent who had shown up at his employer's convention with a person who was not his wife.[19] And in another case, the Kansas Supreme Court rejected a claim brought by an unmarried secretary and married employee who were fired after they accompanied each other on a company business trip.[20]

II. Past Practice Issues

Employees claiming sexual harassment will often attempt to introduce evidence of the alleged harasser's prior practices, or the employer's prior practices regarding reported incidents of sexual harassment, to demonstrate the employer's knowledge of harassment in the workplace, the existence of a hostile work environment, or the supervisor's motive in a "quid pro quo" harassment case. Such evidence will usually be admissible. For example, in one case, the court allowed evidence of a harasser's prior voluntary workplace affair and prior harassment to show his tendency to use his supervisory power to "sexually exploit" women employees.[21]

If the prior incidents of sexual harassment are remote in time, or dissimilar to the claim presented, however, the courts may be less willing to allow evidence on such prior incidents. For example, where the plaintiff sought to introduce evidence of past acts of discrimination which occurred more than four years before the plaintiff's claim, the court excluded such evidence on the grounds that the remoteness of such evidence made it unfairly prejudicial.[22] Similarly, the court excluded evidence of the alleged harasser's previous relationships with other women, because the incidents

were not similar to those charged, and were mainly consensual relationships, unlike the relationship claimed in the case.[23]

The courts also may be unwilling to allow evidence of the alleged harasser's prior sexual conduct with others outside of the workplace. In a California case, the court reasoned that since federal and state constitutional privacy rights applied to sexual conduct within and outside of the marital relationship, the plaintiff was not permitted discovery into the harasser's sexual conduct with persons outside of the workplace.[24]

III. Same Sex Relationships on the Job

The courts have not always applied the same standards to homosexual relationships in the workplace as those applied to heterosexual relationships. Some cases appear to take the position that the employer must prove that the homosexual relationship has an adverse effect on job performance, in order to take adverse employment action based on the existence of such a relationship. In one case, for example, the court held that a male teacher who engaged a fellow male teacher in a non-criminal physical homosexual relationship was not subject to disciplinary action under a state statute which authorized revocation of a teacher's life diploma for immoral or unprofessional conduct or moral turpitude, unless the state could show that such conduct affected the teacher's ability to teach.[25]

In other cases, however, the courts appear to be more willing to accept the employer's judgment concerning the adverse impact of the employee's homosexual relationship. For example, the court sustained the reassignment of a graduate student who had a homosexual relationship with a university student (not her student), despite the argument that such reassignment violated the graduate student's freedom of association.[26] In another case, a female road patrol deputy was discharged because of rumors circulating within the sheriff's department concerning her relationship with another female road patrol deputy.[27] The court entered judgment for the sheriff's department, finding that its interest in protecting its public image and its relationships with the community justified the plaintiff's termination. These cases suggest that the courts may defer to the employer's justifications concerning employment actions taken on the basis of employees' homosexual relationships with fellow employees.

IV. Profanity/Obscenity

The use of profanity or obscenity in the workplace can obviously give rise to a "hostile work environment" sexual harassment claim. A classic, if extreme, example of hostile work environment was found in Robinson v. Jacksonville Shipyards, Inc..[28] In that case, a female craftsworker's workplace was filled with pornography and posters of nude women engaged in sexual acts. In addition, the plaintiff and other female workers were verbally harassed with comments like "Hey pussycat, come here and give me a whiff"; and "I'd like to get into bed with that." Although the plaintiff made repeated requests of various supervisors to change the workplace conditions, she was told that the male workers had constitutional rights to display nude pictures. The court found that the plaintiff had stated a claim for sexual harassment based upon a hostile work environment.

In an interesting twist on this theory, an employee brought an action against his employer, claiming that he was harassed by his fellow male employees because he would not engage in their "dirty" conversations and he had complained of his co-workers' use of profanity at work.[29] The court granted summary judgment for the employer, finding that the employee had failed to present evidence showing that such harassment was based on his sex.

Where sexual harassment is not an issue, however, the courts may be less tolerant of profanity or obscenity. The court rejected, for example, a claim by a bellman at a hotel who was discharged for swearing at the company director of security during a company picnic.[30] The court did not agree with the employee's claim that his actions should be protected as "free speech."

Similarly, the court rejected a Title VII claim brought by an employee who was subjected to verbal taunts and threats made by co-workers who believed that the employee was homosexual.[31] The court ruled that Title VII's prohibition against sex discrimination applied only to discrimination based upon a person's gender, and not to discrimination based on sexual preference.

V. Off Duty Conduct

Employers sometimes attempt to regulate employees' off-duty conduct. One issue that comes up with some frequency is the employer's right to interfere with employees' relationships with employees of the employer's competitor. For example, in Bloom v. General Electric Supply Co., two employees were married. The husband resigned to work for a competitor. The wife was terminated due to a potential conflict of interest. The court rejected the wife's claim that her right of freedom of association was protected by public policy, and thereby constituted an exception to employment at-will.[32]

In Tennessee, where that case arose, there were no laws protecting spousal relationships. Other states' statutory protections for marital relationships have been found to create the public policy basis for wrongful termination claims. In one case, an employee was transferred after her husband had been assigned to be her supervisor.[33] The school district that employed them both had a policy prohibiting a spouse from directly supervising his or her spouse, and based its transfer on that policy. However, the Illinois Human Rights Act prohibited discrimination on the basis of a person's marital status. The court found that the school district's policy imposed a burden on marriage. Therefore, the transfer was held to be prohibited by the state statute.

The same rationale has been applied to prohibit the discharge of an employee because he refused to marry a woman with whom he was living.[34] The court held that Minnesota's Human Rights Act protected the employee from discrimination because he refused to marry, just as it would protect his decision to marry. While this rationale would not appear to apply to New Mexico employers, because New Mexico does not have a state statute protecting the marital relationship from adverse employment decisions, the reasoning of these cases is instructive.

In another case, it was found that the discharge of an employee for dating the employee of a competitor violated the company's own policy of not interfering with employees' off-duty conduct.[35] Specifically, IBM had a policy which notified

employees that the company would not terminate or discipline them under circumstances that would intrude on their personal lives. The plaintiff had progressed through the ranks at IBM, from receptionist to marketing manager in ten years. IBM's management had previously been aware of her relationship with a manager at a rival company. However, shortly after receiving a merit raise, she was asked whether she was dating the rival company's manager, was told that the relationship was a conflict of interest and was ordered to stop dating him or lose her job. The next day she was fired. The court found that IBM's policy of non-interference with off-duty conduct was an enforceable contract, and her termination breached that contract. The appeals court sustained a verdict awarding her $100,000 in compensatory damages and $200,000 in punitive damages for intentional infliction of emotional distress.

The courts have also not been extremely tolerant of employer's decisions on the basis of inter-racial association or marriage. In Parr v. Woodmen of the World Life Ins. Co., the court held that the employer couldn't refuse to hire the plaintiff on the basis of his inter-racial marriage.(36) The court reasoned that an allegation of discrimination on the basis of inter-racial marriage was actually an allegation that the employer discriminated on the basis of race when employment was denied because the applicant's race was different than his wife's. The same reasoning has been applied to discrimination based on an inter-racial relationship.(37)

Employers may also attempt to regulate other off-duty activities of employees. Such regulation was sustained in a dismissal of a homosexual employee, despite the fact that the employer's handbook stated that sexual preference would not be a basis for job discrimination or termination.(38) Similarly, the FBI's refusal to hire an avowed homosexual was upheld on the basis that the challenged classification of homosexuality was required to satisfy only a minimum standard of rationality.(39) Several other cases, however, have refused to uphold dismissals of public employees on the basis of their sexual preferences, unless the public employer can demonstrate that the sexual preference affects job performance.(40)

Courts have been fairly tolerant of employers' adverse employment actions based on employees' off-duty, "immoral" conduct. In one case, the court upheld the termination of a teacher who joined a "swingers" club, and who was observed by an undercover police officer committing three separate acts of oral copulation with three different men at a party.(41) The teacher's termination for immoral and unprofessional conduct evidencing unfitness to teach was upheld. Similarly, in another case, the court rejected an argument that a constitutional right of privacy prevented the State of Utah from discharging a police officer for entering into a polygamous marriage.(42)

VI. Flirtation/Prior Sexual Conduct

In many cases, employers attempt to introduce evidence concerning the plaintiff's previous sexual conduct in order to rebut suggestions that sexual conduct in the workplace was unwelcome. For example, in Richardson v. Great Plains Manufacturing, Inc.,(43) the court considered the fact that the plaintiff alleging sexual harassment had been abused and sexually molested by her cousin and two uncles when she was a child, that she had been raped in high school, had sexual relations with between 20 and 50 persons before her first marriage in 1974, that she had been engaged to be married 15 times, and had been married twice. The court found

that the plaintiff had failed to establish her claim of sexual harassment in the workplace, and entered judgment in favor of the employer.

Similarly, in McLean v. Satellite Technology Services, Inc.,[44] the court upheld the termination of a female employee, rejecting her claim that she was wrongfully discharged after she spurned romantic advances of her supervisor. The court noted that "plaintiff was anything but demure, that she possessed a lusty libido and was no paragon of virtue." In addition, the court found that during her employment, the plaintiff had "displayed her body through semi-nude photographs or by lifting her skirt to show her supervisor an absence of undergarments." Furthermore, the plaintiff had "continued her libidinous behavior" with an employee of a customer at a trade show, "despite orders from her supervisor to abstain from promiscuity with customers or dealers."[45] These factors may have influenced the court to find the testimony of the plaintiff less credible than that of her supervisor.

CONCLUSION

Under present federal law relating to sexual harassment, employers frequently feel that they are "between a rock and a hard place." That is, if employers attempt to regulate their employees' sexual or romantic off-duty conduct, they may be accused of violating their employees' privacy or associational rights. On the other hand, if employers do not regulate such activity, they may be accused of condoning or authorizing sexual or romantic conduct in the workplace. This paper was intended to provide guidance on how these issues have arisen in the workplace, and how the courts have resolved these issues. This paper could not discuss all of the issues that arise in this context, and did not purport to offer advice as to how employers should handle particular situations.

1. Because Title VII defines "employer" as including "any agent" of an employer, the employer may be held liable for the actions of its supervisory employees.

2. Toscano v. Nimmo, 570 F. Supp. 1197 (D. Del. 1983).

3. King v. Palmer, 778 F.2d 878 (D.C. Cir. 1985).

4. 807 F.2d 304 (2d Cir. 1986), cert. denied, 484 U.S. 825 (1987).

5. The court stated: "The defendant's conduct, although unfair, simply did not violate Title VII[.] The plaintiffs were not prejudiced because of their status as males; rather, they were discriminated against because Ryan preferred his paramour. Appellees faced exactly the same predicament as that faced by any woman applicant for the promotion: No one but the favored woman could be considered for the appointment because of her special relationship to the defendant." 807 F.2d at 308.

6. 807 F.2d at 308, citing Preamble to Interim Guidelines on Sex Discrimination, 45 Fed. Reg. 25,024 (1980).

7. Miller v. Aluminum Co. of America, 679 F. Supp. 495 (W.D. Pa.), aff'd without opinion, 856 F.2d 184 (3rd Cir. 1988).

8. 679 F. Supp. at 501.

9. EEOC Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism, EEOC Notice No. 915-048 (Jan. 12, 1990).

10. Ayers v. American Telephone & Telegraph Co., 826 F. Supp. 443 (S.D. Fla. 1993).

11. 826 F. Supp. at 445.

12. Dirksen v. City of Springfield, 842 F. Supp. 1117 (C.D. Ill. 1994).

13. Patton v. J.C. Penney Co., 301 Or. 117, 719 P.2d 854 (1986).

14. Sarsha v. Sears, Roebuck & Co., 3 F.3d 1035, 1042 (7th Cir. 1993). See also Shawgo v. Spradlin, 701 F.2d 470 (5th Cir.), cert. denied, 464 U.S. 965 (1983) (upholding regulations proscribing cohabitation of two police officers, as such could be deemed conduct prejudicial to good order); McCabe v. Sharret, 12 F.3d 1558 (11th Cir. 1994) (court rejected claim of former secretary to police chief after she was transferred to a less desirable job following her marriage a police officer; the transfer did not violate the plaintiff's right of freedom of association because the state had a compelling interest in protecting the loyalty and confidentiality of the position of police chief).

15. Zentiska v. Pooler Motel, Ltd., 708 F. Supp. 1321 (S.D. Ga. 1988).

16. Ruh v. Samerjan, 816 F. Supp. 1326 (E.D. Wis. 1993), aff'd, 32 F.3d 570 (7th Cir. 1994).

17. Schomer v. Smidt, 113 Cal. App. 3d 828, 833-35, 170 Cal. Rptr. 662 (Cal. App. 1980).

18. Cooper v. Mumford & C.J.M. Properties, Inc., No. 644747 (Sup. Ct. San Diego County, Calif. November, 1992).

19. Staats v. Ohio National Life Insurance Co., 620 F. Supp. 118 (W.D. Pa. 1985).

20. Morris v. Coleman Co., 241 Kan. 501, 738 P.2d 841 (Kan. 1987). See also Hollenbaugh v. Carnegie Free Library, 436 F. Supp. 1328 (W.D. Pa. 1977), aff'd, 578 F.2d 1374 (3rd Cir.), cert. denied, 439 U.S. 1052 (1978) (upholding employer's decision to discharge two library employees because they were living together in "open adultery").

21. Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc., 755 F.2d 599, 602 (7th Cir. 1985).

22. Stair v. Lehigh Valley Carpenters Local Union No. 600, 813 F. Supp. 1116, 1119 (E.D. Pa. 1993).

23. Kresko v. Rulli, 432 N.W.2d 764, 768 (Minn. App. 1988).

24. Boler v. Solano County Superior Court, 201 Cal. App. 3d 467, 247 Cal. Rptr. 185 (Cal. App. 1987).

25. Morrison v. State Board of Education, 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (Cal. 1969).

26. Naragon v. Wharton, 572 F. Supp. 1117 (M.D. La. 1983), aff'd, 737 F.2d 1403 (5th Cir. 1984).

27. Endsley v. Naes, 673 F. Supp. 1032 (D. Kan. 1987).

28. 760 F. Supp. 1486 (M.D. Fla. 1991).

29. Polly v. Houston Lighting & Power Co., 825 F. Supp. 135 (S.D. Tex. 1993).

30. Pagdilao v. Maui Intercontinental Hotel, 703 F. Supp. 863 (D. Haw. 1988).

31. Dillon v. Frank, 58 FEP Cases 90 (E.D. Mich. 1990).

32. 702 F. Supp. 1364 (M.D. Tenn. 1988).

33. River Bend Community Unit School District No. 2 v. Illinois Human Rights Commission, 232 Ill. App. 3d 838, 597 N.E.2d 842 (Ill. App.), app. denied, 147 Ill. 2d 637, 606 N.E.2d 1235 (1992).

34. State v. Porter Farms, 382 N.W.2d 543 (Minn. Ct. App. 1986).

35. Rulon-Miller v. IBM Co., 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (Cal. App. 1984).

36. 791 F.2d 888 (11th Cir. 1986).

37. Chacon v. Ochs, 780 F. Supp. 680 (C.D. Cal. 1991).

38. Joachim v. AT&T Information Systems, 793 F.2d 113 (5th Cir. 1986).

39. Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987).

40. See Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969); benShalom v. Secretary of the Army, 489 F. Supp. 964 (E.D. Wis. 1980); Society for Indiv. Rights, Inc. v. Hampton, 63 F.R.D. 399 (N.D. Cal. 1973), aff'd on other grounds, 528 F.2d 905 (9th Cir. 1975).

41. Pettit v. State Bd. of Education, 10 Cal. 3d 29, 513 P.2d 889, 109 Cal. Rptr. 665 (Cal. 1973).

42. Potter v. Murray City, 760 F.2d 1065 (10th Cir.), cert. denied, 474 U.S. 849 (1985).

43. No. 93-1028-PFK (U.S. D.C. Kan. June 30, 1994).

44. 673 F. Supp. 1458 (E.D. Mo. 1987).

45. 673 F. Supp. at 1460.