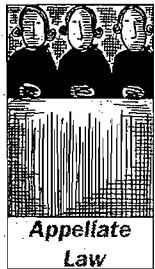


## 10th Circuit at Center of Splits on Anti-Discrimination Laws

By Laura W. Brill,  
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Federal courts of appeals in June 2006 created or deepened conflicts of authority on important questions relating to anti-discrimination laws. Two such cases came from the 10th Circuit, and both were written by Michael McConnell, the professor-turned-judge who was frequently mentioned as a possible nominee for the Supreme Court.



Appellate  
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Although McConnell was opposed by many liberal groups, he authored unanimous opinions in both cases siding with the employee claiming unlawful discrimination in both cases. In both cases, McConnell provided an unusually high level of factual detail in what comes across as a desire to convey to all sides of relatively mundane workplace disputes that he has heard their views.

Other recent cases relate to the availability of prevailing party attorneys' fees when a case settles and the scope of the requirement that federal agencies insure that their activities do not harm endangered species.

### Employment Discrimination

In *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476 (10th Cir. 2006), McConnell weighed in on the standards governing "subordinate bias liability" under Title VII. Subordinate bias liability applies where a biased subordinate, who lacks actual decision making power, nevertheless influences the formal decision maker to take

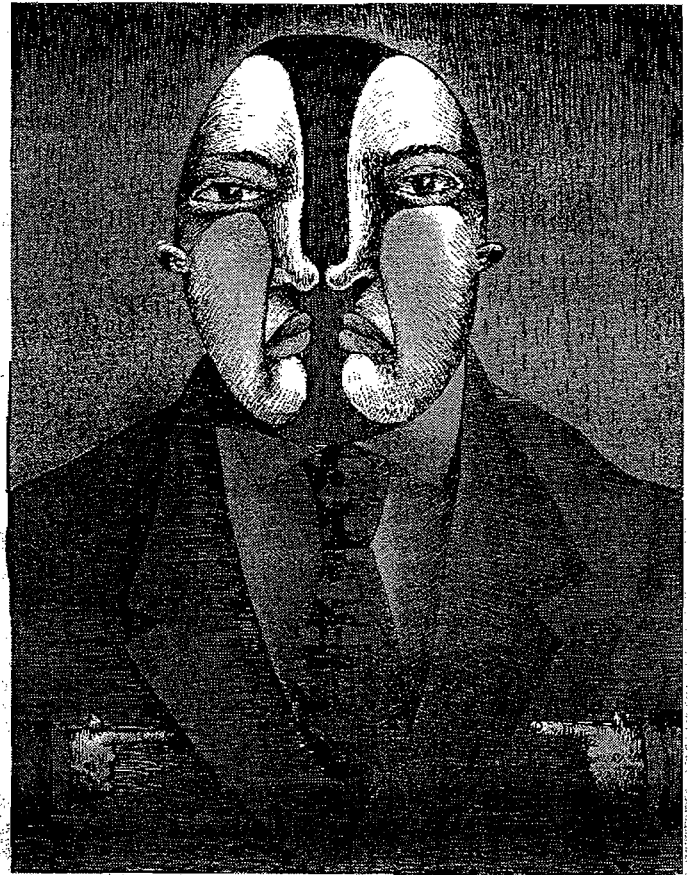
discriminatory action. While this theory of liability has been adopted by the majority of circuit courts, there remains a lack of uniformity with regard to the proper standards to apply to such a claim.

In discussing this issue, the court attempted to steer a path between what it regarded as the two extremes. Under the 5th Circuit's approach, which the 10th Circuit referred to as "lenient," summary judgment on the issue of subordinate liability may be defeated simply by showing that the biased subordinate reported any factual information or had any other input that may have affected the employment action. At the other extreme lies the 4th Circuit, which has rejected subordinate bias liability altogether, even if the biased subordinate plays a significant role in the decision and exercises "substantial influence."

Rejecting each of these extremes, the 10th Circuit endorsed the 7th Circuit's most recent pronouncement on the topic in *Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004), which holds that to prevail, a plaintiff must show more than mere influence or input, but may prevail upon a showing that the biased subordinate's discriminatory reports or recommendations caused the adverse employment action.

In *Shrum v. City of Coweta*, 449 F.3d 1132 (10th Cir. 2006), in another opinion by McConnell, the 10th Circuit addressed a Section 1983 action brought by a police officer who claimed that changes in his work schedule were calculated to conflict with his duties as a minister and therefore violated the First Amendment. Relying on the 8th Circuit's en banc opinion in *Brown v. Polk County, Iowa*, 61 F.3d 650 (8th Cir. 1995), the plaintiff claimed that the failure of a government employer to accommodate the religious needs of an employee, short of undue hardship to the government employer, violates the First Amendment.

The 10th Circuit, however, rejected the 8th Circuit's reasoning that the First Amendment, in contrast to Title VII, provides such protection. "[T]he mere failure of a government employer to accommodate the religious needs of an employee, where the need for accommodation arises from a conflict with a neutral and generally applicable employment requirement, does not violate the Free Exercise Clause,



as that clause was interpreted in *Employment Division v. Smith*, 494 U.S. 872 (1990)." As the officer had produced facts sufficient to call into question the neutrality of the police chief's act, however, he was nevertheless able to survive summary judgment, rendering dictum the 10th Circuit's views on the need for accommodation in these cases. It remains to be seen whether any other circuits will follow the 8th Circuit in holding that, despite *Smith*, the First Amendment requires government employers to accommodate religious employees' beliefs.

### Americans with Disabilities Act

In *Iverson v. City of Boston*, 452 F.3d 94 (1st Cir. 2006), the 1st Circuit considered whether the self-evaluation and transition plan regulations promulgated by the attorney general under Title II of the Americans with Disabilities Act are enforceable through a private right of action — a question that previously divided the 6th and 10th

Circuits.

Title II of the ADA guarantees that qualified disabled persons enjoy meaningful access to public services, programs and activities. The attorney general promulgated self-evaluation and transition plan regulations which require governments to pinpoint and evaluate their Title II compliance.

The plaintiffs in *Iverson* filed an action alleging that the city of Boston had failed to provide disabled persons with equal access because many municipal facilities, including streets, sidewalks and public buildings, lacked adequate means of ingress and egress for wheelchair-bound people. The plaintiffs alleged that the self-evaluation and transition plan regulations imposed an affirmative obligation on the city, an obligation that was enforceable via a private right of action.

The 1st Circuit disagreed, reasoning that because the regulations impose obligations beyond the statutory mandate, under the Supreme Court's decision in *Alexander v. Sandoval*, 532 U.S.

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275 (2001), the regulations are not enforceable through a private right of action. Thus, the 1st Circuit sided with the 6th Circuit and split with the 10th, which had previously held that self-evaluation and transition regulations are so enforceable.

#### Attorney Fees

District courts have discretion to award "reasonable attorneys' fees" to the prevailing party in a Section 1983 suit. 42 U.S.C. Sec. 1988(b). The Supreme Court has held that to prevail within the meaning of Section 1988, a party must obtain a judgment on the merits, consent decree, or other settlement that materially alters the relationship of the parties. *Buckhannon Board & Care Home Inc. v. West Virginia Department of Health and Human Services*, 532 U.S. 598 (2001).

The circuits have split over whether a private settlement agreement can bestow prevailing party status where the agreement is not incorporated into a court order or otherwise approved by the court. The 9th Circuit recognizes private settlement agreements as conferring prevailing party status on the ground that a settlement agreement is "a legally enforceable instrument" enforceable in court. *Barrios v. Cal. Interscholastic Federation*, 277 F.3d 1128 (9th Cir. 2002). Other circuits, by contrast, have held that a private settlement agreement, if not incorporated into a court order, does not confer prevailing party status. *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469 (7th Cir. 2003).

The 10th Circuit recently adopted the majority rule, holding that a settlement that was not approved by the court or implemented in a consent decree, and that resulted in the court dismissing the suit "is not cognizable in the fee analysis under Sec. 1988." *Bell v. Bd. of County Comm'rs*, 451 F.3d 1097 (2006).

#### Administrative Law / Environmental Law

In June, Judge Alex Kozinski filed a strongly worded dissent from the 9th Circuit's denial of rehearing en banc in a case that originally came down last August. The opinion, *Defenders of Wildlife v. Environmental Protection Agency*, 450 F.3d 394 (9th Cir. 2006), concerns the scope of the requirement contained in

Section 7(a)(2) of the Endangered Species Act that federal agencies "insure" their actions do not jeopardize endangered species.

Here, the EPA had acted pursuant to the Clean Water Act to transfer pollution permitting authority to the state of Arizona. This was done under Section 1342(b) of the Clean Water Act, which provides that the EPA "shall" transfer such authority to a state if the state's proposal meets nine criteria (none of which involves consideration of endangered species). Arizona had satisfied the nine statutory criteria, but the EPA was concerned that the transfer might affect endangered species. In consultation with the Fish and Wildlife Service, the EPA eventually came around to the view that the Endangered Species Act was inapplicable to the transfer, given both the express transfer requirement of the Clean Water Act and the fact that Section 7 of the Endangered Species Act is inapplicable to the states. The panel majority (Judges Stephen Reinhardt and Marsha Berzon) held (over Judge Gordon Thompson's dissent) that the Endangered Species Act was applicable, and that the EPA's transfer had been arbitrary and capricious because its very act of consulting the Fish and Wildlife Service showed that it knew the transfer would affect endangered species.

The majority acknowledged that its ruling was in conflict with the 5th and D.C. Circuits, each of which has held that Section 7 of the Endangered Species Act does not require or permit federal agencies to insert wildlife protective conditions into determinations whose criteria are established by statute.

In his dissent from denial of rehearing, Kozinski argued that the panel majority's decision was also in conflict with the Supreme Court's ruling in *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004), which addressed a similarly broad mandate in the NEPA calling for agencies to take the environmental impact of their actions into account.

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